2007 BCSECCOM 623

Edward Bernard Johnson

Section 171 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken	Vice Chair
	David J. Smith	Commissioner
	Suzanne K. Wiltshire	Commissioner
Hearing date	September 19, 2007	
Date of decision	October 15, 2007	
Appearing		
John S. Forstrom	For Edward Bernard Johnson	
C. Paige Leggat Lisa Ridgedale	For the Executive Director	

Decision

¶ 1 This is an application by Edward Bernard Johnson under section 171 of the *Securities Act* RSBC 1996, c. 418. Johnson wants us to vary our July 20, 2007 Decision in *Edward Bernard Johnson* 2007 BCSECCOM 437. That decision was based on our Findings in the same matter (see *Edward Bernard Johnson* 2007 BCSECCOM 257).

¶ 2 In our decision we ordered Johnson to pay an administrative penalty of $68,000. We also ordered a two-month suspension with the proviso that the suspension would continue for so long as the penalty remained unpaid.

¶ 3 Johnson is applying to vary our order to reduce the penalty to $20,000 and to drop the proviso extending the period of suspension until the penalty is paid.

I Background

¶ 4 We found that Johnson contravened three rules of the Investment Dealers Association of Canada and section 168.1 of the Act. We also found that those contraventions constituted conduct contrary to the public interest.

¶ 5 In our decision, we described the seriousness of Johnson's conduct as follows:

> 20 . . . Johnson's contravention of IDA rules was serious. The IDA rules that Johnson contravened are important ones. They are all designed to prevent, in one way or another, improper trading. . .
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> 21 As a registrant, Johnson is a person the regulatory system depends upon to be familiar, and comply, with the rules of his self-regulatory organization, the IDA, to ensure that the integrity of the markets is not damaged. . . .
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> 22 . . . of the 450 or so trades . . . at least 400 of them Johnson executed in contravention of IDA rules. . . .
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> 25. . . Johnson's contravention of section 168.1 was very serious. Section 168.1 is important in preserving the integrity of the regulatory system by requiring those required to provide information to the commission to do so truthfully. . . .
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> 26 . . . Johnson's conduct was not inadvertent. The only reasonable inference to be drawn from the evidence is that he intentionally misled commission investigators. His misleading statements were the exact opposite of the actual facts, and went to the heart of the matter under investigation. That he misled investigators twice while under oath raises serious questions about his personal integrity.
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> 28 . . . What is important is that at the crucial time of the investigation, he chose, under oath, to mislead commission investigators on the very matter that was under investigation. Our expectations of registrants are much higher.
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> 30 . . . We expect [registrants] to demonstrate integrity not just in day-to-day trading and advising, but also candour and cooperation with securities regulatory authorities in connection with investigations into suspected wrongdoing. Any lesser standard invites contempt of the enforcement process by the very ones charged to a large degree with protecting the integrity of our markets. Johnson failed to meet that standard of integrity when he misled commission staff investigators.

¶ 6 We considered several factors in determining the appropriate sanction, including those listed in *Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22. Those factors include specific and general deterrence. In the decision, we said:

> 56 Through the orders we are making, we intend to demonstrate the consequences of Johnson's conduct, to deter him from future misconduct, and to create an appropriate general deterrent.

¶ 7 In determining the amount of the administrative penalty, we considered the commissions Johnson earned from the trades made in contravention of IDA rules. These are the relevant excerpts from the decision:

> 35 Johnson's firm earned commissions of about $59,000 from his trading . . . of which Johnson's share was "50% or less". . . .
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> . . .
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> 59. . . Johnson cannot be seen to have profited from his wrongdoing, and any penalty we order ought to act as disincentive, both to Johnson and to others in future, to attempt to do so. The penalty therefore must exceed the commissions Johnson earned.
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> 60 We do not have precise evidence as to the commissions Johnson earned through his trades . . . . However we do know that his commissions were "50% or less" of the $59,000 that his firm earned on his trades. For the purposes of ordering an administrative penalty, we have set his share arbitrarily at 45%, and have taken into account that he executed about 10% of the trades without violating IDA rules. We then doubled that figure. This accounts for $48,000 of the administrative penalty we are ordering.
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> 61 In addition, an administrative penalty is appropriate in light of his intentional misleading of commission investigators. That accounts for the balance of the administrative penalty we are ordering.

