# 2009 BCSECCOM 145

**Kegam Kevin Torudag and Lai Lai Chan**

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

**Hearing**

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| **Panel** | Brent W. Aitken | Vice Chair |
| | Kenneth G. Hanna | Commissioner |
| | Shelley C. Williams | Commissioner |
| **Dates of hearing** | January 19, 20, and 22, 2009 | |
| **Date of Findings** | March 11, 2009 | |

**Appearing**

| | |
|---|---|
| Sean K. Boyle | For the Executive Director |
| H. Roderick Anderson | For Kegam Kevin Torudag |

**Findings**

## I Introduction

¶ 1 On June 24, 2008, the executive director issued a notice of hearing (see *Torudag* 2008 BCSECCOM 378) alleging that Torudag and Chan contravened section 86(1) of the Act as it was in force when they bought shares of Icon Industries Limited while being persons in a special relationship with Icon and having undisclosed material facts about the company.

¶ 2 Torudag appeared at the hearing and was represented by counsel. Chan did not appear, nor was she represented by counsel. She submitted email correspondence relevant to the allegations, which we admitted as evidence.

¶ 3 The evidence includes an agreed statement of facts among the executive director, Torudag, and Chan.

## II Background

### *Icon's acquisition of mineral claims*

¶ 4 Icon is a British Columbia reporting issuer listed on the TSX Venture Exchange. Its head office is in British Columbia.

¶ 5 Chan had Quebec mineral claims for sale. In early March 2007 Torudag, along with his long-standing friend and colleague Tasso Baras, met Chan to discuss

acquisition of the claims. Torudag and Baras then met Barry Coughlin, the president of Icon, about Icon's potential acquisition of the claims. At the time, Icon was a shell company.

¶ 6 Negotiations ensued and resulted in agreements. In an agreement dated March 12, 2007, Torudag and Baras agreed to purchase the claims from Chan, and in an agreement dated March 13, Torudag and Baras assigned the claims to Icon.

¶ 7 On March 13, 2007 at 15:32 Eastern time Icon issued a news release disclosing the assignment agreement and a $450,000 private placement. (In these Findings, all times are Eastern.)

¶ 8 Beginning about two and a half hours before Icon's issuance of the news release, Torudag and Chan bought Icon shares through the facilities of the Exchange. Torudag bought 119,000 and Chan bought 10,000.

¶ 9 All of the Icon shares Chan bought, and at least 71,000 of the Icon shares that Torudag bought, were sold through brokerage accounts of sellers with British Columbia addresses.

¶ 10 Torudag and Chan admit

- the negotiations and the resulting agreements were material facts about Icon
- Torudag and Chan knew those facts when they bought shares of Icon on March 13, 2007
- when Torudag and Chan bought their Icon shares those facts had not been generally disclosed
- Torudag and Chan were persons in a special relationship with Icon.

***Torudag***

¶ 11 Torudag assists reporting issuers in raising capital and performs investor relations activities for them, including assistance in "getting their story out" to investment analysts and investors. He is an active trader in junior public companies, primarily in the resource sector, and in recent years has made a significant portion of his living by trading on the Exchange.

¶ 12 At the relevant time Torudag was in the process of moving from Alberta to Quebec and was not a resident of British Columbia.

¶ 13 The remaining paragraphs in this section summarize Torudag's testimony about his purchase of Icon shares on March 13, 2007.

¶ 14 On the morning of March 13, 2007 he was working at his desk in Montreal. He had signed the agreement assigning the mineral claims to Icon, and that morning had faxed the signature page to either Icon or Baras. Baras had told Torudag that Icon would be issuing a news release announcing its acquisition of the mineral claims as soon as Torudag sent the signature page.

¶ 15 Torudag had real-time stock quotes running on his Stockwatch screen for a few companies, including Icon. He intended, once news of Icon's acquisition of the claims became public, to purchase Icon shares.

