

2012 BCSECCOM 194

Gibraltar Global Securities Inc.

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Bradley Doney Brent W. Aitken David J. Smith	Commissioner Vice Chair Commissioner
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Hearing date October 4, 2011

Submissions Completed February 20, 2012

Date of Findings May 22, 2012

Appearing

Mila A. Pivnenko For the Executive Director

Ronald N. Pelletier For Gibraltar Global Securities Inc.

Findings

I Introduction

- ¶ 1 This is the liability part of a hearing under sections 161 and 162 of the *Securities Act*, RSBC 1996, c. 418.
- ¶ 2 In 2008, BCSC staff in a sworn interview as part of an investigation learned from a resident of British Columbia that the resident held an account with Gibraltar Global Securities Inc. BCSC staff determined Gibraltar was registered with the Securities Commission of the Bahamas (SCB), was not registered in any capacity under the Act and had accounts with Global Securities Corporation, a registrant in BC.
- ¶ 3 In January 2009, BSCC staff requested the assistance of the SCB in obtaining the names and contact information of:
- Gibraltar's principals, including all of its beneficial owners;
 - employees of Gibraltar; and
 - all BC residents who ever held accounts with Gibraltar, either directly or beneficially.

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- ¶ 4 Gibraltar refused to provide the SCB with this information.
- ¶ 5 In December 2009, BCSC staff sent a letter to Gibraltar asking that it provide the following information:
- names and contact information of all BC residents that have ever held accounts with Gibraltar, either directly or beneficially; and
 - copies of new client account forms and account statements for each such account.
- ¶ 6 Gibraltar refused to provide BCSC staff with this information.
- ¶ 7 Over two years later, in January 2011, the SCB provided BCSC staff with a list entitled “Gibraltar Global Securities Inc. Clients - British Columbia, Canada”, which it obtained from Gibraltar during a visit to the firm. The list contained 22 account names of corporate clients, as well as two names of individual clients. For each corporate client, the beneficial owner and his current address were listed. The list contained names of at least 16 beneficial owners holding more than one corporate account. A number of the accounts were offshore corporations with beneficial owners resident in BC.
- ¶ 8 On August 5, 2011, the Commission issued a freeze order under section 151 of the Act against Gibraltar. The freeze order freezes assets held by Gibraltar in brokerage accounts with Global Securities Corporation.
- ¶ 9 On August 24, 2011, Gibraltar applied under section 171 of the Act for an order to revoke the freeze order.
- ¶ 10 On September 6, 2011, the executive director issued a notice of hearing [2011 BCSECCOM 421] under sections 161 and 162 of the Act alleging that:
- Gibraltar held itself out as being in the business of trading and advising in securities and carried out both activities without being registered to do so, contrary to section 34 of the Act; and,
 - Gibraltar’s refusal to provide the BCSC with the names, account information, and account statements for all British Columbia residents who have beneficially

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held accounts with it makes Gibraltar unsuitable to engage in securities related activities in, or connected with, British Columbia.

- ¶ 11 These findings address both Gibraltar’s section 171 application and the executive director’s allegations in the notice of hearing.

II Background

- ¶ 12 Gibraltar’s website describes the services it provides, and invites potential clients to “create a GCSI online brokerage account in just a few minutes” by downloading an account opening application and faxing or emailing it to Gibraltar. The website states

“ . . . we have no minimum account opening and setup fee policy. We make it easy to get the most from your money. As a GCSI client, you have everything you need to manage your account under one ‘offshore’ roof – right at your fingertips.”

- ¶ 13 The “frequently asked questions” section invites potential clients “to contact us anytime. We at Gibraltar Global Securities Inc. look forward to helping you achieve your investment goals.”

- ¶ 14 Through its website, Gibraltar states it will buy and sell securities, including corporate stocks & bonds, options, money market funds and mutual funds and provide advisory and other services for its clients. It describes itself as a

“broker/dealer, investment management and advisory firm whose mission is to provide comprehensive, quality brokerage and investment services in an offshore environment at an affordable cost. Simply put, we provide offshore benefits at an onshore cost.

. . .

Gibraltar Global Securities easily handles most needs. We offer our clients a full suite of services to meet their financial services needs. These include brokerage accounts, offshore company formations and asset planning structures.”

- ¶ 15 Warren Davis, President of Gibraltar, is advertised on Gibraltar’s website as a professional trader and portfolio manager with over 10 years experience.

