2004 BCSECCOM 677

Extension of Temporary Orders and Adjournment

Terry James Minnie and Raymond Patrick Shaw

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

Hearing

Panel	Robin E. Ford	Commissioner
	Marc A. Foreman	Commissioner
	Robert J. Milbourne	Commissioner
Date of Hearing	October 20, 2004	
Date of Ruling	November 26, 2004	

Appearing

Paige C. Leggat	For the Executive Director

Ruling

Introduction

¶ 1 This is our decision in the application by the executive director to adjourn and to extend temporary orders against Terry James Minnie and Raymond Patrick Shaw (the respondents). The executive director issued the orders with a notice of hearing on October 7, 2004.

Overview

¶ 2 In summary, the notice of hearing alleges that Minnie and Shaw engaged in a fraudulent scheme in which they issued promissory notes to British Columbia residents contrary to sections 34(1)(a), 61, 50(1)(d) and 57(b) of the *Securities Act*.

¶ 3 The executive director imposed temporary orders that:

a) under section 161(1)(a) of the Act, the respondents comply with and cease contravening the Act and the regulations;
b) under section 161(1)(b) of the Act, the respondents cease trading in and are prohibited from purchasing any securities or exchange contracts; and
c) under section 161(1)(d) of the Act, the respondents resign from any positions they may each hold as, and are each prohibited from becoming or acting as,

directors or officers of any issuer, and are prohibited from engaging in investor relations activities,

for a period expiring on October 20, 2004.

¶ 4 On October 20, 2004, the executive director asked the commission to adjourn the hearing and extend the temporary orders until a hearing is held and a decision rendered.

¶ 5 The respondents did not appear at the hearing on October 20. We reviewed the affidavits of service and found that the respondents had each received notice of the hearing according to section 180 of the Act.

¶ 6 After hearing submissions from commission staff and reviewing the affidavit of Paul Bansal, a staff investigator, and considering it to be necessary and in the public interest, we extended the temporary orders until we issued our decision on the application to extend the temporary orders.

¶ 7 Following our request during the hearing, staff provided a second affidavit of Paul Bansal sworn on November 2, 2004, which we now enter into the record as exhibit 5.

¶ 8 On October 8, 2003, the Crown laid an information charging the respondents with theft, fraud and attempted fraud. Some of the charges relate to the allegations in the notice of hearing. The trial of the criminal matter is scheduled for February 7 to March 3, 2005.

¶ 9 Staff asked us to adjourn the hearing on the allegations raised in the notice of hearing until May 2005. Staff said that they were not in a position to proceed with the hearing because the investigation had not been completed and a decision in the criminal proceedings is unlikely before late March. We proposed to hold the dates of June 1 – 8 (except June 2), 2005 in the hearings calendar, but declined to set dates for the hearing until we had decided the application to extend the temporary orders.

The Test

¶ 10 As set out in *Re Fairtide* (2002 BCSECCOM 993), in determining this application, we must first consider the regulatory context.

¶ 11 The Act is a regulatory statute with a public interest mandate. Its overarching purpose is to ensure investor protection, capital market efficiency and public confidence in the system. See: *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301; *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR

557 at 589; *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at 26; *Global Securities Corp v British Columbia (Securities Commission)*, [2000] 1 SCR 494.

¶ 12 The public interest purpose in imposing regulatory enforcement orders is neither remedial nor punitive, but protective and prospective in nature. The purpose of these powers is to prevent likely future harm to investors and the integrity of our capital markets, not to punish.

¶ 13 To discharge its mandate, the commission must use the regulatory tools given to it. Some of the most effective tools the commission has are the powers in section 161(1) of the Act.

¶ 14 Section 161(1) provides that the commission or the executive director may, after a hearing, make any one of a variety of enforcement orders described in that section. These include orders of the kind made against the respondents.