¶ 16 Between 12:50 and 12:55 on March 13, Torudag noticed trading activity in Icon shares that he describes as "aggressive" – three trades totalling 41,500 shares, followed by six trades totaling about 38,500 shares, at prices starting at 17 cents and rising to 20 cents. In his opinion, these trades were unusual in the context of Icon's recent trading history. That history reflected, in Torudag's opinion, the type of trading pattern one would expect of a shell company – small volumes and insignificant price movements. A volume of 104,000 shares traded on February 21 at 14.5 cents and 15 cents, but he did not consider that significant because the price change was small, and Icon had no active business at the time.

¶ 17 Assuming that Icon had issued its news release, Torudag entered purchase orders through an online brokerage account at a dealer registered outside British Columbia held by one of his companies, Farlack Ventures Limited. Between 13:00 and 14:15, Torudag placed 11 buy orders for a total of 119,000 Icon shares at 20 cents, 20.5 cents, and 21 cents.

¶ 18 Torudag did not consider it necessary to call Baras, Coughlin, or Icon's counsel to confirm that the news had been released. Nor did he check Icon's website, the Exchange website, or any on-line news service. He thought he did not need to confirm that Icon had issued the news release, because he thought only disclosure of the news could account for the trading activity he saw.

¶ 19 Stockwatch attaches a code letter "N" to the trading symbol of an issuer that has issued a news release. This code was absent from the Icon symbol when Torudag placed his trades. In his experience it can take up to an hour or more for this code to appear after a news release is issued, so he attached no significance to its absence.

¶ 20 Torudag knew at the time, based on his experience, that it was not permissible to trade shares of a public company while knowing material information about the company that was not generally disclosed.

***Chan***

¶ 21 The following paragraphs summarize Chan's evidence.

¶ 22 In 1995 Chan took a two-week prospecting course and later attained a prospector designation from Newfoundland and Labrador. At the relevant time, she was a resident of Quebec.

¶ 23 Chan says:

> We concluded the contract with Mr. Baras and Mr. Torudag by fax on March 12, 2007, and I was under the impression that the assignment to Icon, along with the public announcement, would follow shortly thereafter. When I had checked Icon on TSX on the internet, it was not actively trading, which made me wonder.
>
> However, I was quite excited by the deal going through, and believed in the property. On the afternoon of March 13, 2007, when I saw that Icon was actively trading, which I assumed was a result of the public announcement, I decided to purchase 10,000 shares at the going price of $0.20. When I checked the Icon site that afternoon, I noticed that the deal had been announced!

¶ 24 Chan bought her shares through a TD Waterhouse account at its office in St. John's Newfoundland. Chan placed two buy orders, at 13:20 and 14:01, for a total of 10,000 Icon shares at 20 cents.

¶ 25 Chan says:

> . . . if I had not unintentionally and unknowingly jumped the gun by an hour or so, the cost for 10,000 shares later that day (March 13, 2007), or even next morning . . . would have been $2100 (as opposed to the actual $2000).
> . . .
> I made an honest and unintentional mistake, based on lack of detailed familiarity with stock exchange rules, compounded by my enthusiasm about the content in the claims being optioned. I had no intention of acquiring the shares before the transaction was concluded and announced.

***Trading in Icon shares***

¶ 26 Between February 1 and March 12, 2007, a volume of nearly 240,000 Icon shares traded on the Exchange in 35 trades, at prices ranging from 14 cents to 16 cents.

¶ 27 During the week of March 5, Icon shares traded only on Thursday (a little over 17,000 shares in 5 trades at 14 cents and 16 cents) and Friday (6,000 shares in 2 trades at 15 cents).

¶ 28 There were no trades on March 12.

¶ 29 The first three trades on March 13, all at 12:50, totalled 41,500 shares at prices between 17 cents and 18 cents. Between 12:51 and 12:55, another 38,000 shares traded in six trades at 19.5 cents and 20 cents.

