

2011 BCSECCOM 521

Jo Ann Nuttall

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken Don Rowlatt Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
Dates of hearing	July 8, 2011	
Date of Findings	November 18, 2011	
Appearing		
Jeremy Gellis	For the Executive Director	
Patricia Taylor	For Jo Ann Nuttall	

Findings

I Introduction

- ¶ 1 This is the liability portion of a hearing under sections 161 and 162 of the *Securities Act*, RSBC 1996 c. 418.
- ¶ 2 On January 25, 2011 the executive director issued a notice of hearing (2011 BCSECCOM 47) alleging that Jo Ann Nuttall made false or misleading statements to Commission staff, contrary to section 168.1(1)(a) of the Act.
- ¶ 3 The notice of hearing specifies the statements that the executive director alleges were false and misleading:

“2. At that interview, Staff asked the Respondent about

- (a) the last time she did any trading in any account:
The Respondent said, ‘I’m not really sure.’
- (b) whether she had placed any trades over the last six months:
The Respondent said, ‘Not that I’m aware of’ and ‘I don’t remember.’

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- (c) whether she had placed any trades in the last month:
The Respondent said, 'I don't recall.'
- (d) how she placed trades:
The Respondent said, 'I don't recall what . . . any of that. So obviously I probably haven't done it for a bit.' "

II Background

¶ 4 The interview referred to in the notice of hearing was a compelled interview under section 144 of the Act that took place on September 7, 2010. Two Commission staff investigators conducted the interview and were appointed under an amended investigation order (which we refer to as the "investigation order") issued under section 142 on April 20, 2010. Nuttall was under oath and was represented by counsel.

¶ 5 The investigation order names as parties, among others, Impala Mineral Exploration Corp. and Nuttall. Its scope is broad: it authorizes the investigators to

"investigate, enquire into, inspect and examine any individual, company or other entity on any matter, for the period from January 1, 2008 forward, that may reasonably relate to . . . the participation of the Parties in the trading of securities in and from British Columbia"

¶ 6 At the interview, the investigators asked Nuttall the following questions and she gave the answers indicated:

Q When's the last time you did any stock trading in any account?

A I'm not really sure. I just – whenever I get slips, I – they all go like into a file format for the end of the year for my accountant, right? Like I don't – I pay him to do up my tax returns for me.

. . .

Q Have you placed any trades over the last six months?

A Not that I'm aware of.

Q How would you not be aware? That you don't remember or –

A Yeah, I don't – I don't remember.

Q Have you placed any trades in the last month?

A I – anything to do with trades, I just – I don't recall.

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Q Can I ask, when you do decide to place a trade, how do you go about placing that trade? Do you phone somebody or do you have direct access?

A Are you talking like personally? Are you talking personally?

Q [Nuttall's counsel] I think what he means, if you decided you wanted to buy some shares in Company X or Y, would you call your broker?

A Yes

Q [Nuttall's counsel] So you would need to know the name of the broker.

A Yes. But I – I don't recall what – any of that. So obviously I probably haven't done it for a bit. All of that stuff I have files and try to keep it organized. But you know, my memory is just – it's – so I can't sit here if I don't know one hundred percent something. I'm not going to say it. You know, I take this very serious and I'm not going to sit here after this lady had me swear, okay? And if I appear – if I appear that I am – I'm stupid, so be it. Okay? I'm not stupid. I just don't have a great memory right now."

- ¶ 7 The evidence shows that Nuttall sold shares of Dynamic Ventures on the morning of the day of the interview, and on every trading day but one during the previous two weeks. During that period, Nuttall sold 39,000 Dynamic shares in 18 trades.
- ¶ 8 At the hearing, Nuttall testified that she instructed her broker, Sandeep Atwal, to make all of these trades.
- ¶ 9 Nuttall and Atwal both testified that Nuttall often traded through standing orders. Atwal testified that usually Nuttall's standing orders were valid for no more than one week, and never more than two weeks. In her testimony, Nuttall agreed that generally her standing orders did not last for more than a week, but did not agree that her standing orders were valid for no more than two weeks.
- ¶ 10 Atwal's testimony was clear, straightforward, certain, and he had no motivation to lie. On the subject of the duration of standing orders, Atwal said, "Not more than two weeks, I'd say for sure."
- ¶ 11 Nuttall's testimony on this point was vague and unhelpful: when asked if the standing orders could have been outstanding for six months or longer, she replied "Who knows. I don't know. I still don't know."