¶ 15 Section 161(2) provides that if the commission or the executive director considers that the length of time required to hold a hearing under subsection (1) could be prejudicial to the public interest, they may make a temporary order, without a hearing, to have effect for no longer than 15 days after the date the temporary order is made.

¶ 16 Section 161(2) was intended to give the regulator the power to act quickly if there is a threat to the public interest. However, the section makes clear that the power to exercise this discretion is not open ended. Firstly, the regulator must have a reasonable belief that the length of time to hold a hearing 'could be prejudicial to the public interest' and secondly, the temporary orders cannot stay in effect for more than 15 days. The 15-day limit indicates that some form of scrutiny should occur before the end of that period.

¶ 17 The commission has established the practice of having the temporary orders, which are generally issued by the executive director, brought before a commission panel before the 15-day period expires. This gives the respondents an opportunity to respond to the temporary orders before the commission determines whether the orders should be further extended under section 161(3).

¶ 18 An extension order made under section 161(3) is not limited to a specific period as in section 161(2), but can be made until the hearing under section 161(1) is held and a decision is rendered. Again this discretion is not open ended. The commission may make an extension order only if it meets the two-pronged test of being 'necessary and in the public interest'. The evidentiary threshold to conclude that an extension order is 'necessary and in the public interest' is obviously

greater than that necessary to conclude (when first issuing the temporary order) that the length of time to hold a hearing 'could be prejudicial to the public interest'.

¶ 19 Affidavits that suggest 'little more than unsubstantiated suspicion' or 'guilt by association' fall far short of providing the kind of evidence necessary to support these kinds of orders. See: *Pessel v. BCSC*, [1992] B.C.C.J. No. 2702 (B.C.C.A.).

¶ 20 What then is required for the commission to conclude that extending temporary orders without a hearing is 'necessary and in the public interest'?

¶ 21 As stated in *Fairtide*, there is no bright line test. The commission considers evidence using its expertise and specialized understanding of the markets and the securities related activities it supervises to determine what is in the public interest in any given circumstance. See: *Pezim* (cited above).

¶ 22 Staff must produce evidence for the commission independently to assess whether there is *prima facie* evidence of the misconduct alleged and whether, in the circumstances, the extension is necessary and in the public interest. The evidence must be more than staff's opinion or belief, given under oath, that a respondent breached the legislation or acted contrary to the public interest.

The Conduct of the Respondents

¶ 23 On the basis of the evidence in Bansal's affidavits, and keeping in mind that the commission investigation is not yet completed, we find as follows.

¶ 24 Minnie and Shaw are residents of Victoria, British Columbia and have never been registered under the Act.

¶ 25 Minnie said that he met Andrew Fuller (Fuller) in 1988 in the course of Minnie's work as realtor. According to Minnie:

a) Fuller was going to inherit close to $20 million, but could not obtain his inheritance until he had paid off some debts; and
b) if people loaned money to Fuller to pay off his debts, he would not only repay them, but would also pay them a high rate of interest on their investments with him

(the Fuller project).

¶ 26 In interview with Bansal on April 16, 2003, Minnie said that he first loaned Fuller $5,000 in 1988 or 1989 and received $7500 in return one week later. Subsequent loans of $25,000 and $75,000 were also repaid with high returns. In 1990,

together with two others, Minnie loaned Fuller $125,000. Fuller repaid the money in 6 months with a return of $30,000. The loans were apparently repaid out of advances given to Fuller from a trust or estate (the inheritance).

¶ 27 We are primarily concerned with the period 1997 to 2001 during which Minnie issued or caused to be issued promissory notes to certain British Columbia residents in exchange for cash (or cheques or bank drafts which Minnie or Shaw cashed) which they gave him to invest in the Fuller project.

¶ 28 Copies of promissory notes obtained by Bansal from BC residents, and Minnie's own evidence, show that from 1997 to 2001, more than $1 million was obtained in exchange for promissory notes signed or apparently signed by Minnie, Shaw, Fuller, Mr B or Mr C.