¶ 30 Volume for the rest of March 13 was 139,500 shares. All but 10,500 of these shares were bought by Torudag and Chan. All trades were between 20 and 21 cents. The last trade of the day was at 14:15. Icon issued its news release at 15:32.

¶ 31 The first trade in Icon shares on March 14, at 09:31, was a purchase by Torudag of 10,000 shares at 21 cents. Between market open and 10:05, over 140,000 Icon shares traded at prices between 21 and 25 cents. Another 124,000 shares traded until 11:02, when the price reached 30 cents. After reaching a high for the day of 49.5 cents, the shares closed at 41 cents on a volume for the day of nearly 1.2 million shares.

¶ 32 On March 15 Icon shares rose to a high of 68 cents and closed at 66 cents on a volume of nearly 1.5 million shares. Total volume between March 15 and April 30 was about 7 million shares at prices ranging from 39 cents to $1.45.

## III Discussion and Analysis

¶ 33 At the relevant time, section 86(1) of the Act said:

> 86 (1) A person that
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> (a) is in a special relationship with a reporting issuer, and
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> (b) knows of a material fact or material change with respect to the reporting issuer, which material fact or material change has not been generally disclosed,

> must not enter into a transaction involving a security of the reporting issuer . . . .

¶ 34 Torudag and Chan admit that their conduct was a contravention of section 86(1), subject to the defence in section 86(4) – that they reasonably believed that the material facts had been generally disclosed when they purchased the Icon shares.

¶ 35 Torudag argues that the Commission does not have jurisdiction to find that he contravened section 86(1) because no element of the impugned conduct occurred in British Columbia. If he is correct, the same defence would benefit Chan.

***Jurisdiction defence***

¶ 36 On December 17, 2008 the Commission heard a preliminary application by Torudag and Chan for a ruling that the Commission did not have jurisdiction to hear the allegations in the notice of hearing. On January 5, 2009 the Commission dismissed the application (see *Torudag* 2009 BCSECCOM 1). On January 9, 2009 it gave its reasons (see *Torudag* 2009 BCSECCOM 9).

¶ 37 Torudag distinguishes this argument about jurisdiction from the one made in the preliminary application. He says that although the panel on that application ruled that the Commission had jurisdiction to enforce its rules against those trading on the Exchange, the panel was not asked to determine, and did not determine, whether a contravention of the Act occurred in British Columbia.

¶ 38 Section 86(1) prohibits the purchase or sale of securities by a person in a special relationship with the issuer of the shares and who has undisclosed material information. It says a person must not, in the circumstances described in that section, "enter into a transaction involving a security" of the reporting issuer with whom the person has the special relationship.

¶ 39 Torudag says the impugned transaction in the notice of hearing is his initiation of his buy orders. He says that because he was not in British Columbia when he entered those orders, he did not "enter into a transaction" in British Columbia. On this basis, he says there is no jurisdiction for the Commission to find that he contravened section 86(1).

¶ 40 This is too narrow an interpretation of section 86(1). A transaction requires at least two parties. The entering of a buy or sell order, in and of itself, is not a transaction until the order is filled. The order then becomes a transaction – a purchase and sale. We find that the transactions that Torudag and Chan "entered into" on March 13, 2007 were their purchases of Icon shares from sellers through the facilities of the Exchange.

¶ 41 We also disagree with Torudag that no element of the transactions took place in British Columbia.

¶ 42 All of the shares that Chan bought, and at least 71,000 of the Icon shares Torudag bought, were sold through brokerage accounts of sellers with British Columbia addresses. We have assumed that their accounts were with British Columbia dealers – there is no evidence to the contrary. We find that Torudag's and Chan's purchases from these sellers occurred within the geographical boundaries of British Columbia and are therefore subject to the Act.

