

2003 BCSECCOM 301

COR#03/076

Decision

Robert Douglas McLean

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

Hearing

Panel	Douglas M. Hyndman	Chair
	Robert J. Milbourne	Commissioner
	Roy Wares	Commissioner

Date of Hearing February 3, 2003

Date of Decision May 5, 2003

Appearing

Kristine Mactaggart	For Commission staff
Gregory S. Yanke	For Robert Douglas McLean

Introduction

¶ 1 This is a hearing under section 161(1) of the *Securities Act*, RSBC 1996, c. 418. Commission staff is seeking the following orders in the public interest against the respondent Robert Douglas McLean:

1. An order that any or all of the exemptions described in sections 44 to 47, 74, 75, 98 or 99 of the Act do not apply to McLean;
2. An order that McLean cease trading in any securities or exchange contracts;
3. An order that McLean resign any position that he holds as a director or officer of any issuer;
4. An order that McLean be prohibited from becoming or acting as a director or officer of any issuer;
5. An order that McLean pay an administrative penalty;

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6. An order that McLean pay the costs of the hearing; and

7. Any other orders that may be appropriate.

¶ 2 The Executive Director issued a notice of hearing on May 23, 2002. After some adjournments, we held the hearing on February 3, 2003.

¶ 3 The notice of hearing alleges that McLean was an insider of a reporting issuer, Markatech Industries Corporation, and failed to report all of his trading in its securities, in contravention of section 87 of the Act.

Background

¶ 4 During the period relevant to this decision — September 1996 to October 1998 — Markatech was a reporting issuer under the Act and its securities were listed on the former Vancouver Stock Exchange. McLean became a director, and therefore an insider, of Markatech in November 1986 and remained an insider until he resigned as a director and officer in December 1999.

¶ 5 Before his involvement with Markatech, McLean had worked as a programmer-analyst with IBM, BC Rail and two other companies and then founded and managed for 15 years a computer services company called Canadian Data Processing Corporation. It provided services to a variety of private companies, law firms and government agencies. He became involved with Markatech when it acquired some assets from Canadian Data Processing Corporation.

¶ 6 When he first became a director of Markatech, McLean filed an initial insider report. He also filed reports on trading during 1996, including reports of transactions for September and October 1996, the first two months of the relevant period. However, these reports were not complete and, during the rest of the relevant period, McLean traded Markatech shares both in his own account and through accounts in the names of his mother, Winifred McLean, and his former fiancée, Brenda Bertch. He did not report these trades. The evidence showed that McLean had trading authority for these accounts and gave all of the trading instructions during the relevant period.

¶ 7 Commission staff learned of McLean's failure to report his trades and issued a cease trade order on October 29, 1998, prohibiting him from trading in Markatech shares. After further investigation, staff issued the notice of hearing on May 23, 2002. McLean finally filed the required reports on January 31, 2003, the last working day before the hearing, but did not pay the required late filing fees of about \$1,300.

