2011 BCSECCOM 518

David Charles Greenway and Kjeld Werbes

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

Application

Panel	Brent W. Aitken	Vice Chair
	Kenneth G. Hanna	Commissioner
	David J. Smith	Commissioner
Written submissions completed	November 4, 2011	
Date of Ruling	November 16, 2011	
Submissions filed by		
Douglas R. Eyford	For Kjeld Werbes	
Joyce Johner	For the Executive Director	

Ruling

Introduction

¶ 1 On July 13, 2011 the executive director issued a notice of hearing alleging that David Charles Greenway and Kjeld Werbes contravened section 57.2 of the *Securities Act* RSBC 1996, c. 418. The executive director says Greenway and Werbes bought shares of Global Uranium Corp. while being in a special relationship with Global and with knowledge of a material fact or material change in relation to Global that had not been generally disclosed.

¶ 2 On September 30, 2011 Werbes applied to have the allegations against him severed from those against Greenway. He asks that the severed allegations be the subject of a separate hearing convened after a hearing is held and a decision rendered in relation to the allegations against Greenway.

Background

¶ 3 The executive director says that between March 31 and April 15, 2010, Global was negotiating the acquisition of a property known as the Anderson property. According to information given by Global's president in an interview with

Commission staff, Greenway was negotiating with the principals of the seller and Werbes was acting as Global's counsel on the transaction.

¶ 4 The agreement for the Anderson property acquisition was completed on April 15, 2010. On April 16, Global issued a news release announcing the acquisition and filed a material change report.

¶ 5 The executive director says that Greenway and Werbes purchased Global shares between March 31 and April 16, 2010.

¶ 6 Werbes says that if severance is not granted, he "faces the prospect of serious prejudice" because evidence he would rely on for his defence is subject to solicitor-client privilege arising from his representing Global in connection with the Anderson property acquisition.

¶ 7 Werbes filed an affidavit in support of his application. In it, he deposes, among other things, that:

- he is a member in good standing of the Law Society of British Columbia
- he purchased 20,000 Global shares on April 14, 2010
- he was retained by Global to settle the terms of the Anderson property acquisition agreement
- "to the best of his knowledge" Global has not waived solicitor-client privilege in relation to the information Werbes obtained while acting as solicitor in connection with the Anderson property acquisition
- in order for him to answer the allegation that he contravened section 57.2(2), "it will be necessary for [him] to refer to and rely on documents and discussions that are confidential and protected by solicitor-client privilege."

Analysis

¶ 8 Werbes referred us to authority that "severance is only to be granted where it is manifest that prejudice will result if it is not granted" (*Fletcher Challenge Canada Inc. v. Miller et al*, 1991 CanLII 1056 (BCSC)). The court in that case denied severance to an applicant because "the public interest in the administration of justice would not be served by individual trials."

¶ 9 Werbes acknowledges the onus is on him to show prejudice, and says the prejudice to him is obvious. If there is not a waiver of privilege, he says, "he would be placed in the invidious position of defending a proceeding where the executive director has alleged that his co-respondent was his client." (Paragraph 8 of the notice of hearing states that Werbes also represented Greenway and the seller in connection with the Anderson property acquisition.) Werbes does not identify the prejudice that could arise from the privilege related to his representation of Global in connection with the acquisition.

¶ 10 Werbes says that severance would be appropriate because:

- he was unaware of Greenway's purchases,
- he did not discuss his purchases with Greenway, and
- the executive director has not alleged that he and Greenway acted in concert.

¶ 11 Section 57.2(2) says:

> "A person must not enter into a transaction involving a security of an issuer, or a related financial instrument of a security of an issuer, if the person,
>
> (a) is in a special relationship with the issuer, and
>
> (b) knows of a material fact or a material change with respect to the issuer, which material fact or material change has not been generally disclosed."

¶ 12 Whether Werbes contravened section 57.2(2) depends on whether

- he purchased Global shares,
- he was in a special relationship with Global when he did so,
- at the time of the purchase he knew of a material fact or change about Global, and
- he purchased the shares before the material fact or change had been generally disclosed.

¶ 13 According to Werbes' affidavit, he purchased Global shares while he was in a special relationship with Global, at the time of the purchase he knew about the Anderson property acquisition, and he purchased the shares before the news release relating to the acquisition was published.

¶ 14 We are not making any finding about whether Werbes contravened section 57.2(2) – we are relying on his affidavit solely for the purpose of this application. That said, his affidavit, taken at face value, states facts that would appear to establish all of the elements of a section 57.2(2), with the exception of whether the Anderson property acquisition was a material fact or a material change with respect to Global.

