2011 BCSECCOM 514

Michael Kyaw Myint Hua Hu

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	Don Rowlatt	Commissioner
	David J. Smith	Commissioner
Date of Hearing	October 13, 2011	
Date of Decision	November 10**,** 2011	
Appearing, and submissions filed by		
Joyce Johner Derek Chapman	For the Executive Director	
Sean Boyle Alexandra Luchenko	For Michael Kyaw Myint Hua Hu	

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 27, 2011 (2011 BCSECCOM 355) are part of this decision.

¶ 2 We found that Michael Kyaw Myint Hua Hu bought shares of Maple Leaf Reforestation Inc. while he was a person in a special relationship with Maple Leaf and knew undisclosed material information about the company. We found that in doing so, Hu contravened section 86 (now section 57.2) of the Act.

¶ 3 We also found that Hu made false or misleading statements to Commission staff, contrary to section 168.1(1)(a).

II Analysis

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

- prohibiting Hu permanently from trading or purchasing securities,
- prohibiting Hu permanently from acting as a director or officer of any issuer,

- prohibiting Hu permanently from participating in securities markets in any capacity, and
- imposing on Hu an administrative penalty of at least $2.4 million.

¶ 5 Hu says the prohibitions should not exceed six years and should allow Hu to trade for his own account. He does not dispute the executive director's submission that the administrative penalty should be determined by the test in *Torudag* 2009 BCSECCOM 339 but says the administrative penalty sought by the executive director is excessive, unfair, and inappropriate.

A Factors

¶ 6 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:
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> - 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 conduct; damage to markets

¶ 7 In *Torudag*, the Commission said this about illegal insider trading:

> "10 The objective of the Act is to protect investors and the integrity of capital markets. Market participants expect that all those trading in a market with integrity have available to them the same material information about the securities traded in that market.
>
> 11 The Act has several provisions intended to ensure that expectation is met. Section 86 is one of the most important. It prohibits persons from trading in securities of an issuer while in possession of material information about the issuer that has not been generally disclosed. Trading in contravention of the section is serious misconduct – it damages the public's perception of the fairness of our markets."

¶ 8 In addition to the inherent seriousness of illegal insider trading, here we have trading in substantial amounts –847,800 shares in 101 trades – over a three-week period as part of a deliberate plan to move Maple Leaf's share price to $2.00. Hu was also the chairman and a director of Maple Leaf. This puts Hu's trading at the high end of the range of seriousness.

¶ 9 Hu says there is no specific evidence that damage was done to the integrity of the capital markets in British Columbia, but acknowledges that generally insider trading has that effect. That is certainly so as a general proposition – specific evidence of damage is not necessary to find that illegal insider trading damages the integrity of our markets. Those who sold into Hu's buy orders were by definition harmed by selling without the benefit of the material information about Maple Leaf that Hu knew. Hu was also the chairman of Maple Leaf. Deliberate illegal insider trading by the chairman of a publicly-traded company cannot help but damage the reputation of our markets – it corrodes the foundation of trust that other market participants must have in the market for it to retain its integrity.

¶ 10 As far as Hu's contravention of section 168.1(1)(a) is concerned, this is also serious misconduct. By attempting to conceal his relationship with Tian, Hu attempted to frustrate the investigation by hiding the key fact that would have tied him to the illegal trading. Hu knew that, and did his best to mislead Commission staff. This was not a case of mere denial of the allegations, or a defence posing a

different interpretation of the facts. It was a deliberate attempt to mislead Commission investigators so that they would not discover his connection with Tian, the owner of the account through which we found he made his illegal trades.

Enrichment; harm to investors

¶ 11 The evidence does not show whether or not Hu was personally enriched by his trading. There is no evidence that it was Hu's money that funded his trades, and no evidence of Hu's beneficial interest, if any, in the Maple Leaf shares he bought in the Tian account.

¶ 12 That said, illegal insider trading harms investors. As noted above, those who sold into Hu's buy orders were by definition harmed by selling without the benefit of the material information about Maple Leaf that Hu knew.

¶ 13 In *Torudag*, the Commission said that illegal insider trading harms investors in direct proportion to the degree to which the illegal trader was enriched. In *Torudag*, the trader was enriched. Here, we have no evidence of Hu's enrichment, but the *Torudag* measurement of harm to investors is equally appropriate in these circumstances.

¶ 14 Although there is no evidence that Hu was personally enriched, his illegal trading generated enrichment for someone. That enrichment came at the expense of the other investors selling into the market when he was buying illegally, and would not have been created but for his illegal trading. The illegal insider trading in this case harmed investors in direct proportion to the degree of enrichment that occurred. Using the method for determining enrichment set out in the *Torudag* case is equally appropriate in these circumstances as it is for determining the enrichment of a trader who benefitted from his illegal trades.

¶ 15 This is the method for determining the degree of enrichment as set out in *Torudag*:

> "21 In our opinion, the benefit a trader has derived from illegal insider trading is measured by the difference between the price at which the illegal trade takes place and the price of the securities after the material information has been generally disclosed. This compares the price at which the trader bought or sold to the price at which the trader could have bought or sold after general disclosure of the material information. The result is the trader's profit earned or loss avoided through the illegal trading."

¶ 16 The executive director submits that general disclosure of the material information had occurred by the close of trading on October 17, 2007, the day following

Maple Leaf's news release. Hu did not contest that position. The closing price of the Maple Leaf shares on October 17 was $1.42.