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- ¶ 8 A few days before the hearing, McLean agreed with staff on a statement of facts for the hearing in which he admits the allegations in the notice of hearing.
- ¶ 9 Commission staff allege, and McLean admits, that he purchased 1.41 million shares and sold 1.88 million shares of Markatech during the relevant period and did not report them as required. McLean's unreported trading accounted for more than 18% of all trading in Markatech shares on the exchange during the relevant period. Staff identified some 333 trades that he failed to report. McLean's reports filed just before the hearing included even more trades that he had not reported, although staff had not yet analysed them and we do not know how much additional trading there was.
- ¶ 10 In testifying at the hearing, McLean said that he had not been aware that he was required to report trades in the accounts of his mother and ex-fiancée and that, when he became aware of this requirement after the cease trade order was issued, he was unable to file the reports because some of his personal records were destroyed along with Markatech company records when Markatech failed to pay its bills from the storage company.
- ¶ 11 However, in cross examination, McLean admitted that only some of his trading records were destroyed and that he could have filed reports for trading he did after the records were destroyed in 1997. He also admitted that the address for both his mother's account and the Brenda Bertch account, to which the account statements were sent, was his mother's home address, and that he received those statements. He claimed that he gave instructions on his mother's account only to carry out his father's trading wishes but he admitted that he personally used the account of his ex-fiancée for trading as a "market maker" for Markatech. For the reports that he did file, reporting some of the trading in his own account, McLean personally filled in the report form and entered the relevant ownership and transaction codes.
- ¶ 12 McLean also testified that he owed \$35,000 for a loan he guaranteed for Markatech and \$40,000 for a judgment against him and Markatech related to a dispute with a consultant over work done for Markatech. The Royal Bank also has a \$70,000 judgment against him that is unrelated to Markatech. He testified that he has few assets and very little income at present.
- ¶ 13 McLean testified that he had no previous disciplinary history with the commission but admitted to some regulatory problems with the Vancouver Stock Exchange and its successors. He is currently prohibited from being a director of a TSX Venture Exchange listed company as a result of some disclosure and filing failures by Markatech.

Analysis

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¶ 14 Section 87(4) of the Act says:

If, while a person is an insider of a reporting issuer, the person's direct or indirect beneficial ownership of, or control or direction over, securities of the reporting issuer changes from that shown or required to be shown in the latest insider report filed by the person, the person must, within the prescribed period after the change takes place, file an insider report in the required form disclosing

(a) the person's direct or indirect beneficial ownership of, or control or direction over, securities of the reporting issuer, and

(b) the change in the person's direct or indirect beneficial ownership of, or control or direction over, securities of the reporting issuer.

¶ 15 The same requirement appeared in section 70 of the former Securities Act, which was in force during part of the relevant period. During all of the relevant period, the prescribed period for filing a report was ten days after the end of the month in which a change occurred.

¶ 16 During the relevant period, the required form for insider reporting was Form 61. It required an insider to report holdings and transactions in the issuer's securities. A table in the form requires each transaction to be reported on one row and different types of information about the transaction to be entered in various columns. Column E is headed "Direct/Indirect Ownership/Control or Direction". Column F is headed "Identify the registered holder where ownership is indirect or where control or direction is exercised." The instructions for those columns on the back of the form say:

(E) Indicate the nature of ownership, control or direction of the class of securities held using the following codes:

Direct ownership	0
Indirect ownership (identify the registered holder)	1
Control or direction (identify the registered holder)	2

(F) For securities that are indirectly held, or over which control or directions is exercised, identify the registered holder.

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- ¶ 17 McLean admits that he was an insider of Markatech, that he failed to report changes in his ownership or control and direction over Markatech shares, and, therefore, that he contravened section 87.
- ¶ 18 The parties agree that the relevant factors in determining the appropriate sanctions for insider reporting violations are those set out by the Commission in *Re Frederick George Orr* 2001 BCSECCOM 1106 (B.C. Sec. Comm.):
- the volume of unreported trading;
 - the number of unreported trades;
 - the duration of non-compliance;
 - the voluntary rectification of non-compliance;
 - the respondent's subsequent conduct;
 - the respondent's previous disciplinary history;
 - the respondent's cooperation with Commission staff; and
 - any aggravating factors, such as other breaches of the Act or actual harm to the public.
- ¶ 19 Staff point to the following facts as relevant:
- McLean's unreported trading accounted for more than 18% of the trading in Markatech shares during the relevant period.
 - McLean failed to report 333 trades.
 - His reporting violations began in 1996 and continued until staff issued a cease trade order in 1998.
 - He did not report after the cease trade order or after the notice of hearing in May 2002, waiting until the eve of the hearing to comply.
- ¶ 20 Staff submit this case is similar to two previous Commission decisions: *Re Lloyd*, [1996] 8 BCSC Weekly Summary 76 (Q.L.) (B.C. Sec. Comm.) and *Re Giesbrecht*, [1996] 8 BCSC Weekly Summary 67 (Q.L.) (B.C. Sec. Comm.). In each of those decisions, an insider traded actively in the shares of the issuer and failed to report the trading until just before the Commission hearing. The Commission banned each respondent from trading and from being a director or officer of a reporting issuer for five years and imposed on each respondent an administrative penalty of \$20,000.
- ¶ 21 In this case, staff argue for a market ban of seven years and an administrative penalty of \$20,000.
- ¶ 22 McLean submits that we should impose lesser sanctions on him than in *Lloyd* and *Giesbrecht* because his failure to file was based on ignorance of the filing

