

2002 BCSECCOM 909

COR#02/126

Decision

Specialized Surgical Services Inc., James Swanney and David Steinart

Section 161 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Adrienne Salvail-Lopez John K. Graf Roy Wares	Vice Chair Commissioner Commissioner
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Date of Hearing October 16, 2002

Date of Decision October 30, 2002

Appearing

Patricia A.A. Taylor For Commission staff

Introduction

- ¶ 1 We released our findings on July 25, 2002: see 2002 BCCSECCOM 675. On October 16, 2002, we reconvened to receive evidence and hear submissions respecting the orders we should make against the respondents. Swanney made a written submission but none of the respondents attended the proceedings. Our decision today should be read in conjunction with our findings.
- ¶ 2 James Swanney is a medical doctor. David Steinart is a real estate developer. Together, they incorporated Specialized Surgical Services Inc. for the purpose of buying a property in Coquitlam and eventually developing and running it as a private surgical hospital.
- ¶ 3 Between August 1977 and June 1999, Specialized Surgical raised \$1,332,000 from 60 investors using two offering memorandums, one dated August 26, 1997 and another dated November 12, 1997. Each offering memorandum omitted to state material facts respecting Specialized Surgical.
- ¶ 4 In April 1998, one of the investors in Specialized Surgical, Rosalind Collins, purchased additional shares in the company. She understood from Mark Foster (a

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respondent in this matter who settled before the hearing) that she was buying 50,000 shares at \$1.00 per share from another shareholder. That shareholder was Steinart. Steinart, on the other hand, understood from Swanney that he was selling 350,000 shares at \$0.15 per share to Foster. In fact, Collins received 50,000 shares for her \$50,000, Steinart received \$50,000 for his 350,000 shares, and Foster received 300,000 shares for free. Swanney knew all of these details and played a key role in facilitating the transaction.

Specialized Surgical

- ¶ 5 We found that Specialized Surgical made statements in the August and November offering memorandums that it knew, or ought reasonably to have known, were misrepresentations, contrary to section 50(1)(d) of the Act.
- ¶ 6 In securities regulation we want to strike a balance between protecting investors and facilitating the raising of capital by companies. One important tool in striking that balance is disclosure. By providing investors with offering memorandums that failed to disclose important information about its affairs, Specialized Surgical upset that balance and put the investors at a disadvantage.
- ¶ 7 If a company does not comply with regulatory requirements and fails to provide investors with complete and accurate disclosure, it should not be permitted to access our capital markets. Therefore, considering it to be in the public interest, we order under section 161(1)(b) of the Act that all persons cease trading and be prohibited from purchasing the securities of Specialized Surgical until Specialized Surgical files and obtains a receipt for a prospectus.

Steinart

- ¶ 8 We found that Steinart, by permitting Specialized Surgical to make misrepresentations in the August and November offering memorandums, failed as a director to “act honestly and in good faith and in the best interests of the company, and exercise the care, diligence and skill of a reasonably prudent person”, contrary to section 118(1) of the *Company Act*, RSBC 1996, c. 62.
- ¶ 9 In our findings, we referred to the Commission’s decision in *Re Slightam* [1996] 30 BCSC Weekly Summary 38, in which the Commission stated at page 74:

It is the responsibility of the directors to ensure that a company complies with applicable legislation and its listing agreement. Directors exercising the care, diligence and skill of a reasonably prudent person may delegate this responsibility to management of the company, but, if they do so, must also set up adequate systems to satisfy themselves that compliance is in fact taking place and, if matters arise that should put them on notice, take the steps necessary to resolve the concern. ...

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¶ 10 Steinart was a founder of Specialized Surgical and bore primary responsibility for managing the company's only asset – its property in Coquitlam. As well, despite circumstances that should have put him on notice that it would be prudent for him to inquire more closely into Specialized Surgical's compliance with its regulatory obligations, Steinart did not take the necessary steps to resolve those concerns.