¶ 43 Even if that were not so, the Commission has jurisdiction to find a contravention of section 86(1) if the transaction, or any part of it, has a real and substantial connection to British Columbia. The transactions took place on the Exchange and involved participants in British Columbia's capital markets. The Exchange is in British Columbia. It is the successor to the merger of the Vancouver Stock Exchange and the Alberta Stock Exchange and has offices and operations here.

¶ 44 In addition, the Commission is responsible, along with the Alberta Securities Commission, for regulatory oversight of the Exchange. As the panel said in dismissing Torudag's preliminary application:

> 37 The significance of the Exchange to British Columbia's capital markets is one reason that the Commission, in cooperation with the Alberta Securities Commission, is responsible for its regulatory oversight. The Commission regulates the Exchange through a recognition order made under section 24 of the Act and market participants expect the Commission to regulate, both directly and through the Exchange, trading activity on the Exchange. The other securities regulators in the Canadian Securities Administrators rely on the British Columbia and Alberta securities commissions to perform this regulatory function.

¶ 45 Trading on the Exchange, like most other major stock exchanges in the world, has undergone technological change. Where once existed physical trading floors thronged with traders shouting bids and asks to make transactions, now is found the quiet humming of computer servers (quite possibly located outside the province) performing the same functions while traders sit at desks in diverse locations entering orders into computers.

¶ 46 The notion of geographical jurisdiction fits easily with the presence of physical trading floors which, after all, have to exist somewhere. However, the Commission's jurisdiction over trading was never solely dependent on the physical presence of the trading floor within the geographical boundaries of British Columbia. What invoked the Commission's jurisdiction was the completion of trades on an Exchange with operations in the province that fell within the Commission's regulatory oversight.

¶ 47 As the panel noted in its reasons for dismissing Torudag's preliminary application:

> 40 That the Exchange chooses to process trades on a server located in Toronto does not diminish the real and substantial connection to British Columbia. . . .

¶ 48 This interpretation is consistent with how Canada's securities markets are regulated. The Supreme Court of Canada's decision in *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557 is instructive. In that case, the Court described the *de facto* system of national securities regulation in Canada (at page 38):

> It is important to note from the outset that the [British Columbia Securities] Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system . . .
>
> Within this large framework, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The [Vancouver Stock Exchange] falls under this head.

¶ 49 By these words, the Court recognized that the system of securities regulation in Canada depends upon a cooperative network of securities regulators and self-regulatory organizations to ensure the protection of investors and the integrity of our capital markets.

¶ 50 If Torudag's jurisdiction argument were to prevail, the powers of the regulators relied on by the rest of Canada's securities regulators to regulate the Exchange – this Commission and the Alberta Securities Commission –would be limited to transactions with a physical connection to either British Columbia or Alberta. This would create a gap in jurisdiction completely at odds with the description in *Pezim* of how securities regulation is administered in Canada to protect the public interest.

¶ 51 Under Torudag's interpretation, British Columbia's jurisdiction would depend upon the matching of orders on the Exchange to establish that at least one party to the trade was physically located in British Columbia at the time of the transaction. If that were so, the Commission's mandate to protect investors and the integrity of British Columbia's capital markets would be defeated. People could avoid section 86(1) merely by stepping outside the province and entering their orders for trades on the Exchange through dealers registered elsewhere. If it were that easy to avoid the rules, investors could not trust the integrity of the Exchange – the level playing field of information that investors count on could not be assured.

¶ 52 Torudag's interpretation would also create uncertainty about which rules apply to trading on the Exchange. Jurisdiction could not be established until after the trade had been completed and its geographical location determined. This would be unworkable and unfair. Those who trade on the Exchange must know what rules apply to their conduct before they trade.

¶ 53 For these reasons, transactions effected through the facilities of the Exchange have a real and substantial connection to British Columbia. It follows that the Commission has jurisdiction to find a contravention of section 86(1) if the transaction referred to in that section is effected through the facilities of the Exchange.

¶ 54 We find that we have jurisdiction to determine that Torudag and Chan contravened section 86(1).