¶ 8 This is the order we made:

> 62 Therefore, considering it to be in the public interest, we order:

1. under section 161(1)(f) of the Act, that Johnson's registration is suspended beginning September 1, 2007 until the later of
   a. November 1, 2007, and
   b. the date he pays the administrative penalty ordered under item 3 of this paragraph;

2. under section 161(1)(f), that for the first six months of his employment with a registered firm after his suspension, Johnson be subject to close supervision; and

3. under section 162, that Johnson pay an administrative penalty of $68,000.

C The application

¶ 9 Johnson says we should eliminate the $48,000 portion of the administrative penalty, thereby reducing it to $20,000, because:

1. the $48,000 portion amounts to a disgorgement order and is not an appropriate order to make in the circumstances of the case,
2. we did not have sufficient evidence to make the order,
3. the formula we used to calculate the penalty was arbitrary,
4. a penalty of $68,000 is too high considering the circumstances of the case, and
5. we did not have jurisdiction to order the $48,000 portion of the penalty.

¶ 10 Johnson also says we should eliminate the proviso in paragraph 1 b. of the order that extends the suspension until the penalty is paid because:

1. it is *ultra vires*, and
2. it is unreasonable in the circumstances.

II Discussion and analysis

A Reduction of penalty

Order is in the nature of a disgorgement order

¶ 11 Johnson says the $48,000 portion of the penalty is in the nature of a disgorgement order, and it is not appropriate in this case. He says disgorgement is usually ordered only in cases with an element of causation, intent or motive – cases in which there was a deliberate attempt to profit through misconduct. He says disgorgement orders are generally not found in cases such as this one, where the element of intention is missing.

¶ 12 The $48,000 portion of the penalty is not in the nature of a disgorgement order. As explained in paragraph 56 of the decision, it is part of an order intended "to demonstrate the consequences of Johnson's conduct, to deter him from future misconduct, and to create an appropriate general deterrent."

¶ 13 We reject this ground as a reason to vary the decision.

Insufficient evidence

¶ 14 In paragraph 32 of the decision we referred to an estimate of Johnson's share of gross commissions of "50% or less." Later, in paragraph 60, we used that figure in determining the quantum of the $48,000 portion of the administrative penalty.

¶ 15 Johnson says the phrase "50% or less" came not from "evidence", but from his submissions. Johnson says that we therefore had insufficient evidence about the "actual net benefit" realized by Johnson as a result of the trading.

¶ 16 Johnson also says that in considering the benefit to him we ought to have considered additional factors, such as the split between him and others in his firm, his expenses, and the effect of income taxes.

¶ 17 Johnson is right that the estimate of his commissions being 50% or less entered the record through his submissions. It was provided to us as part of his submissions about whether we ought to consider the commissions he earned in determining the amount of the administrative penalty.

¶ 18 There is no evidentiary issue here. A panel is entitled to assume that information provided in submissions is accurate.

¶ 19 Johnson's remedy, if he believes we proceeded on incorrect or incomplete information, is to enter evidence relevant to the issues and make appropriate submissions based on that evidence. We expected him to do that, because in his application he sought the opportunity to enter evidence relevant to that issue. That is why we heard the matter orally (usually, section 171 applications are heard by way of written submissions). However, at the hearing, Johnson chose not to enter any new evidence.

¶ 20 That leaves us with the information we originally relied on to determine Johnson's share of gross commissions. As we noted in the decision, we had sufficient information to make a determination of Johnson's probable share of gross commissions. In the absence of any new evidence, there is no basis for us to change that.