¶ 15 Werbes' affidavit contains no evidence that would show how the information he says is privileged could be relevant to the factors establishing a contravention of section 57.2(2).

¶ 16 Werbes says that he is entitled to lead evidence in his defence to address these issues:

- the defences in section 57.4
- when general disclosure of the material fact in issue occurred
- whether the misconduct was due to an error of judgment or a calculated intention to profit through wrongdoing
- whether the public interest requires that he be prohibited from providing services to listed companies
- whether the amount by which he was enriched as a result of unlawful trading ought to be multiplied for the purposes of an administrative penalty
- the nature and duration of any cease-trade order against him

¶ 17 The section 57.4 defences available to an individual against an alleged contravention of section 57.2(2) are:

- the person reasonably believed the other party to the transaction knew of the material fact or change
- the person entered the transaction under a pre-existing automatic investment plan
- the person entered into the transaction as a result of a pre-existing legal obligation
- the person was acting as agent under a pre-existing agency agreement

¶ 18 None of these applies to Werbes. He made his purchases on the open market, so he could not reasonably have believed that the sellers knew about the transaction. He did not buy the shares under an automatic investment plan nor did he buy them as a result of a pre-existing legal obligation. He did not act as an agent – he bought for his own account in his RRSP.

¶ 19 The determination of when general disclosure of a material fact or change occurs is a question of fact, and usually arises when a transaction is made between the time disclosure is made and the market becomes aware of the information. Here, the allegation is that the transactions were made before disclosure. In any event, the factors relevant to the determination are all objective and transparent. They include such matters as when the news release was issued, the means of dissemination, the typical pace at which news about the issuer has been disseminated in the past, and the price and trading volume of the shares before and after disclosure. Werbes has not shown how the information he says is privileged could contain any information relevant to the determination of when general disclosure occurred.

¶ 20 All of the remaining issues Werbes indentifies are irrelevant to the issue of liability, although they are relevant to any orders the panel might make. The Commission's practice is to hold the liability portion of hearings first and make its

findings on liability. The penalty portion of the hearing follows. Parties make submissions as to sanction and may, if they wish, enter evidence relevant to sanction. It follows that none of these issues is relevant to the application to sever the allegations in the liability hearing.

¶ 21 Werbes' contention that prejudice will result if his case is not severed appears to rest on the statement in paragraph 8 of the notice of hearing that Werbes represented Greenway in connection with the Anderson property acquisition. The executive director says that this "assertion" is not "an essential element of the insider trading allegation against Werbes." The executive director says a finding whether Werbes contravened section 57.2(2) "does not depend in any way" upon whether Werbes was representing Greenway.

¶ 22 We take from this that the executive director will not be relying on the "assertion" in paragraph 8 that Werbes represented Greenway in connection with the Anderson property acquisition to prove any part of the case against Werbes. It follows that there is no potential prejudice to Werbes arising from paragraph 8 of the notice of hearing.

¶ 23 In our opinion, Werbes has not met the onus of proving that it is manifest that prejudice will result if severance is not granted. *The Canadian Oxford Dictionary*, Oxford University Press Canada 1998 defines "manifest" as "clear or obvious to the mind or eye." Werbes has provided no evidence that it is clear or obvious that the information he says is privileged could be relevant to the allegations against him or to his defence. Of course he cannot reveal the content of privileged communications, but neither is his mere assertion enough to establish that the prejudice to him is manifest.

¶ 24 Werbes' submission that he and Greenway did not act in concert or with knowledge of each other's trades is not relevant to the question of the prejudice Werbes says he may suffer if severance is not granted. He has also failed to show how severance will solve what he says is his ultimate problem – how to defend himself without the use of privileged information he acquired while acting for Global. Severing his allegations from those against Greenway does not address that problem.

¶ 25 We have also considered the public interest. Were we to grant severance, there would be significant duplication of effort and cost. The circumstances of the Anderson property acquisition, whether the acquisition was material information with respect to Global, and when that information was generally disclosed, all arise from the same facts. The allegations against Werbes would also be significantly delayed if we were to follow his suggested process. The Greenway hearing, now scheduled for January 2012, would go through the entire liability

and (if the allegations are proven) sanction phases of the hearing, resulting in a decision some time in May or June. The process would then start all over again with Werbes, based on the same facts. This is not efficient and the public interest would not be served by individual hearings for Greenway and Werbes.

¶ 26 We dismiss the application.

¶ 27 November 16, 2011

¶ 28 **For the Commission**

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner

David J. Smith
Commissioner