2006 BCSECCOM 153

Corporate Express Inc., also known as Corporate Express Club and Corporate Express Club (CEC) 1998, Fortress International Ltd., Great American Gold Ltd., John Thomas McCarthy and Cameron Willard McEwen

Section 161(1) of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken	Vice Chair
	Robert J. Milbourne	Commissioner
	Roy Wares	Commissioner
Date of Hearing	February 28, 2006	
Date of Decision	March 20, 2006	

Appearing

Douglas H. Christie	For Cameron Willard McEwen
Mark Hilford Adrianne Marskell	For the Executive Director

Decision

Introduction

¶ 1 This decision should be read with our Findings in this matter made on September 9, 2005 (see 2005 BCSECCOM 583).

¶ 2 The notice of hearing in this matter was issued December 9, 1999 and was accompanied by temporary orders (still in force as a result of a subsequent Commission order) prohibiting trading in the securities described below and removing the use of the exemptions in the Act from all of the respondents. The orders also prohibited the individual respondents from acting as directors and officers of any issuer, and from engaging in investor relations activities.

¶ 3 Corporate Express (which includes Corporate Express Inc., Corporate Express Club, and Corporate Express Club (CEC) 1998) sold club memberships, which we found to be securities, to 264 people, 117 of whom were residents of British

Columbia. At the membership sales price of US$350 per membership, this implies sales in British Columbia of US$40,950.

¶ 4 Corporate Express also offered its members "gold shares", interests in an investment fund called the Investment Opportunity Fund, and interests in a venture partnership, all of which we also found to be securities. There is no evidence as to how many Corporate Express members, if any, invested in the gold shares, IOF or the venture partnerships.

¶ 5 Great American Gold Ltd. sold debentures, which we found to be securities. About US$650,000 flowed from purchasers of these debentures through the trust account of a Vancouver lawyer. At least US$135,000 principal amount of these debentures was purchased by seven residents of British Columbia.

¶ 6 In early 2000 Corporate Express established a website on McCarthy's instructions. After McCarthy's departure from Corporate Express (as described below) McEwen administered the website for a time. In the same time frame, Great American established a website on McEwen's instructions. Both websites provided information about the securities offered by Corporate Express and Great American.

¶ 7 Fortress was significantly involved in the financing activities of Corporate Express and Great American, as described in paragraph 85 of the Findings.

¶ 8 As described in paragraphs 86 and following of the Findings, McCarthy established Corporate Express in 1998 and mostly ran the show until 2001, when he and McEwen apparently had a falling out and McCarthy left Corporate Express and Fortress.

¶ 9 McEwen's involvement in the affairs of Corporate Express, IOF, Great American and Fortress are described in the Findings, beginning at paragraph 89.

¶ 10 None of Corporate Express, Great American, Fortress, McCarthy or McEwen has ever been registered under the Act, nor has any of them filed a prospectus.

Findings

¶ 11 We found that:

1. Corporate Express, Great American, Fortress, McCarthy and McEwen traded in securities without being registered to do so, contrary to section 34(1);

2. Corporate Express, Great American, Fortress, McCarthy and McEwen distributed securities without filing a prospectus, contrary to section 61(1);

3. Corporate Express gave an undertaking relating to the future value or price of an investment in IOF while engaging in investor relations activities or with the intention of effecting a trade in those securities, contrary to section 50(1)(b);

4. Corporate Express, Great American, Fortress, McCarthy and McEwen breached the temporary orders by trading in securities of Corporate Express and Great American after the date of the orders; and

5. McCarthy and McEwen breached the temporary orders by engaging in investor relations activities in connection with the securities of Corporate Express and Great American after the date of the orders.

Discussion

¶ 12 The Executive Director seeks a cease trade order against the corporate respondents, the permanent withdrawal of exemptions from all of the respondents, and orders permanently prohibiting McCarthy and McEwen from being directors or officers of any issuer, and from engaging in investor relations activities.