¶ 21 We reject this ground as a reason to vary the decision.

Arbitrary formula

¶ 22 Johnson says that doubling Johnson's share of gross commissions to arrive at that portion of the penalty is arbitrary, as the decision disclosed no principle on which the panel relied in deciding to do so.

¶ 23 We disagree. We set out two principles. First, in paragraph 56 of the decision, we said, "Through the orders we are making, we intend to demonstrate the consequences of Johnson's conduct, to deter him from future misconduct, and to create an appropriate general deterrent."

¶ 24 Second, in paragraph 59 we said, "Johnson cannot be seen to have profited from his wrongdoing, and any penalty we order ought to act as disincentive, both to Johnson and to others in future, to attempt to do so. The penalty must therefore exceed the commissions earned."

¶ 25 Deterring misconduct by basing a fine or penalty on a multiple of the gains enjoyed by the wrongdoer is not an arbitrary or a novel concept. Indeed, sections 155(5) and (6) of the Act base fines for market manipulation, fraud, illegal insider trading, and tipping in part on "an amount equal to triple any profit" made as a result of the contravention.

¶ 26 We reject this ground as a reason to vary the decision.

Penalty too high

¶ 27 Johnson says the overall amount of the penalty is too high in the circumstances. In our opinion the penalty is appropriate in light of the seriousness of the contraventions, as explained in the decision. Johnson has offered nothing new to persuade us that the penalty is not appropriate in the circumstances.

¶ 28 We reject this ground as a reason to vary the decision.

No jurisdiction

¶ 29 The decision arises from Johnson's contravention of IDA rules and his contravention of section 168.1 of the Act. Johnson says that the paragraphs 59, 60 and 61 of the decision (quoted above) show that only $20,000 of the administrative penalty we ordered was for Johnson's contravention of section 168.1 of the Act. Johnson says the $48,000 portion was for Johnson's trading in contravention of the IDA rules, and so we do not have the jurisdiction to impose it because it does not relate to a contravention of the Act, as required by section 162.

¶ 30 Section 162 says, "If the commission, after a hearing . . . determines that a person has contravened . . . a provision of this Act or the regulations . . . the commission may order the person to pay an administrative penalty . . . .

¶ 31 The commission has jurisdiction to make an order under section 162 only if it finds a contravention of the Act or the regulations. However, once the commission finds a contravention, it is entitled to consider all of the circumstances of the respondent's conduct in determining the amount of the penalty.

¶ 32 In *Re Cartaway Resources Corp*, [2004] 1 SCR 672, the commission, having found that the respondents contravened section 61, found that it was in the public interest to impose the maximum administrative penalty then allowed under section 162. In doing so, the commission concluded that it had the jurisdiction, when determining a penalty under section 162, to consider all of the conduct of the respondents, not just the conduct that constituted their contravention of section 61.

¶ 33 The Supreme Court of Canada ruled that the commission's interpretation of section 162 was reasonable. The court said:

> 5 On the facts of this case, the imposition of the maximum penalty is rationally connected to the conduct of [the respondents] globally. Section 162 of the Act is triggered by a breach of the Act, but in formulating an order that protects the public interest, the Commission may take into account the context surrounding the breach.
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> 63 . . . While a specific breach of the Act is required to trigger the application of s. 162, unlike s. 161, the penalty that the Commission ultimately imposes should take into account the entire context, as well as the preservation of the public interest. The public interest must be satisfied under both ss. 161 and 162, and is not restricted to situations where the Commission imposes a ban on market participation under s. 161. Where conduct could be addressed under the two sections, the Commission may use both provisions to craft the order that is most in the public interest.
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> 64 The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a different remedial emphasis according to the circumstances. Courts should review the order <u>globally</u> to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the

> Commission in crafting an order in the public interest. . . . [*emphasis in the original*]
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> 65 . . . The Commission stressed the seriousness of the respondents' conduct and the damage done to the integrity of the capital markets, and found that when making an order that is in the public interest, "[w]e are obliged to take whatever remedial steps we determine are appropriate to maintain the public's confidence in the fairness of our markets."

