2010 BCSECCOM 626

Steven Peter Kyllo
Mercury Capital S.A., Moenkopi Resources Inc.,
and Frey Mining Company Ltd.

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	Don Rowlatt	Commissioner
	Suzanne K. Wiltshire	Commissioner
Submissions completed	November 5, 2010	
Date of Decision	November 16, 2010	
Submissions filed by		
Mila A. Pivnenko	For the Executive Director	

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 October 7, 2010 (2010 BCSECCOM 579) are part of this decision.

¶ 2 Stephen Peter Kyllo used the three corporate respondents, Frey Mining Company Ltd., Moenkopi Resources Inc. and Mercury Capital S.A., to raise US$1.14 million from 40 investors in British Columbia, Alberta, Ontario and the United States. In doing so, he misrepresented the nature of the so-called investments, and perpetrated a fraud by using investors' funds to enrich himself and members of his family, and for other purposes.

¶ 3 We found that:

1. all of the respondents traded in securities without being registered to do so, contrary to section 34(1)of the Act, and distributed those securities without filing a prospectus, contrary to section 61(1);

2. Kyllo, Moenkopi and Mercury made misrepresentations, contrary to section 50(1)(d), when they lied to investors about how investors' funds would be invested, the returns offered, and the risk associated with the investments; and

3. Kyllo perpetrated a fraud, contrary to sections 57(b) and 57.1(b), when he lied to investors, and used investors' funds to enrich himself and his family members, and for other purposes.

¶ 4 The executive director filed written submissions on the subject of sanctions. Kyllo, who did not appear at the hearing, filed none.

¶ 5 The executive director seeks orders under sections 161(1) and 162 against Kyllo prohibiting him permanently from:

- trading securities,
- acting as a director or officer of any issuer,
- acting as a registrant, investment fund manager or promoter
- acting in a management or consultative capacity in connection with activities in the securities market, and
- engaging in investor relations activities.

¶ 6 The executive director also asks that Kyllo be ordered to pay disgorgement in the amount of US$1.14 million, and to pay an administrative penalty of $250,000.

¶ 7 The executive director seeks orders against the corporate respondents prohibiting all persons permanently from trading or purchasing their securities and prohibiting the corporate respondents permanently from

- using the exemptions under the Act,
- acting as a registrant, investment fund manager or promoter, and
- engaging in investor relations activities.

¶ 8 The executive director also asks that Frey, Moenkopi and Mercury be ordered to pay disgorgement in the amounts of US$500,000, US$75,000 and US$565,000, respectively, and to pay an administrative penalty of $500,000 each.

II Analysis

¶ 9 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 for Kyllo and $500,000 for each of the corporate respondents: see *Thow v. BC (Securities Commission)* 2009 BCCA 46.

¶ 10 The factors relevant to sanction are set forth in *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22 (see page 24).

¶ 11 Fraud is inherently serious. It strikes at the heart of market integrity. Kyllo's fraud is no different. For years he took investors money and used it for his own purposes. This is at the high end of the range of seriousness of misconduct. To further his fraudulent ends, Kyllo engaged in illegal distributions, made misrepresentations, and caused Frey, Moenkopi and Mercury to engage in the same misconduct – all contraventions of key provisions of the Act designed to protect investors and the integrity of our markets.

¶ 12 The quantum of Kyllo's enrichment was significant. Over half of the money he took from investors he spent on himself, his wife and his daughter-in-law.

¶ 13 That investors were harmed is obvious. The 40 investors lost over $1 million, and any funds any of them received as purported returns were in fact proceeds from new investors.

¶ 14 All of this damaged the integrity and reputation of our markets, both locally and in other jurisdictions – Alberta, Ontario and the United States – where Kyllo raised money.

¶ 15 There are no mitigating factors, but there are aggravating ones. The evidence cited by the executive director in submissions shows that Kyllo continued to promise investors to repay their funds long after there was no money available to do so. This evidence also shows Kyllo attempted to dissuade investors from assisting the Commission's investigation by suggesting that to do so would put their funds at risk. It is clear from this evidence that Kyllo shows no remorse.

¶ 16 Kyllo knew better – he was acquainted with the requirements of securities regulation. In 2001 Commission staff warned him that his then attempted distribution of high-yield investment programs was likely in contravention of the Act. In 2002 the Saskatchewan Securities Commission issued a temporary order against him for the same misconduct, an order that remains in force today. In 2007 regulators in the State of Washington charged Kyllo with violations of anti-fraud legislation in that state.

¶ 17 Kyllo is a confirmed wrongdoer whose presence in our markets constitutes an ongoing and serious risk to investors. Our orders are intended to address that risk permanently.

¶ 18 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.

¶ 19 The executive director cited three fraud cases. Although on a scale of dollars two involved much larger frauds, one involved only $100,000. What matters is that the underlying dishonest and reprehensible conduct is common between those cases and this one. The sanctions ordered in those cases therefore provide an appropriate foundation for the orders we are making.

IV Orders

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

Kyllo

1. under section 161(1)(b) of the Act, that Kyllo cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

2. under section 161(1)(d)(i), that Kyllo resign any position he holds as a director or officer of any issuer;

3. under section section 161(1)(d)(ii), that Kyllo is prohibited permanently from acting as a director or officer of any issuer;

4. under section 161(1)(d)(iii), that Kyllo is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

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

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

7. under section 161(1)(g), that Kyllo pay to the Commission US$1.14 million obtained as a result of his contraventions of the Act;

8. under section 162, that Kyllo pay an administrative penalty of $250,000;

Frey

9. under section 161(1)(b), that all persons cease trading permanently, and are prohibited permanently from purchasing, any Frey securities;

10. under section 161(1)(d)(iii), that Frey is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

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

12. under section 161(1)(g), that Frey pay to the Commission US$500,000 obtained as a result of its contraventions of the Act;

13. under section 162, that Frey pay an administrative penalty of $500,000;

Moenkopi

14. under section 161(1)(b), that all persons cease trading permanently, and are prohibited permanently from purchasing, any Moenkopi securities;

15. under section 161(1)(d)(iii), that Moenkopi is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

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

17. under section 161(1)(g), that Moenkopi pay to the Commission US$75,000 obtained as a result of its contraventions of the Act;

18. under section 162, that Moenkopi pay an administrative penalty of $500,000;

Mercury

19. under section 161(1)(b), that all persons cease trading permanently, and are prohibited permanently from purchasing, any Mercury securities;

20. under section 161(1)(d)(iii), that Mercury is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

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

22. under section 161(1)(g), that Mercury pay to the Commission US$565,000 obtained as a result of its contraventions of the Act;

23. under section 162, that Mercury pay an administrative penalty of $500,000; and

24. that the aggregate amount paid to the Commission under paragraphs 7, 12, 17 and 22 of these orders must not exceed US$1.14 million.

¶ 21 November 16, 2010

¶ 22 **For the Commission**

Brent W. Aitken
Vice Chair

Don Rowlatt
Commissioner

Suzanne K. Wiltshire
Commissioner