¶ 29 In interview with Bansal on September 24, 2002, Shaw said that he (and others) assisted Minnie in soliciting money for Minnie to loan to Fuller. Shaw told certain British Columbia residents about the opportunity to obtain high returns by loaning money to Fuller, collected money from them, and issued promissory notes in exchange on Minnie's behalf. He then gave the money to Minnie in cash to advance to Fuller.

¶ 30 Shaw was introduced to the Fuller project by Minnie in 1996 or 1997. Shaw said that 95% of the business relating to the Fuller project was done through Minnie. Shaw did not have an address for Fuller, or a phone number, at any time. When he spoke to Fuller on the telephone, he did so only when Fuller phoned him. The last time he met or spoke with Fuller was in 1998. Shaw said all investments were made in cash and he did not know of any investor who had received money from his investment in the Fuller project. Some of the investors were his friends or relatives; some were not.

¶ 31 Shaw gave the money he received to Minnie, but he did not know whether Minnie actually gave it to Fuller or whether Fuller used it to pay his debts. He did not know when Fuller was supposed to receive his inheritance – the date had changed three times since he had become involved in the Fuller project. He said to Bansal "this thing is a recurring nightmare and it keeps going on and on and on, because there is always one more debt, there's always one more debt …"

¶ 32 Apart from the initial loans made by Minnie, there is no evidence that money advanced for loans to Fuller in exchange for promissory notes has been repaid.

¶ 33 Minnie told Bansal that there was a point in time when Fuller stopped repaying the investors, but Minnie kept borrowing money on Fuller's behalf. He did this because Fuller "basically had a reason for every delay that took place". Minnie

told Bansal that he last spoke to Fuller in 2003, but had no contact details for him and could not have contacted Fuller himself. Shaw told Bansal in 2002 that he was no longer raising money for anything.

¶ 34 No prospectus has ever been filed for any of the promissory notes issued in connection with the Fuller project.

Breaches of the Act

¶ 35 Staff say there is a *prima facie* case that Minnie and Shaw breached sections 34(1)(a), 61, 50(1)(d) and 57(b) of the Act and their conduct was contrary to the public interest. They say there is sufficient evidence to determine that it is 'necessary and in the public interest' to extend the temporary orders.

¶ 36 Under section 1(1) of the Act :

> "distribution" means, if used in relation to trading in securities,
>
> (a) a trade in a security of an issuer that has not been previously issued, …;
>
> "investor relations activities" means any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer …;
>
> "issuer" means a person who
>
> (a) has a security outstanding,
> (b) is issuing a security, or
> (c) proposed to issue a security;
>
> "material fact" means, where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities;
>
> "misrepresentation" means
>
> (a) an untrue statement of a material fact, or
> (b) an omission to state a material fact that is
>
> (i) required to be stated, or

> (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made;
>
> "security" includes
>
> …
> (d) a bond, debenture, note or other evidence of indebtedness …,
> …;
>
> "trade" includes
>
> (a) a disposition of a security for valuable consideration whether the terms of payment be on margin, installment or otherwise …,
> …
> (f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e).

Section 34(1)(a)

¶ 37 Section 34(1)(a) of the Act provides that a person must not trade in a security unless the person is registered in accordance with the regulations. Section 46 of the Act provides certain exemptions to the registration requirement in section 34(1). Neither of the respondents was registered. We received no submissions from staff on whether any exemptions from the registration requirements were available to the respondents.

¶ 38 It is settled law that a promissory note is a "security" and the issuing of promissory notes in exchange for cheques or cash is a "trade" (see *Re Eron Mortgage Corp,* [2000] 7 BCSC Weekly Summary 22).

¶ 39 In our view, there is evidence to support a *prima facie* case that Minnie and Shaw traded in the promissory notes without being registered, **a breach of section 34(1)(a) of the Act**.