***Section 86(4) defence***

¶ 55 At the relevant time, section 86(4) of the Act said:

> (4) A person does not contravene subsection (1) . . . if the person proves on the balance of probabilities that, at the time of the purchase or sale referred to in subsection (1) . . . , the person reasonably believed that the material fact or material change had been generally disclosed.

¶ 56 Chan did not claim a defence under section 86(4). Her evidence and submissions show that she appears unfamiliar with public markets and the requirements of securities regulation. We considered her evidence to determine whether it establishes a defence under the section. We find it does not.

¶ 57 Torudag relies on the defence under section 86(4). He argues that when he entered his buy orders, he honestly and reasonably believed that the material fact of Icon's acquisition of the mineral claims had been generally disclosed.

¶ 58 The defence in section 86(4) is an affirmative defence: a person relying on the defence must prove on a balance of probabilities that either (1) the person had an honest and reasonable belief in a mistaken set of facts which, if true, would render the person's conduct innocent, or (2) the person took all reasonable steps to avoid the event giving rise to liability: *R v Sault Ste Marie* [1978] 2 SCR 1299. In *R v Harper* [2002] OJ No. 8, the Ontario Superior Court of Justice applied substantively identical tests in considering a prosecution under the section of the Ontario *Securities Act* equivalent to section 86(4).

¶ 59 Torudag must prove on a balance of probabilities that, before he bought Icon shares on March 13, either (1) he had an honest and reasonable belief that the material facts about Icon had been generally disclosed, or (2) he took all reasonable steps to establish that the material facts about Icon had been generally disclosed.

¶ 60 In our opinion, Torudag's defence fails on both tests.

¶ 61 This is why Torudag says he had an honest and reasonable belief that the material facts about Icon had been generally disclosed:

1. Icon was a shell company. Before Icon's acquisition of the claims, there was no corporate activity to influence the price and trading volume of its shares.
2. He had signed and sent the signature page of the assignment agreement before his first trade. Baras had told Torudag that once he sent it, Icon would issue the news release.
3. During the week before March 13, trading in Icon shares was thin, and there was little price movement. No shares traded in Icon on March 13 until 12:50.
4. Between 12:50 and 12:55 on March 13, about 80,000 Icon shares traded at prices between 17 cents and 20 cents – a 5-cent increase in price compared to the 15-cent trades on March 9. His experience with junior market issuers was that significant trading activity usually followed the issue of news releases.
5. Up to an hour could pass before the "N" code would appear next to the trading symbol on the Stockwatch screen.

¶ 62 We heard submissions from Torudag and the executive director about whether Torudag's belief was honest. We make no finding on that issue because we find that his belief, honest or not, was not reasonable.

¶ 63 The prohibition in section 86(1) applies until the material information has been "generally disclosed." National Policy 51-201 *Disclosure Standards* describes the interpretation of "generally disclosed" by Canada's provincial and territorial securities regulators:

> "3.5 (2) Securities legislation does not define the term 'generally disclosed'. Insider trading court decisions state that information has been generally disclosed if:
>
> (a) the information has been disseminated in a manner calculated to effectively reach the marketplace; and
> (b) public investors have been given a reasonable amount of time to analyze the information.
>
> (3) . . . In determining whether material information has been generally disclosed, we will consider all of the relevant facts and circumstances, including the company's traditional practices for publicly disclosing information and how broadly investors and the investment community follow the company. . . ."

¶ 64 This interpretation recognizes that general disclosure of material information does not necessarily occur at the moment of the news release. It may take time for the market to become aware of and absorb the information. If, as here, the issuer is inactive and its stock is not closely followed, it is reasonable to expect that general disclosure may not occur until some time after the news release.

¶ 65 Torudag is an experienced trader, and is familiar with the junior resource issuer market. He has significant investor relations experience and understands how information is disseminated to the market. He testified, based on his experience, that a junior company's stock price and trading volume typically increases quickly and significantly once material information becomes generally disclosed. He would also know that it can take some time after issuance of the news release for general disclosure to occur.