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- ¶ 12 We prefer Atwal's evidence.
- ¶ 13 Atwal described Nuttall as a sophisticated investor. He said her account documents described her as such, and he considered her success in trading in the US Over-The-Counter Bulletin Board market was consistent with the results one would expect from an experienced trader.
- ¶ 14 This was confirmed by Nuttall's testimony in the hearing. Asked by her counsel whether she considered herself to be a sophisticated investor, Nuttall said:

“As far as not having to be baby-sat or listen to somebody else's instruction or recommendation, yes, then I would say I'm sophisticated because I don't need anyone else's advice.”

- ¶ 15 Nuttall had an ongoing professional relationship with Atwal, who testified that he was essentially an order taker on her account. He testified she was in regular contact with him in the months prior to the interview, sometimes contacting him every few days and usually once a week. He testified that she instructed him to make the trades in the two weeks before the interview by way of weekly or bi-weekly standing orders. He said that in August and September of 2010 Nuttall gave him a series of standing orders to sell Dynamic shares.

III Analysis

- ¶ 16 Section 168.1(1)(a) says:

“168.1 (1) A person must not

(a) make a statement in evidence or submit or give information under this Act to the commission, the executive director or any person appointed under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading

- ¶ 17 The issue before us is straightforward. There is no dispute that the information Nuttall gave in her interview was given under the Act to persons appointed under the Act. The issue is simply whether that information was, in a material respect and at the time and in light of circumstances under which it was made, false or misleading.

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- ¶ 18 The executive director says that the facts show that Nuttall’s answers to the questions in issue are false and misleading, and her explanation for her answers is not credible.
- ¶ 19 Nuttall puts forward various propositions in her defence. Nuttall says:
- She told the truth.
 - The investigation order was about Impala, and Commission staff had told her that the interview would be about trading and other matters related to Impala. Nuttall says she came prepared to answer questions about only that, and had not prepared herself to discuss trading of other companies.
 - She answered truthfully when she said she had not traded shares of Impala and that ought to have been the end of the inquiry. She says the executive director is attempting to take her answers about trading in Impala “out of context” and to apply them to her trading in Dynamic.
 - Her answers were not false or misleading in a material respect.
 - She did not intend to mislead the Commission staff investigators.
 - The interview did not meet the standard of fairness for a compelled interview under section 7 of the *Canadian Charter of Rights and Freedoms*, as described in *British Columbia Securities Commission v. Branch* [1995] 2 SCR 3.
 - Commission staff did not meet the required disclosure standards.

Whether Nuttall told the truth

- ¶ 20 Nuttall’s submissions do not all lie comfortably together. On the one hand she says that she was telling the truth because she in fact did not remember her trading in Dynamic. The reason, she says, is because she was expecting questions only about trading in Impala. She says she did not remember her other trading because she did not review her records of trading other than in shares of Impala before the interview.
- ¶ 21 On the other hand she says that she was telling the truth because she thought the Commission staff investigators were asking her about trading in Impala shares. She says in her submissions:

“[I] truthfully answered that [I] did not trade in Impala. Having been unable to prove [I] traded in Impala, that ought to have been the end of the inquiry. However, Staff now says the questions related to a different matter, the trading in Dynamic. The answer to one series of questions have been taken out of context and applied to an unrelated matter, the trading in Dynamic Ventures.”

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- ¶ 22 That said, her apparent confusion now about what she was being asked at the time is not important. What matters is that the answers Nuttall gave in the interview are not true, and her explanations for those answers do not hold water.
- ¶ 23 The questions cited in the notice of hearing were clear and framed unambiguously. They inquired about her trading in any security in any account. They were not limited, by their wording nor by the context in which they were asked, to her trading in Impala. At the point in the interview at which the investigators asked these questions, the name of Impala had not yet been mentioned.
- ¶ 24 Nuttall was a sophisticated investor and a frequent trader. She knew about standing orders and used them extensively to manage her trading. She was in frequent and regular contact with Atwal. The trading she did had been ongoing for the two weeks immediately preceding the interview and included trades on the morning of the interview. The evidence is that the instructions she gave Atwal to make the trades could not have been given, at the earliest, more than two weeks before the date of the interview.
- ¶ 25 In the face of these facts, it is not remotely credible that she was “not really sure” when she last traded, was not “aware of” whether she placed any trades in the six months before the interview, did not recall whether she placed any trades in the month before the interview, or did not recall how she placed her trades and so probably hadn’t “done it for a bit”.
- ¶ 26 Nuttall did not need trade tickets or other records to refresh her memory enough to remember when she last traded, and whether she did so in the last month or last six months, nor to remember how she did her trading. She knew how she did her trading with Atwal, and she knew at the time of the interview, and for some time prior to that, she had standing orders in place to sell Dynamic shares.
- ¶ 27 Although it is possible she may not have known at the time of the interview whether or how many Dynamic shares she had sold through the standing order in place at the time of the interview, there can be no doubt that she knew it was possible, even probable, that she had sold some shares. Neither is there any doubt that she would have known whether she had sold Dynamic shares under previous standing orders that had expired. And she clearly knew how she traded shares through Atwal. She knew all of this, and needed no records to give a truthful answer.
- ¶ 28 We find that the answers Nuttall gave to all of the questions cited in the notice of hearing were false and misleading.