Section 61(1)

¶ 40 Section 61(1) of the Act provides:

> Unless exempted under this Act or the regulations, a person must not distribute a security unless
>
> (a) a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and
> ….

¶ 41 "Distribution" includes a trade in a security of an issuer that has not been previously issued. We find that the issue of the promissory notes by Minnie and Shaw was in each case a distribution in that it was a trade in a security of an "issuer" (namely Fuller, if he exists, or if he does not, Minnie) that had not been previously issued. In our view, there is evidence to support a *prima facie* case that neither Minnie nor Shaw filed a preliminary prospectus and a prospectus, **a breach of section 61(1) of the Act**.

Section 50(1)(d)

¶ 42 Section 50(1)(d) of the Act provides:

> A person, while engaging in investor relations activities or with the intention of effecting a trade in a security, must not do any of the following:
>
> …
> (d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation.

¶ 43 Staff submit that Minnie and Shaw, while engaging in activities to promote the sale of securities in the Fuller project, namely "investor relations", made statements which they knew, or ought reasonably to have known, were misrepresentations contrary to section 50(1)(d).

¶ 44 Staff submit that Minnie was engaging in investor relations activities when, from the early 1990s, he started telling people about a person named Andrew Fuller and the Fuller project. Shaw also told investors about the investment opportunity and both respondents collected money from investors and provided promissory notes in exchange.

¶ 45 We find that Minnie and Shaw engaged in investor relations.

¶ 46 Staff also say that Minnie and Shaw made statements that they knew or ought reasonably to have known were misrepresentations when they told investors or prospective investors that Fuller and the Fuller project existed when they knew, or ought reasonably to have known, that both Fuller and the Fuller project were fictitious. Staff submit this could reasonably be expected to significantly affect the value of the promissory notes issued in relation to the Fuller project, and so the statements fall within the definitions of "material fact" and "misrepresentation" in the Act.

¶ 47 Even if Fuller exists, say staff, Minnie and Shaw made statements that they knew, or ought reasonably to have known, were misrepresentations when they told investors and prospective investors that loans would be repaid and returns would be high.

¶ 48 There is no direct evidence that Fuller and the Fuller project are fictitious. On the contrary, there is evidence from Minnie that Fuller exists. Staff have asked us nevertheless to infer that Fuller and the Fuller project are fictitious and that Minnie has not used any of the money collected from British Columbia residents for the purported investment. Staff have asked that we infer this from some evidence that Minnie hired D to play the role of Fuller and went to some lengths to make his presence known in Victoria.

¶ 49 We do not give this evidence much weight in this hearing. It was obtained from a transcript of an interview of D by the police, and was provided to us by way of Bansal's affidavit where he used language like "it appears", "I learned", and the "transcript indicates that". We have not ourselves been able to assess that evidence. Nor was it put to Minnie in his interview with Bansal. In any event, D did not say that Fuller does not exist.

¶ 50 Minnie's evidence is that he met Fuller in the late 1980s and frequently after that, for a period, and that for a time in that period Fuller had a residence in Victoria. Shaw has not said that Fuller does not exist, rather that he thought the man he dealt with in 1998 was Fuller.

¶ 51 We do not think the evidence before us supports an inference that both Fuller and the Fuller project are fictitious. We should not make findings which are "little more than unsubstantiated suspicion' or 'guilt by association': see *Pessel* (cited above).

¶ 52 With respect to the use of the money, the investors known to Bansal have not been repaid, but Minnie asserted that he did give the money to Fuller and, while the loans were repaid initially, they have not been repaid since, because the inheritance has not been paid. We have seen no direct evidence to contradict this and we are not prepared on the evidence before us to make inferences to the contrary.

