2010 BCSECCOM 578

Andrew Gordon Walker, Dale Michael Paulson and Giuliano Angelo Tamburrino

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Brent W. Aitken	Vice Chair
	Bradley Doney	Commissioner
	Suzanne K. Wiltshire	Commissioner
Date of Hearing	September 30, 2010	
Date of Decision	October 7**,** 2010	
Appearing, and submissions filed by		
Sean K. Boyle Karine Oldfield	For the Executive Director	
L. John Alexander	For Andrew Gordon Walker	
Ronald N. Pelletier Brigeeta Richdale	For Giuliano Angelo Tamburrino	
Dale Michael Paulson	For himself	

Decision

I Introduction

¶ 1 This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. Our Findings on liability made on July 12, 2010 (2010 BCSECCOM 401) are part of this decision.

¶ 2 Giuliano Angelo Tamburrino, Andrew Gordon Walker and Dale Michael Paulson took over $86,000 from Panterra Resource Corp. to purchase Panterra shares from a third party for their own account. We found that in doing so, Tamburrino, Walker and Paulson perpetrated a fraud on Panterra in contravention of sections 57(b) and (c) of the Act.

¶ 3 We found that Tamburrino caused Panterra to issue 200,000 finder's fee shares for his own benefit when he was not entitled to them, and concealed that by causing Panterra to issue the shares to a corporation with no apparent ties to him but that he controlled in fact. We found that in doing so, Tamburrino perpetrated a fraud on Panterra in contravention of sections 57(b) and (c).

¶ 4 We found that Tamburrino, Walker and Paulson sold, with the intent of keeping the proceeds for themselves, the 200,000 finder's fee shares for their own account, knowing that the shares had been wrongfully issued. We found that in doing so, Tamburrino, Walker and Paulson perpetrated a fraud on Panterra in contravention of sections 57(b) and (c).

¶ 5 We found that Tamburrino, Walker and Paulson, under section 168.2, contravened section 168.1(1)(b) when they authorized, permitted, or acquiesced to Panterra's filing of its 2005 first and second quarter financial statements which we found contained false and misleading disclosure about the $86,000 transaction.

II Analysis

A Positions of the parties

¶ 6 The executive director, Tamburrino and Walker all filed written submissions on the subject of sanctions. We heard oral submissions from Paulson. Counsel for Tamburrino, Walker, and the executive director also appeared and made submissions at the oral hearing.

Executive Director

¶ 7 The executive director seeks orders under sections 161(1) and 162 of the Act:

- prohibiting the respondents permanently from trading or purchasing securities,
- prohibiting them permanently from acting as directors or officers of any issuer,
- prohibiting them permanently from engaging in investor relations activities, and
- imposing an administrative penalty of $200,000 against Tamburrino and of $150,000 against each of Walker and Paulson.

¶ 8 The orders sought by the executive director do not include all of the orders the Commission is authorized to make under section 161(1). In a note to the parties before the oral hearing, we told the parties that we would consider the appropriateness of all of the orders authorized by that section. We invited the parties to make submissions at the hearing about the appropriateness of any orders authorized by section 161(1) beyond those requested by the executive director.

Tamburrino

¶ 9 Tamburrino says the prohibition against his purchasing and trading should be for no more than one year. He says that during that period he should be allowed to purchase and trade securities for his own account through his investment corporation, and that he and any entity controlled by him or his family should be allowed to sell specified securities.

¶ 10 Tamburrino says that he should also be allowed to participate in up to 15 private placements, and that he and any entity controlled by him or his family should be permitted to acquire securities for services rendered, finders fees, or for vending assets to public issuers. He says there should be no prohibition against his engaging in investor relations activities or his acting in a management or consulting capacity in connection with activities in the securities market. In essence, Tamburrino is asking that he be allowed to continue his activities in our capital markets unimpeded.

¶ 11 Tamburrino says the prohibition against acting as a director or officer of any issuer should be no longer than three years, and any administrative penalty should not exceed $30,000.

Walker

¶ 12 Walker says there should be no prohibition against acting as a director or officer and any administrative penalty should be between about $30,000 and $60,000.

¶ 13 Walker also says there should be no prohibitions against his trading or purchasing securities, his engaging in investor relations activities, or his acting in a management or consulting capacity in connection with activities in the securities market.