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- ¶ 29 Nuttall testified at the hearing. We did not find her a credible witness. When describing her investment experience, method of trading, and like matters, she was articulate, confident, straightforward, and exhibited no difficulty in remembering facts. However, in cross-examination, especially when the questioning ventured into areas that might have put her conduct at the interview in an unfavourable light, she became noticeably less proficient at articulating her thoughts, was unsure, became evasive, indeed defensive at times, and claimed to be unable to recall facts on subject matters similar to those that she had recalled with no apparent difficulty in earlier testimony.
- ¶ 30 We have found, based on the transcript of her interview alone, that Nuttall did not answer truthfully the questions that are the subject of this notice of hearing. Her testimony and demeanour at the hearing confirm that finding.
- ¶ 31 There is no reasonable basis to conclude anything other than that she remembered perfectly well the true answers to everything she was asked yet chose to conceal that information under the guise of not remembering.

Scope of interview questions

- ¶ 32 The evidence shows that there were discussions between Nuttall and the Commission staff investigators in which the investigators told her that they were investigating Impala and others. However, there is nothing in those discussions to suggest that the questions they would be asking in the interview would be restricted only to her trading in Impala shares.
- ¶ 33 In the same vein, Nuttall says that the investigators told her at the outset of the interview that it was related to trading in securities of Impala. This is untrue. At the outset of the interview the investigators gave Nuttall no general indication of what the interview was about other than to inform her that the interview was a compelled interview under the Act pursuant to the investigation order. They merely referred to the investigation order, pointing out that it “sets out the scope of the investigation, the parties of the investigation, who is appointed as investigators.”
- ¶ 34 Nuttall says she was confused about whether the questions related to Impala, but in answering the questions, she did not indicate that her answers related only to trading in Impala nor did she or her counsel ask to clarify whether the investigators were asking about trading in Impala or in other companies.
- ¶ 35 In any event, all of that is largely irrelevant. Even if Nuttall had been led to believe, rightly or wrongly, that the scope of the interview was only about her trading, if any, in Impala, it is not the least persuasive as an explanation for her answers.

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- ¶ 36 To the extent that Nuttall is saying that the investigators were precluded from asking questions about her trading in Dynamic Ventures because that was outside the scope of the investigation order, that is based on an incorrect understanding of the scope of an investigation order.
- ¶ 37 Nuttall was a named party in the investigation order. The investigation order authorized the investigators to investigate and inquire into “the trading of securities in and from British Columbia” by any or all of the parties. The scope of the interview was not restricted to the subject of Impala. Commission staff were authorized to ask Nuttall questions about her stock trading generally – this area of inquiry is specifically identified in the investigation order.
- ¶ 38 What the Commission staff investigators may or may not have told her before the interview about its scope is also irrelevant to the investigators’ authority to ask the questions they did.
- ¶ 39 Nuttall cited no law to suggest that the investigators’ conduct in this case, even if it were as she characterizes it (which we found it was not), would restrict their authority to conduct a free and wide-ranging inquiry under the investigation order. Neither did her counsel at the interview object to any of the questions that are the subject of this notice of hearing on the basis that they were outside the scope of the investigation order. To the contrary, he encouraged Nuttall to answer them.
- ¶ 40 At the conclusion of the executive director’s case, Nuttall made a no-evidence motion on essentially the same basis as she argued in these submissions. She said it was an abuse of process for Commission staff investigators to have summoned her to a compelled interview to talk about Impala and then ask her questions about other trading. We dismissed the application. Our reasons for doing so are the same as our reasons for rejecting this aspect of her defence.