¶ 53 With respect to the rate of return on the loans, we have no evidence before us as to what was promised to investors and prospective investors by Fuller, Minnie or Shaw, other than examples ranging from 25% to 50% (Minnie interview) and '50% or double' (Shaw interview). This is sufficient, however, to allow us to find that Minnie and Shaw made false statements to investors that the Fuller project would provide a high return. By 2001 at the very latest, they knew that investors had not been repaid for some time (let alone received high returns) and that the

date of the inheritance had changed three times. This was a fact that could reasonably be expected to significantly affect the market price or value of the promissory notes and so it was material.

¶ 54 In our view, there is evidence to support a *prima facie* case that Minnie and Shaw misrepresented the risks of the investment and the returns to investors and prospective investors. They knew, or ought reasonably to have known, that they were making statements that were misrepresentations, **a breach of section 50(1)(d) of the Act**.

Section 57(b)

¶ 55 Section 57(b) of the Act provides:

> A person in or outside British Columbia must not, directly or indirectly, engage in or participate in a transaction or series of transactions relating to a trade in or acquisition of a security … if the person knows, or ought reasonably to know, that the transaction or series of transactions
>
> …
> (b) perpetrates a fraud on any person in British Columbia,
> ….

¶ 56 We find that Minnie and Shaw directly or indirectly engaged in or participated in a transaction or series of transactions relating to a trade in or acquisition of a security. The more difficult questions are whether Minnie knew that the transactions perpetrated a fraud on the investors and (if he did) whether Shaw ought reasonably to have known about Minnie's fraud.

¶ 57 As set out in the BC Court of Appeal judgment in *Anderson v BCSC*, 2004 BCJ 8 at para 27, the elements of fraud under section 57(b) of the Act are summarized in *R v Théroux*, [1993] 2 SCR 5 at 20, 100 DLR (4th) 624, 79 CCC (3d) 449 by Madam Justice McLachlin (as she then was) as follows:

> ... the actus reus of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the mens rea of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and

2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

¶ 58 McLachlin J. also cited with approval at 23 the words of Taggart J.A. who stated in *R v Long* (1990), 51 BCLR (2d) 42, 61 CCC (3d) 156 at 174:

> ... the mental element of the offence of fraud must not be based on what the accused thought about the honesty or otherwise of his conduct and its consequences. Rather, it must be based on what the accused knew were the facts of the transaction, the circumstances in which it was undertaken and what the consequences might be of carrying it to a conclusion. [underlining added]

¶ 59 The BC Court of Appeal in *Anderson* went on to say (at para 29):

> Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

¶ 60 This suggests to us that although the burden under section 161(3) is to show a *prima facie* case, that *prima facie* case should nevertheless be 'clear and convincing'.

¶ 61 On this test, we find that the *actus reus* of fraud is shown in the facts which support our findings of a *prima facie* breach of section 50. By 2001 at the latest, Minnie and Shaw were making statements to investors and prospective investors that they would be repaid with a high return, when they knew existing investors were not being repaid (and certainly not being repaid with a high return). They misrepresented the risks of the investment and the returns. In the result, new investors' pecuniary interests were put at risk and they may well have lost all or most of their money.

¶ 62 We must base our finding of the mental element of fraud on our findings as to what Minnie actually knew. The evidence must show a 'clear and convincing' *prima facie* case of a 'guilty mind'.

¶ 63 We have concluded that the *prima facie* evidence of Minnie's guilty mind is not clear and convincing. Accordingly, **we do not find that Minnie and Shaw breached section 57(b) of the Act**.

Acts Contrary to the Public Interest

¶ 64 We find that the conduct of the respondents was contrary to the public interest.

Necessary and in the Public Interest

¶ 65 The onus is on staff to produce evidence upon which we can determine that it is necessary and in the public interest to extend the temporary orders against each respondent.

¶ 66 Unregistered trading is a serious problem in our capital markets and poses a significant threat to investors, as does the making of misrepresentations about investments.