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requirement for his mother's and ex-fiancée's accounts, because he tried to file when the obligation was brought to his attention but could not because he did not have access to the records, and because he has no previous disciplinary history with the Commission. He also says that he should get credit for cooperating with Commission staff and for ultimately filing reports disclosing his trades, including trades of which staff were not aware. Finally, he submits that we should take account of his straitened financial circumstances in assessing an administrative penalty.

- ¶ 23 We do not accept McLean's excuse that he was unaware of the requirement to report the trades. As an experienced businessman he could not have thought that he could avoid the obligation to report trading he was doing as a market maker merely by doing it through accounts in the names of others. Despite McLean's assertion that he was carrying out his father's wishes for trades in his mother's account, it is clear that he completely controlled the trading in both his mother's and his ex-fiancée's accounts. Since he personally filled out insider report forms for some of his trading, he was familiar with the requirements of the form and he must have known that he should have disclosed these trades in securities over which he had control or direction.
- ¶ 24 Similarly, we reject McLean's claims that he did not have the records to complete the reports when Commission staff called his attention to his failure to file. If nothing else, he could have gone to the brokers to obtain the required information about trading in the accounts.
- ¶ 25 Although McLean appears to have no previous disciplinary history with the Commission, he gets no credit for this, given his problems with the exchange. However, like Lloyd and Giesbrecht, he should get some recognition for ultimately filing his insider reports before the hearing, although, like them, he had not yet paid the late filing fees.

Decision

- ¶ 26 The Commission has repeated in many decisions our view of the importance of insider reporting to the integrity of the market and the damage caused by failure to file.
- ¶ 27 In our view, this case warrants sanctions equivalent to those in *Lloyd* and *Giesbrecht*. However, we are prepared to reduce the administrative penalty somewhat to reflect McLean's financial circumstances, particularly because of the debts he has incurred in supporting Markatech.
- ¶ 28 Accordingly, we consider it in the public interest to make the following orders:

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1. Under section 161(1)(a) of the Act, we order that McLean comply with the requirement to pay filing fees for the insider reports that he failed to file within the prescribed period.
 2. Under section 161(1)(c) of the Act, we order that the exemptions described in sections 44 to 47, 74, 75, 98 and 99 of the Act do not apply to McLean for a period of 5 years, except that McLean may rely on section 45(2)(7) of the Act to trade in securities for his own account.
 3. Under section 161(1)(d) of the Act, we order that McLean resign any position that he holds as a director or officer of a reporting issuer and is prohibited from becoming or acting as a director or officer of any reporting issuer until the later of five years from the date of this decision and the date on which he complies with the orders to pay fees for late filing, an administrative penalty, and fees or charges for costs.
 4. Under section 162 of the Act, we order that McLean pay an administrative penalty of \$10,000.
 5. Under section 174 of the Act, we order that McLean pay prescribed fees or charges for the costs of, or related to, the hearing.
- ¶ 29 We will consider written submissions before making an order for costs. We direct Commission staff to file their submissions and send a copy to McLean by May 23, 2003. We direct McLean to file his submissions and send a copy to Commission staff by June 6, 2003.
- ¶ 30 May 5, 2003
- ¶ 31 **For the Commission**

Douglas M. Hyndman
Chair

Robert J. Milbourne
Commissioner

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Roy Wares
Commissioner