¶ 13 McEwen says the temporary orders against him should be lifted and no sanctions imposed.

¶ 14 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission discussed the factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,

- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

Seriousness of the respondents' conduct

¶ 15 We found that all of the respondents contravened sections 34(1) and 61(1), the foundation investor protections in the Act. Section 34(1) requires that those who trade in securities be registered. It is the means by which the Act intends to ensure that purchasers of securities are offered only securities that are suitable. Section 61(1) requires that those who wish to distribute securities file a prospectus with the Commission. Its intent is that investors and their advisers get the information they need to make an informed investment decision.

¶ 16 Any contravention of sections 34(1) and 61(1) is therefore inherently serious. In some cases, there is evidence of the circumstances surrounding the investor's investment decisions, which make it clear that the investors would have benefited had the respondents complied with these sections. That evidence is another factor the Commission considers in determining the seriousness of a contravention of sections 34(1) and 61(1) in a given case. In this case, there is little evidence of that nature.

¶ 17 McEwen argued that his conduct was less serious because he did not actually solicit or sell securities. However, we found that it was McEwen who was primarily responsible for allocating the funds raised. McCarthy and McEwen worked together to raise funds and to allocate them among the corporate respondents. Accordingly, there is no basis to treat them differently for their respective contraventions of sections 34(1) and 61(1).

¶ 18 Corporate Express gave an undertaking as to future price or value in contravention of section 50(1)(b) in connection with investments in IOF. However, there is no evidence that anyone actually invested in IOF, or if they did, the extent to which they relied on the undertaking. We therefore cannot determine the seriousness of this contravention.

¶ 19 All of the respondents breached the temporary orders. This is extremely serious misconduct. Once a temporary order is issued and notice given to the respondent (and the respondents had notice of the temporary orders in this case), the respondent is on notice that the conduct that gave rise to the order is suspect, and is sufficiently serious that the Commission (or the Executive Director) has made orders to deal with it.

¶ 20 The Act provides review and appeal mechanisms for respondents who believe that a temporary order is unfair or who want the order varied or revoked. A respondent who has notice of a temporary order, yet continues the activities prohibited by it, demonstrates a disregard for the regulatory system. This conduct is a significant aggravating factor in considering sanctions.

Damage done to British Columbia markets

¶ 21 In the case of an illegal distribution, the extent and scope of the distribution, as well as the impact on investors, is relevant evidence. In this case, Corporate Express sold securities to 264 people, 117 of whom were residents of British Columbia. Great American sold US$650,000 principal amount of debentures through the trust account of its British Columbia lawyer. At least US$135,000 of that was purchased by seven residents of British Columbia. These trades contravened sections 34(1) and 61(1), cornerstone provisions of the legislation, and damage to British Columbia markets can be inferred.

¶ 22 More important, a breach of temporary orders is very damaging to British Columbia markets. If those who are subject to Commission orders could breach them with impunity, the enforcement function of the Commission would be rendered ineffective. This would cause significant damage to the markets of British Columbia, for they would be perceived as essentially unregulated. Therefore, a breach of a temporary order challenges the integrity of our markets, and cannot be tolerated.

Risk that the respondents pose to British Columbia investors and markets

¶ 23 As long as the corporate respondents are in a position to sell securities without filing a prospectus or using an exemption, they pose a continued risk to British Columbia investors and markets. As for the individual respondents, there is little evidence as to their current activities in British Columbia. What evidence there is suggests that neither is active in British Columbia. It is therefore difficult to assess the risk they represent to our markets. However, whether or not either of them are currently active in British Columbia, we are not aware of any impediments to their becoming so in future. In making orders we need to consider the possibility that either of them could become active in British Columbia. The appropriate sanction ought therefore to include some element of specific deterrence.