¶ 67 On the other hand, there has been an 18 month period from the date of Minnie's interview by Bansal (and a one year period from the laying of the criminal charges) to October 7, 2004 when the executive director issued the temporary orders and notice of hearing in this matter. Staff say the reason for delay is resources. It is the policy of the executive director that, in cases where non-registrants are charged with a criminal offence that relates to the trading of securities, in most circumstances, temporary orders under section 161 of the Act will be made. But in this case a staff lawyer was not available to put onto the file until recently, and therefore staff did not proceed earlier.

¶ 68 The executive director must decide how best to allocate the scare resources of the commission. But that decision (and any resulting delay) does not mean in itself that it cannot be necessary and in the public interest now to extend the temporary orders. It simply means that, given other priorities, the executive director decided not to make temporary orders earlier.

¶ 69 Staff ask us to infer from the length of time that the Fuller project has been promoted, and the fact of repeated breaches of the Act until 2001, that the risk to the public continues. However, so far as we are aware, there is no evidence that in the last year, or since 2002, the respondents have continued to trade by issuing promissory notes or otherwise, or to breach the Act. Minnie told Bansal that he had spoken to Fuller in 2003, but he also said that he did not have contact details for Fuller and could not call or contact him. Shaw told Bansal in 2002 that he was no longer raising money for anything.

¶ 70 Staff also say that the extension of the orders is necessary because the investigation is not yet completed, and that we should take into account the

seriousness of the criminal charges against Minnie and Shaw. The Commission investigation and the criminal proceedings may reveal more evidence that is adverse to the respondents.

¶ 71 While temporary orders should not be made lightly, in circumstances in which all the evidence is not yet in, but where there is *prima facie* evidence of egregious behaviour, our main aim must be to protect the public. Although we have no evidence of breach of the Act after 2001, and although we have decided that there is not a *prima facie* case of breach of section 57(b) of the Act, it appears that neither Minnie nor Shaw are fit to be acting as directors or officers of any issuer and should not be engaging in investor relations. Minnie and Shaw misrepresented the risks of investment to investors and prospective investors who may have lost a substantial amount of money.

¶ 72 We find that to allow the respondents to operate without restrictions would pose a continuing threat to our capital markets and to investors, and so it is necessary and in the public interest to impose restraints until the hearing is held and a decision is rendered. We have concluded, however, that the order under section 161(1)(b) of the Act should be modified to allow Minnie and Shaw to trade securities on their own account through a registered representative.

¶ 73 Accordingly, **we consider it necessary and in the public interest to extend the temporary orders under section 161(3) of the Act** against Minnie and Shaw as follows:

a) under section 161(1)(a), that each comply with or cease contravening the Act;
b) under section 161(1)(b), that each cease trading in and are prohibited from purchasing any securities or exchange contracts, except for his own account through a registered representative;
c) under section 161(1)(d), that each resign from any positions they may hold as, and are prohibited from becoming or acting as, directors or officers of any issuer; and
d) under section 161(1)(d), that each is prohibited from engaging in investor relations activities,

until a hearing is held and a decision is rendered.

¶ 74 Although we have described some of the evidence, we emphasize that we have made no final determinations with respect to the allegations made in the notice of hearing.

Limitation Period

¶ 75 There is an issue in this case as to whether section 159 (limitation period) allows us to take into account events which occurred more than 6 years prior to the date of the notice of hearing (October 7, 2004). We have decided that we do not need to consider this issue because we have sufficient evidence of events taking place during the period October 7, 1998 to October 6, 2004 on which to grant the application of the executive director.

Hearing Date

¶ 76 We are of the view that it is in the public interest not to proceed with the hearing in this matter until staff conclude their investigation and a decision is issued in the criminal proceedings. The hearing is therefore adjourned until 10 am June 1, 2005.

¶ 77 November 26, 2004.

¶ 78 **For the Commission**

Robin E. Ford
Commissioner

Marc A. Foreman
Commissioner

Robert J. Milbourne
Commissioner