¶ 34 Johnson's interpretation of the decision is not correct. The $48,000 portion of the penalty was not based on our finding that Johnson contravened IDA rules. As we said in paragraphs 56 and 62 of the decision, we formulated our orders under sections 161(1) and 162 to demonstrate the consequences of Johnson's conduct, to invoke specific and general deterrence, and satisfy the public interest.

¶ 35 In making the order that reflected those factors (along with the other factors identified in the decision), we considered the entire context of Johnson's conduct. This included not just his contravention of section 168.1, but the conduct about which he misled Commission investigators and that led to the contravention.

¶ 36 Johnson's trading in contravention of IDA rules is part of the context of his contravention of section 168.1 of the Act. Had he not traded in contravention of IDA rules, he would not have had to mislead commission staff about it. His contravention of section 168.1 and his contraventions of the IDA rules all arise from the same events.

¶ 37 The goal of general deterrence would not be met, and the public interest would not be served, if the administrative penalty were set at $20,000. A penalty that low, in the circumstances of this case, would leave the impression that a registrant could contravene important IDA rules, intentionally mislead investigators about it in contravention of the Act, and incur no meaningful financial penalty relative to his commissions earned through the misconduct.

¶ 38 We find we have the jurisdiction to order the $48,000 portion of the administrative penalty.

¶ 39 We reject this ground as a reason to vary the decision.

B Suspension continues until penalty paid

¶ 40 Johnson says that there is no authority in the Act to require a penalty to be paid before a suspension will be lifted that otherwise would have expired on a fixed date.

¶ 41 Section 161(1)(f) authorizes the commission to make an order in the public interest suspending a person's registration, and does not limit the commission's discretion to define the time period or circumstances in which the suspension will end. Similarly, section 162 authorizes the commission to order an administrative penalty. In addition, section 172 of the Act authorizes the commission to impose conditions on its decisions.

¶ 42 He also says that the order is tantamount to a collection process. He says that because the Act provides a mechanism for collecting administrative penalties (by providing for commission orders to be filed with the Supreme Court and treated as judgments of that Court), that is the only means by which the commission may collect its penalties. Therefore, he says this portion of the order is, in essence, an attempt to do indirectly what the commission cannot do directly, and therefore *ultra vires*.

¶ 43 We disagree. For one thing, paragraph 1 b. of the order, if invoked, does not necessarily result in payment of the penalty. As a means to collection it would be an unpredictable and clumsy process. To the extent it encourages Johnson to pay the penalty so that collection efforts are not required, the proviso ensures the integrity of the regulatory process. As the Supreme Court observed in *Cartaway*, the commission can use both sections 161(1) and 162 to craft orders in the public interest. It follows that it is in the public interest that respondents comply with all aspects of orders so crafted. If a registrant subject to a suspension and a penalty were able to serve the suspension, ignore the penalty and return to work, it would make a mockery of the disciplinary process.

¶ 44 We find that we have the jurisdiction to include the proviso in paragraph 1 b. of the order that extends the suspension until the penalty is paid.

¶ 45 We reject this ground as a reason to vary the decision.

¶ 46 Johnson says that the paragraph is not reasonable because it creates a catch-22 situation for him. He cannot pay the penalty unless he is able to work, he says, and yet he cannot work until he pays the penalty.

¶ 47 This situation is not without a solution. In settlement agreements with the commission, respondents who cannot pay a penalty at the time of settlement typically negotiate the right to pay over time if they provide adequate security for the amount owing. It is open to Johnson to apply to vary the decision by the inclusion of a similar arrangement.

¶ 48 We reject this ground as a reason to vary the decision.

III Decision

¶ 49 We dismiss the application.

¶ 50 October 15, 2007

¶ 51 **For the Commission**

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner

Suzanne K. Wiltshire
Commissioner