¶ 11 Steinart failed to fulfil his duties as a director under the Company Act. As a director of Specialized Surgical, he was responsible for ensuring that Specialized Surgical's August and November offering memorandums did not contain misrepresentations. He failed and his failure harmed investors, impaired the integrity of our capital markets and was prejudicial to the public interest. Consequently, considering it to be in the public interest, we order:

under section 161(1)(c) of the Act that the exemptions described in sections 44 to 47, 74, 75, 98 and 99 of the Act do not apply to Steinart until October 30, 2005, except that Steinart may rely on section 45(2)(7) of the Act to trade in securities for his own account;

1. under section 161(1)(d)(i) of the Act that Steinart resign any position he holds as a director or officer of any issuer, other than the real estate development company of which he is sole shareholder;
2. under section 161(1)(d)(ii) of the Act that Steinart is prohibited from becoming or acting as a director or officer of any issuer, other than the real estate development company of which he is sole shareholder, until the later of
 - (a) October 30, 2005, and
 - (b) the date Steinart successfully completes a course of study satisfactory to the Executive Director concerning the duties and responsibilities of directors and officers; and
3. under section 161(1)(d)(iii) of the Act that Steinart be prohibited from engaging in investor relations activities until October 30, 2005.

Swanney

¶ 12 We found that Swanney

1. by permitting Specialized Surgical to make misrepresentations in the August and November offering memorandums, failed as a director to “act honestly and in good faith and in the best interests of the company, and exercise the care, diligence and skill of a reasonably prudent person”, contrary to section 118(1) of the Company Act; and

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2. through his participation in the transfer of shares from Steinart to Collins, perpetrated a fraud on Collins, contrary to section 57(b) of the Act.
- ¶ 13 Swanney was a founder of Specialized Surgical and ran the company throughout the distribution periods under both offering memorandums; he was Specialized Surgical's president and chief executive officer and signed both offering memorandums. Swanney should have been the first to recognize that the offering memorandums omitted to state material facts. Like Steinart, however, Swanney failed to put in place adequate compliance systems. Like Steinart, despite circumstances that should have put Swanney on notice that it would be prudent for him to inquire more closely into Specialized Surgical's compliance with its regulatory obligations, he did not take the necessary steps to resolve those concerns.
- ¶ 14 We also found that Swanney perpetrated a fraud on one of Specialized Surgical's investors. He was a key participant in the transactions that resulted in Collins paying \$50,000 for shares that were worth only \$7,500 at the time.
- ¶ 15 Swanney failed to fulfil his duties as a director under the Company Act. As a director and chief executive officer of Specialized Surgical, he was responsible for ensuring that Specialized Surgical's offering memorandums did not contain misrepresentations. He also perpetrated a fraud, one of the most serious contraventions of the Act. Swanney harmed investors, Collins in particular, and seriously impaired the integrity of our capital markets and the public interest. We consider it to be in the public interest to remove Swanney from the market, and from involvement with issuers, for a significant period. Therefore, we order:
3. under section 161(1)(c) of the Act that the exemptions described in sections 44 to 47, 74, 75, 98 and 99 of the Act do not apply to Swanney until October 30, 2017;
 4. under section 161(1)(d)(i) of the Act that Swanney resign any position he holds as a director or officer of any issuer;
 5. under section 161(1)(d)(ii) of the Act that Swanney is prohibited from becoming or acting as a director or officer of any issuer until the later of
 - (a) October 30, 2017; and
 - (b) the date Swanney successfully completes a course of study satisfactory to the Executive Director concerning the duties and responsibilities of directors and officers;

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6. under section 161(1)(d)(iii) of the Act that Swanney be prohibited from engaging in investor relations activities until October 30, 2017;
7. under section 162 of the Act that Swanney pay an administrative penalty of \$35,000; and
8. under section 174 of the Act that Swanney pay the costs of or related to the hearing incurred by the Commission and the Executive Director, the amount to be determined following further submissions from the parties.

¶ 16 October 30, 2002

¶ 17 **For the Commission**

Adrienne Salvail-Lopez
Vice Chair

John K. Graf
Commissioner

Roy Wares
Commissioner