Paulson

¶ 14 Paulson says any prohibition against acting as a director or officer should be no longer than one year, and any administrative penalty should be no greater than $25,000. He says we should make no other prohibitions.

B Factors to consider

¶ 15 The respondents' misconduct occurred prior to amendments to the Act that increased the maximum administrative penalty that the Commission can order under section 162. The maximum administrative penalty we can order in this case under that section is therefore $250,000 per respondent: see *Thow v. BC (Securities Commission)* 2009 BCCA 46.

¶ 16 The prohibition authorized by section 161(1)(d)(iv) was also added to the Act after the time of the respondents' misconduct. However, we are not prevented from applying that prohibition: see *Thow*.

¶ 17 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.

C Application of the factors

Seriousness of the conduct; damage to markets; harm suffered by investors; enrichment

¶ 18 The respondents minimize the seriousness of their misconduct. They say:

- There was only a small amount of money involved in the $86,000 transaction, and besides, it was paid back.
- No harm was done – the company's share price and financial health was stable throughout the period.
- There is no evidence of harm to the market, or to any investor.

¶ 19 For all those reasons (and others we discuss below), the respondents say there is no basis for significant sanctions.

¶ 20 We profoundly disagree. We stated our view of the seriousness and nature of the respondents' conduct in our Findings. We said:

> "185 Panterra was a small company. The amounts of money involved in the allegations are not great. The respondents argue that the company did not really need the cash, that the dilution associated with the issuance of the finder's fee shares was negligible, and that, in the end, no harm was done because – after all – they paid back the money.
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> 186 This is an astonishingly narrow perspective from individuals who are directors of a junior public company. If anyone should understand the importance of having a credible market for venture issuers, it should be them. Venture capital markets are the lifeblood of a growing economy. They are a source of new businesses. They are a place where new ideas and enterprises can find the capital they need to grow and prosper, creating jobs and economic benefits in the process.
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> 187 When these markets are abused, untold damage ensues. People with the interest in venture capital, and with appropriate tolerance for risk, are prepared to invest in a venture market if they know that market has integrity. They understand that those markets have the risk inherent in the nascent quality of the issuer's businesses. This risk they are prepared to accept.
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> 188 What they are not prepared to accept is fraud and false disclosure. When they find these, they lose confidence in the market. They look elsewhere to invest. So every fraud in a venture market puts at risk the viability of all of the other participants in that market.

> 189 The respondents in this case appear either not to understand that, or they do not care. They were Panterra's board of directors, yet used over $86,000 of its funds for their own purposes and casually decided it was all right not to document the transaction to protect Panterra's interest. They knowingly (or in Walker's case, negligently) filed false disclosure that concealed the transaction. Tamburrino's attitude was blasé. He convinced himself that the misleading disclosure was not serious.
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> 190 Tamburrino chose to enrich himself at Panterra's expense by causing it to issue finder's fees to which he was not entitled. He, Walker and Paulson decided to solve this problem by enriching themselves through the sale of the shares.
>
> 191 There are no doubt countless ways for directors of public companies to demonstrate reprehensible behaviour. This is a deplorable example. It is exactly the kind of conduct that brings the reputation of venture markets into disrepute."

¶ 21 The significance the respondents attach to their repayment of the $86,000 ignores the fact that they took steps to repay the funds only in response to the considerable pressure being applied by Panterra's management. As we noted in the findings, who knows how long Panterra would have waited for its money had the respondents been successful in continuing their deception.

¶ 22 Walker seeks to trivialize the impact of the $86,000 on Panterra by calculating the interest it would have earned on that amount, or the cost it would incur to borrow to replace it. This ignores the fact that $86,000 represented about one-third of Panterra's cash on hand, the uses to which that cash could have been put by Panterra, and whether Panterra had the capacity to borrow that amount.

¶ 23 The orders we are making reflect the respondents' lack of appreciation of the seriousness of their conduct, its negative impact on the integrity of our markets, and the yawning gap between their conduct and the standard of conduct expected of directors and officers of public venture issuers.

Enrichment; mitigating or aggravating factors

¶ 24 The respondents say they were not significantly enriched through their misconduct because they lost anything they made through the sale of the finders fee shares, and more, through their settlements of Panterra's civil lawsuits against them.