¶ 66 There were only nine trades totalling 80,000 shares on March 13, at 17 cents to 20 cents, before he began to trade. In our opinion, this trading activity and price movement alone were not enough to lead a reasonable person in Torudag's

position to conclude that the material facts about Icon had been generally disclosed. The volume alone was not significant – the trading of 104,000 shares on February 21 showed that a sudden increase in volume could occur in the absence of the disclosure of material information – and the price change was not great. Indeed, significant trading activity in Icon shares did not occur until the next day, March 14, the company having issued its news release the previous afternoon. The price reached 30 cents at about 11:00, on its way to a high for the day of 49.5 cents. The volume that day was nearly 1.2 million shares. In the next month and a half, about 7 million shares traded and the price reached a high of $1.45.

¶ 67 The trading activity that Torudag observed on March 13 occurred over a five-minute period ending at 12:55. Torudag's Stockwatch screen showed trades in Icon shares in real time. He had to have noticed that between his first and last trades on March 13 (at 13:00 and 14:15), all the purchases of Icon shares were his, but for 20,000 shares – the 10,000 shares Chan bought at 13:20 and 14:01, and 10,000 bought by an unidentified buyer at 13:40. His 11 purchases for 119,000 shares represented 85% of the shares traded for the balance of the day. That almost no one else was in the market buying would, in our opinion, lead a reasonable person in Torudag's position to doubt whether the material facts about Icon had been generally disclosed.

¶ 68 For those reasons, it was not reasonable for Torudag to believe that the few trades he saw in the five minutes between 12:50 and 12:55 on March 13 were a result of general disclosure of the material facts about Icon. In fact a reasonable person, with only the facts available to Torudag while he was trading on March 13, could not, without confirming that Icon had issued its news release, form a reasonable belief that the information had been released, never mind judge whether it had become generally disclosed.

¶ 69 Torudag also failed to take reasonable steps to establish that the material facts about Icon had been generally disclosed. Torudag was in a special relationship with Icon because he was directly involved in the deal that gave rise to the material facts about the company. We would expect a person in a special relationship with an issuer, who knows material information about the issuer because of direct involvement in the relevant events, to take at least the reasonable initial step of confirming that the issuer has announced the material information.

¶ 70 It would have been a simple matter for Torudag to do so. He was connected to the internet. He had computer access to up-to-date market information. In a matter of seconds, he could have checked Icon's website, the Exchange's website, or a news service to confirm whether Icon had issued its news release. He could have called

Baras, Coughlin, or Icon's counsel. These were initial reasonable steps necessary to establish whether the material facts about Icon had been generally disclosed, yet he took none of them.

¶ 71 We find:

- Torudag did not, before purchasing Icon shares, hold a reasonable belief that the material facts about Icon had been generally disclosed.
- Torudag failed, before purchasing Icon shares, to take all reasonable steps necessary to establish that the material facts about Icon had been generally disclosed.
- Torudag has not established a defence under section 86(4).

***Finding***

¶ 72 We find that Torudag and Chan contravened section 86(1) of the Act when they bought Icon shares while being persons in a special relationship with Icon and while having knowledge of material facts about Icon that had not been generally disclosed.

## VI Submissions on Sanctions

¶ 73 We direct the parties to make their submissions on sanctions as follows:

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| By April 6 | The executive director delivers submissions to the respondents and to the secretary to the Commission |
| By April 20 | The respondents deliver response submissions to the executive director, to each other, and to the secretary to the commission; any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission |
| By April 27 | The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission |

¶ 74 March 11, 2009

¶ 75 **For the Commission**

Brent W. Aitken
Vice Chair

# 2009 BCSECCOM 145

Kenneth G. Hanna
Commissioner

Shelley C. Williams
Commissioner