Materiality

- ¶ 41 Nuttall says that the information was not material because the “material issue in the Interview was trading in Impala, not trading generally” and that the “circumstances of the Interview were an investigation into Impala”.
- ¶ 42 Nuttall’s submissions on this point misinterpret section 168.1(1)(a).
- ¶ 43 The materiality of false and misleading information is not measured by the materiality of that information to the investigation. It cannot be – at the start of an investigation, what is ultimately material as a result of the investigation is not known with any certainty. Indeed, that is the purpose of an investigation: to determine whether there is evidence to support the allegation or suspicion being

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investigated. That is why the investigative powers granted to investigators under the Act are broad – investigators must have wide scope to investigate potential wrongdoing in order to protect the public interest. It is not uncommon that an investigation leads investigators down paths not expected when the investigation began.

- ¶ 44 The materiality threshold in section 168.1(1)(a) measures the degree to which the information given is false or misleading – how far it departs from the truth – not its relevance to the investigation.
- ¶ 45 Accordingly, the phrase “in a material respect and at the time and in light of circumstances under which it is made” requires a comparison of the information that was given to the facts that were known to the person giving the information at the time the person gave it.
- ¶ 46 In this case, Nuttall professed to be unable to recall information about her trading when the circumstances were that she had been trading regularly and frequently during the two weeks before the interview. The information she gave in her interview that we have found to be false and misleading was material because it was the opposite of the truth at the time.
- ¶ 47 We have found that the answers Nuttall gave to the interview questions cited in the notice of hearing were false and misleading. We find that the information was false and misleading in a material respect at the time and in light of circumstances under which it was made.

Intent to mislead

- ¶ 48 Nuttall also says that the “root of an allegation under section 168.1(1)(a) is an intention to mislead.” Nuttall says she did not attempt to hinder or frustrate the investigation, that no benefit accrued to her as a result of her answers, and she did not intend to mislead Commission staff investigators.
- ¶ 49 We disagree. No element of intention is found in the words of section 168.1(1)(a). The contravention is established if the information given is materially misleading as a matter of fact (subject to the due diligence defence in section 168.1(1)(b), which was not pleaded, and is not relevant, here).
- ¶ 50 Whether Nuttall intended to mislead, whether her false statements hindered or frustrated the investigation, or whether she benefitted from her false statements, may be relevant for the purpose of determining the appropriate penalty. It is not relevant for the purpose of determining whether she contravened section 168.1(1)(a).

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Fairness

- ¶ 51 Nuttall says that the interview did not meet the required standards of fairness, citing the judgement of L’Heureux-Dubé J. in *Branch*. In our opinion, there is no merit to this argument.
- ¶ 52 Nuttall was given adequate notice of the interview and was represented by counsel. She and her counsel were given the investigation order at the beginning of the interview, and had the opportunity to review it. It is not a long or complicated document. Nuttall raised no objections to it, nor did her counsel raise any significant objections to the questions asked at the interview on the basis that they exceeded the scope of the investigation order. Neither did they object to procedural fairness at the time of the interview.
- ¶ 53 The conduct of Nuttall’s interview, considered in light of L’Heureux-Dubé J.’s comments as a whole in *Branch*, met the standard of fairness that the Court set forth.

Disclosure

- ¶ 54 Nuttall’s argument that Commission staff failed to meet disclosure standards also has no merit. She has not cited the disclosure standard she alleges that Commission staff has failed to meet. She does not allege any prejudice to her defence and asks for no remedy. In the course of the hearing she sought documents she said were not properly disclosed. The executive director disclosed them during the hearing. They were not long or complicated nor were they, in our opinion, relevant, but she received them.

Finding

- ¶ 55 We find that Nuttall gave information under the Act to a person appointed under the Act that, in a material respect and at the time and in light of circumstances under which it is made, was false or misleading when she gave the answers she did to the questions cited in the notice of hearing.

Sanctions

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

- | | |
|---------------|--|
| By December 2 | The executive director delivers submissions to Nuttall and to the secretary to the Commission |
| By December 9 | Nuttall delivers response submissions to the executive director and to the secretary to the commission; a party wishing an oral hearing on the issue of sanctions so advises the secretary to the Commission |

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By December 16

The executive director delivers reply submissions (if any) to Nuttall and to the secretary to the Commission

¶ 57 November 18, 2011

¶ 58 **For the Commission**

Brent W. Aitken
Vice Chair

Don Rowlatt
Commissioner

Suzanne K. Wiltshire
Commissioner