¶ 25 We agree that their enrichment was not significant. Tamburrino and Paulson received only about $30,000 each from the sale of the finder's fee shares, and Walker received nothing.

¶ 26 However, we did not consider the costs to the respondents of their civil settlements with Panterra. It seems to us that when assessing the degree of enrichment through misconduct, the costs associated with the consequences of the misconduct should not be a factor.

¶ 27 There are no mitigating factors. Tamburrino cites his cooperation with the investigation as a mitigating factor, but that is offset by his testimony (which we found to be not credible on several important points) and by our finding that he misled his fellow directors, Panterra's management, and the Exchange about the $86,000 transaction.

¶ 28 The respondents also cite in mitigation the Exchange's prohibition of their acting as directors or officers, or in any other capacity, for Exchange-listed issuers. This is not a mitigating factor; it is a foreseeable consequence of their misconduct.

¶ 29 There are, however, aggravating factors. At the time of the misconduct the respondents were essentially the sole directors and officers of Panterra, a public company, and its directing mind and will. Those in that role in a public company are expected to demonstrate integrity and to put the best interest of the company ahead of their own. The integrity of the market depends on it. The respondents fail on both counts.

¶ 30 Instead, they conspired to take funds from Panterra without the right to do so, and used it for their own purposes. Then they lied about it to the public, to Panterra's management, and to the Exchange.

¶ 31 The respondents knew better. All of them had years of experience with the markets and public companies. Tamburrino acted as a director and officer of public companies and was active in their businesses. Walker had acted as counsel to public companies for 15 years. Paulson spent many years in the brokerage business, and his activities included raising money for public companies.

¶ 32 Tamburrino's demeanour at the hearing, and his submissions on sanction in the face of our findings about the inappropriateness of his conduct, shows he does not accept the panel's opinion of his conduct, and that he has no remorse.

Past conduct

¶ 33 Neither Walker nor Paulson have any regulatory disciplinary history.

¶ 34 That is not so in Tamburrino's case. He acted as a signing officer on Panterra's bank account while under a prohibition by the Exchange from acting as a signing officer for any Exchange-listed company. He says he either forgot about the prohibition or thought it no longer applied, evidence we found unconvincing. We noted in the findings his misleading statements to the Exchange in connection with the $86,000 transaction.

Risk to investors and markets

¶ 35 We have observed that the respondents did not appreciate the seriousness of their misconduct, nor of the standard of conduct expected of directors and officers of public venture issuers. That is a significant risk to investors and markets.

¶ 36 Tamburrino says that because his conduct did not involve representations to the public or investors, he should not be prohibited from engaging in investor relations activities. He says the orders ought to be framed so as not to interfere with his business activities in our markets. We disagree. Tamburrino has exhibited serious misconduct in connection with our markets and shows no sign of understanding what he did wrong, or why it was wrong.

Specific and general deterrence

¶ 37 The orders we are making are intended to deter the respondents from future misconduct and to demonstrate the consequences of inappropriate conduct to other market participants.

Previous orders

¶ 38 The executive director cited several cases of serious misconduct. The respondents say the misconduct in those cases involved misconduct far more serious than the misconduct in this case.

¶ 39 It is true that this case does not involve large fraudulent illegal distributions to large numbers of unsophisticated investors. It does, however, involve two findings of fraud against two of the respondents and three findings against the third, all in connection with their activities as directors and officers of a public company. In any event, the orders sought by the executive director are less than were made in most of those cases. In making these orders, we considered the cases cited as well as the seriousness of the misconduct and the other factors discussed above.

III. Decision

¶ 40 We are making orders against the respondents prohibiting them from trading or purchasing securities. However, in our opinion there is no foreseeable risk to the market posed by their trading or purchasing for their own account; the prohibitions have appropriate exceptions.

¶ 41 We are also making orders prohibiting the respondents from acting as directors and officers, from acting in a management or consultative capacity in connection with activities in the securities market, and from engaging in investor relations activities, for the reasons explained earlier.

¶ 42 In Tamburrino's case, the prohibitions are permanent. We would likely have not imposed permanent orders had the only fraud we found been the $86,000 transaction. However, the respondents' fraudulent activity did not end there. Tamburrino then wrongfully issued finders fee shares to himself, and conspired with Walker and Paulson to sell them and keep the proceeds. The sale itself, which could easily have been executed directly through local brokers, the respondents instead organized through an offshore intermediary in an attempt to conceal the transaction.