¶ 17 We found that Hu's illegal trades took place between September 24, 2007 and October 12, 2007. Hu bought 847,800 Maple Leaf shares during that period for a total cost of $824,956, which works out to an average cost per share of $0.97. The difference between that number and $1.42, the price of the Maple Leaf shares after the material information had been generally disclosed, is $0.45. That amount, multiplied by the 847,800 shares Hu bought, establishes the enrichment created by his illegal trading, under *Torudag*, at $381,510.

Mitigating or aggravating factors

¶ 18 There are no mitigating factors. Aggravating factors are that Hu's trading was repeated and deliberate, involved a large quantity of Maple Leaf shares, and was dishonest. He attempted to conceal his trading by doing so through the Tian account. We can conclude from his attempt to conceal his trading that he knew it was wrong. He also misled Commission staff investigators when asked about his relationship with Tian.

Past conduct

¶ 19 There is no evidence that Hu has any previous regulatory history.

Risk to investors and markets

¶ 20 Hu's deliberate decision to trade on undisclosed material information, and to conceal that trading by using the account of a third party who would not be easily connected to him, shows a calculated contempt for the integrity of securities markets. His acting in any capacity in connection with our markets would pose a serious risk to those markets.

Specific and general deterrence

¶ 21 We have noted the seriousness of illegal insider trading generally, and of Hu's trading in particular, as well as the other factors described above. It is appropriate to make orders that have a proportionate specific deterrent effect on Hu, and general deterrence to other market participants who may be tempted to engage in similar misconduct.

Previous orders

¶ 22 Other than *Torudag*, no cases were cited to us that were directly related to illegal insider trading. However, we found the panel's approach in *Torudag* sufficiently comprehensive to deal with the issues in this case.

B Sanctions

Prohibitions

¶ 23 The orders we are making under section 161(1) are permanent. Hu has no regulatory history, but in our opinion permanent orders are appropriate.

¶ 24 In *Walker* 2010 BCSECCOM 578 a Commission panel ordered market bans against three individual respondents, two of whom had no regulatory history, for their roles in an $86,000 fraud on a public company. The panel made permanent orders against the one respondent who in the past had misled staff of the TSX Venture Exchange, citing that and other instances of dishonesty in its findings. The panel said:

> "42 In Tamburrino's case, the orders 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 fees 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.
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> 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."

¶ 25 The panel went on to impose 10-year prohibitions against the other two respondents, observing that:

> "44 . . . 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."

¶ 26 Hu's conduct was serious and deliberate. His conduct displayed dishonest intent throughout – the illegal trading itself, his attempt to conceal his trading, and his misleading of Commission staff investigators. There is no evidence of his remorse or whether he has learned his lesson. Like Tamburrino, Hu 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.

Administrative penalty

¶ 27 In *Torudag*, the Commission said this about administrative penalties in illegal insider trading cases:

> "49 We have ordered administrative penalties. The objective of an administrative penalty in an illegal insider trading case is to ensure that, generally, a person who engages in illegal insider trading cannot be seen to have profited from that wrongdoing, and that the penalty serves as a disincentive, both to the person and to others from engaging in similar illegal conduct.
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> 50 The amount of an administrative penalty is not determined by a formula, but one way to arrive at an appropriate penalty for illegal insider trading is to consider the extent to which the trader is enriched. . . . The amount by which the enrichment should be multiplied for the penalty to offset profit and provide both specific and general deterrence will vary with the circumstances of each case. Here, the executive director and Torudag agree that 1.5 is an appropriate multiplier for an administrative penalty based on enrichment in these circumstances. We agree and have imposed an administrative penalty on Torudag using that multiplier. . . ."

¶ 28 In *Torudag*, the respondent did not trade intentionally. He did so on the mistaken belief that the news had been disseminated by the time he traded. He cooperated with Commission staff and assisted with obtaining records beyond the Commission's jurisdiction. His enrichment was modest – about $24,000.

¶ 29 Hu traded intentionally. He knew he was trading on undisclosed material information and he knew it was wrong. He attempted to conceal his trading. Far from cooperating with Commission staff, he deliberately misled them. We believe a multiplier of 2.5 to 3 times the calculation of the enrichment created by Hu's illegal trading is appropriate.

¶ 30 In so doing, we note section 155(5) of the Act. That section prescribes the maximum fine for illegal insider trading as "not less than any profit made by *all* persons" as a result of the contravention, *and* "the greater of $3 million and an amount equal to triple any profit made by *all* persons" as a result of the contravention [emphasis added].

¶ 31 In section 155(5) the legislature recognizes that a penalty based on the total enrichment created is appropriate, regardless of the degree to which the trader was enriched, and also includes as one of the criteria in determining the fine an amount equal to as much as 3 times that total enrichment.

¶ 32 The administrative penalty we have ordered includes $1 million for Hu's contravention of section 86. With no evidence as to Hu's enrichment, we have not made a disgorgement order (unlike the panel in *Torudag* which did so, the trader's enrichment being known in that case).

¶ 33 The remainder of the administrative penalty, $500,000, we have ordered for Hu's contravention of section 168.1(1) and reflects his conduct as a whole.

III Orders

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

1. under section 161(1)(b) of the Act, that Hu cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts, except that Hu, 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 Hu 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 161(1)(d)(ii), that Hu 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)(iii), that Hu is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

5. under section 161(1)(d)(iv), that Hu 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 Hu is prohibited permanently from engaging in investor relations activities; and

7. under section 162, that Hu pay an administrative penalty of $1.5 million.

¶ 35 November 10**,** 2011

¶ 36 **For the Commission**

Brent W. Aitken
Vice Chair

Don Rowlatt
Commissioner

David J. Smith
Commissioner