Need to demonstrate the consequences of conduct and general deterrence

¶ 24 Sections 34(1) and 61(1) play a fundamental role in our regime of regulation, and temporary orders are a vital element of the enforcement of that regime. We think that the sanctions must communicate clearly to market participants the seriousness

of a contravention of those sections, and of a breach of temporary orders. The sanctions must also achieve an appropriate level of general deterrence.

¶ 25 There are no mitigating factors, but there is no evidence of harm to investors (apart from Stojak, mentioned below), of the degree to which any of the respondents were enriched (if at all), or of past improper conduct by the respondents.

Orders made by the Commission in the past

¶ 26 Pat Stojak, who is mentioned in the Findings (see paragraph 48), was originally a respondent but settled with the Executive Director (see 2004 BCSECCOM 374 and 375). Under his settlement, he agreed to orders that he not trade in securities, act as a director or officer, or engage in investor relations activities for a minimum of three years. He also agreed to pay $5,000 to the Commission.

¶ 27 The sanctions in the settlement were based on Stojak's admission that he contravened sections 34(1) and 61(1), section 50(1)(c) and (d), and breached the temporary orders by acting as a director and officer (of companies unrelated to the corporate respondents) after the date of the orders. The settlement listed as mitigating factors that he personally lost $20,000 of his own money through investments in the securities offered by the corporate respondents, and that he did not continue to distribute those securities in breach of the temporary orders.

¶ 28 The precedents cited by the Executive Director in connection with the contraventions of the legislation involved conduct more serious than McCarthy's and McEwen's, but did not involve a breach of temporary orders.

Orders

¶ 29 Considering it to be in the public interest, we order:

CEC, Fortress and Great American

1. under section 161(1)(b) of the Act, that all persons cease trading in, and are permanently prohibited from purchasing any securities issued or offered by, CEC, Fortress, and Great American;

2. 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 CEC, Fortress, and Great American permanently;

McCarthy

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 McCarthy for ten years expiring on March 19, 2016;

4. under section 161(1)(d)(ii) of the Act, that McCarthy is prohibited from becoming or acting as a director or officer of any issuer for ten years expiring on March 19, 2016;

5. under section 161(1)(d)(iii) of the Act, that McCarthy is prohibited from engaging in investor relations activities for ten years expiring on March 19, 2016;

McEwen

6. 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 McEwen for ten years expiring on March 19, 2016;

7. under section 161(1)(d)(ii) of the Act, that McEwen is prohibited from becoming or acting as a director or officer of any issuer for ten years expiring on March 19, 2016; and

8. under section 161(1)(d)(iii) of the Act, that McEwen is prohibited from engaging in investor relations activities for ten years expiring on March 19, 2016.

¶ 30 We make no orders under sections 162 (administrative penalty) or 174 (hearing fees and charges) because the Executive Director did not seek orders under those sections in the notice of hearing.

Reasonable Apprehension of Bias

¶ 31 At the sanctions hearing, McEwen pointed out that we did not address in our Findings the arguments he made in his closing argument in the liability portion of the hearing about reasonable apprehension of bias arising from the integrated structure of the Commission.

¶ 32 The Act established the Commission and in so doing gave it the authority to investigate, prosecute and adjudicate contraventions of the Act and conduct contrary to the public interest. McEwen says this is flawed because combining the investigative, prosecutorial and adjudicative functions in one agency gives rise to a reasonable apprehension of bias.

¶ 33 This issue has been dealt with by the Supreme Court of Canada in *Brosseau v. The Alberta Securities Commission* [1989] 1 SCR 301. In that case, the court considered the structure of the Alberta Securities Commission, which was substantially the same as that of the British Columbia Securities Commission today. The court held that no reasonable apprehension of bias can exist when a

securities commission acts within the structure established for the commission by its enabling legislation, even if that legislation combines the investigative, prosecutorial and adjudicative functions in one agency. In our opinion, that disposes of McEwen's argument.

¶ 34 March 20, 2006

¶ 35 **For the Commission**

Brent W. Aitken
Vice Chair

Robert J. Milbourne
Commissioner

Roy Wares
Commissioner