¶ 43 All of this is in combination with Tamburrino's apparent belief that he did nothing seriously wrong, and with a pattern of dishonesty established by his misleading of the Exchange, of his fellow directors, and of the management of Panterra. This displays an absence of responsibility and integrity in Tamburrino that poses a significant risk to the markets, and has no place in the management of public companies. Allowing him to continue to participate in our markets in the face of this misconduct would itself damage the integrity of our markets.

¶ 44 Walker and Paulson, by participating in the sale of the finders fee shares with the intent of keeping the proceeds, also demonstrated misconduct that could justify permanent prohibitions. However, it appears that they both understand that their conduct was wrongful. They express remorse, and say that they will never engage in similar misconduct again. Given that the outcome of their involvement with Panterra has been ruinous to their lives and careers, a strong deterrent has been established against their future misconduct. For these reasons, the prohibitions against them are not permanent.

¶ 45 We have ordered administrative penalties against each of the respondents. The administrative penalties comprise:

- $60,000 in connection with the $86,000 transaction (being about twice the share of each respondent in that transaction),
- in the case of Tamburrino and Paulson, another $60,000 in connection with the sale of the finders fee shares (being about twice the proceeds received by each of them), and
- in the case of Tamburrino, another $60,000 in connection with his causing the improper issue to himself of the finders fee shares.

IV Orders

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

Tamburrino

1. under section 161(1)(b) of the Act, that Tamburrino cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts, except that Tamburrino, or an issuer all the securities of which are owned by him or members of his immediate family may trade or purchase securities for his or its own account (other than in consideration for services rendered, finders fees, or for vending assets to public issuers) through not more than two accounts with a registrant, if he gives the registrant a copy of this decision;

2. under section 161(1)(d)(i), that Tamburrino resign any position he holds as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

3. under section section 161(1)(d)(ii), that Tamburrino is prohibited permanently from acting as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

4. under section 161(1)(d)(iv), that Tamburrino is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

5. under section 161(d)(v), that Tamburrino is prohibited permanently from engaging in investor relations activities;

6. under section 162, that Tamburrino pay an administrative penalty of $180,000;

Walker

7. under section 161(1)(b) of the Act, that Walker cease trading, and is prohibited from purchasing, securities or exchange contracts, except that Walker, or an issuer all the securities of which are owned by him or members of his immediate family may trade or purchase securities for his or its own account (other than in consideration for services rendered, finders fees, or for vending assets to public issuers) through not more than two accounts with a registrant, if he gives the registrant a copy of this decision;

8. under section 161(1)(d)(i), that Walker resign any position he holds as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

9. under section section 161(1)(d)(ii), that Walker is prohibited from acting as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

10. under section 161(1)(d)(iv), that Walker is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

11. under section 161(d)(v), that Walker is prohibited from engaging in investor relations activities;

12. under section 162, that Walker pay an administrative penalty of $60,000;

13. that the orders in paragraphs 7 and 9 through 11 of these orders remain in force until the later of October 7, 2020 and the date Walker pays the amount in paragraph 12 of these orders;

Paulson

14. under section 161(1)(b) of the Act, that Paulson cease trading, and is prohibited from purchasing, securities or exchange contracts, except that Paulson, or an issuer all the securities of which are owned by him or members of his immediate family may trade or purchase securities for his or its own account (other than in consideration for services rendered, finders fees, or for vending assets to public issuers) through not more than two accounts with a registrant, if he gives the registrant a copy of this decision;

15. under section 161(1)(d)(i), that Paulson resign any position he holds as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

16. under section section 161(1)(d)(ii), that Paulson is prohibited from acting as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

17. under section 161(1)(d)(iv), that Paulson is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

18. under section 161(d)(v), that Paulson is prohibited from engaging in investor relations activities;

19. under section 162, that Paulson pay an administrative penalty of $120,000; and

20. that the orders in paragraphs 14 and 16 through 18 of these orders remain in force until the later of October 7, 2020 and the date Paulson pays the amount in paragraph 19 of these orders.

¶ 47 October 7**,** 2010

¶ 48 **For the Commission**

Brent W. Aitken
Vice Chair

Bradley Doney
Commissioner

Suzanne K. Wiltshire
Commissioner