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- ¶ 16 The Gibraltar website posts no restrictions or limitations, geographic or otherwise, on who may access the site, open accounts with Gibraltar or use the various advertised services. The site contains no disclaimer that identifies the jurisdictions in which Gibraltar offers or solicits trades of securities. Gibraltar took no precautions on its website not to sell to anyone in BC. Anyone in BC could access the website or apply for an account with Gibraltar.
- ¶ 17 In addition to the BC resident clients identified by the SCB, BCSC staff subsequently identified other residents of BC that maintained accounts directly with Gibraltar. In total, BCSC staff submitted evidence of 26 residents of BC that held accounts either directly or beneficially with Gibraltar.
- ¶ 18 Of the Gibraltar clients BCSC staff identified subsequently, one was guilty of securities fraud and several are subjects of past and ongoing BCSC investigations for suspected market manipulation.
- ¶ 19 Gibraltar opened its accounts with Global Securities Corporation in 2006. In 2007, Gibraltar sent letters to Global stating that Gibraltar's trading in its BC accounts was proprietary and not for the benefit of its clients. The letters read "I am writing this letter to insure you that our account with you is based on proprietary trading for Gibraltar Global Securities Inc. and only for Gibraltar."
- ¶ 20 Notwithstanding, BCSC staff produced evidence of multiple examples where Gibraltar was taking instructions from clients for its trading in Gibraltar's Global accounts.
- ¶ 21 BCSC staff produced evidence for Gibraltar's Global accounts showing Gibraltar was an active trader, both buys and sells, predominantly in shares that trade on the TSX Venture Exchange. For the 12 months ended June 30, 2011, the aggregate value of the trading in the accounts was more than \$14 million.
- ¶ 22 In August 2011, BCSC staff made two further attempts to gather information from Gibraltar. They sent two letters to Gibraltar's BC counsel, one on August 10 and another on August 17 with a draft of the notice of hearing.
- ¶ 23 Gibraltar did not reply to these letters and did not provide BCSC staff with the requested information.

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III Allegations

¶ 24 The Notice of hearing alleges

- Gibraltar held itself out as being in the business of trading and advising in securities and carried out both activities without being registered to do so, contrary to section 34 of the Act; and,
- Gibraltar's refusal to provide the BCSC with the names, account information, and account statements for all British Columbia residents who have beneficially held accounts with it makes Gibraltar unsuitable to engage in securities related activities in, or connected with, British Columbia.

IV Analysis and findings – trading and advising

¶ 25 Section 34 of the Act states in part:

34 A person must not

(a) trade in a security...

(b) act as an adviser,

unless the person is registered in accordance with the regulations and in the category prescribed for the purpose of the activity.

¶ 26 A trade is defined in section 1(1) of the Act as follows:

“trade” includes

(a) a disposition of a security for valuable consideration whether the terms of payment be on margin, installment or otherwise ...

(c) participation as a trader in a transaction in a security made on or through the facilities of an exchange ...

(d) the receipt by a registrant of an order to buy or sell a security ...

(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e).

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¶ 27 A security is defined in section 1(1) of the Act to include:

- (a) a document, instrument or writing commonly known as a security
-
- (c) a document evidencing an option...
- (d) ...a share, stock...

¶ 28 An advisor is defined in section 1(1) of the Act as:

“advisor” means a person engaging in, or holding himself, herself or itself out as engaging in, the business of advising another with respect to investment in or the purchase or sale of securities

¶ 29 Companion Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means*, in section 2.2(1) provides guidance about when a trade is considered to have taken place in a jurisdiction:

“2.2 Trading in a Jurisdiction

(1) The securities regulatory authorities generally consider a person or company to be trading in securities in a local jurisdiction if that person or company posts on the internet a document that offers or solicits trades of securities, and if that document is accessible to person or companies in that local jurisdiction.

(2) Despite subsection (1), the securities regulatory authorities consider the posting of a document on the internet that offers or solicits trades of securities not to be a trade or, if applicable, a distribution, in a local jurisdiction if

(a) the document contains a prominently displayed disclaimer that expressly identifies the local jurisdictions and/or foreign jurisdictions in which the offering or solicitation is qualified to be made, and that identification does not include the local jurisdiction; and

(b) reasonable precautions are taken by all persons or companies offering or soliciting trades of securities through the document posted on the internet not to sell to anyone resident in the local jurisdiction.”

¶ 30 In our opinion, these are correct guidelines for determining the jurisdiction in which a trade takes place.

¶ 31 None of the exceptions in section 2.2 (2) of Companion Policy 47-201 apply to Gibraltar. Gibraltar’s website included no disclaimer described in section 2.2(2)(a)

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and Gibraltar took no precautions described in section 2.2(2)(b). Gibraltar's website is fully accessible to persons and companies from BC, and Gibraltar opened numerous accounts for BC residents, and accounts where BC residents were beneficial owners.

- ¶ 32 We find that Gibraltar was trading in securities in BC as contemplated by paragraph (f) of the definition of "trade" when it offered to provide trading and advising services on its website and made its website accessible to persons and companies in BC.
- ¶ 33 National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* sets out the registration requirements (referred to in section 34) and available exemptions. None of the exemptions apply to Gibraltar.
- ¶ 34 Companion Policy 31-103 *Registration Requirements, Exemptions and Ongoing Obligations* sets out how the Canadian Securities Administrators interpret or apply the provisions of NI 31-103. Section 1.3 of the companion policy reiterates that firms must register if they are "in the business of trading", in the business of advising", or "holding themselves out as being in the business of trading or advising".
- ¶ 35 The companion policy describes the factors used to determine if a firm is trading or advising in securities for a business purpose and must, therefore, be registered under the securities legislation in the jurisdiction where it is trading or advising. The policy states that "for the most part, these factors are from case law and regulatory decisions that have interpreted the business purpose test for securities matters".
- ¶ 36 The factors include engaging in activities similar to a registrant; intermediating trades; directly or indirectly carrying on the activity with repetition, regularity and continuity; being, or expected to be, remunerated or compensated; and directly or indirectly soliciting.
- ¶ 37 Gibraltar is registered with the SCB as a broker-dealer. On its website, Gibraltar describes itself as a "broker/dealer, investment management and advisory firm whose mission is to provide comprehensive, quality brokerage and investment services in an offshore environment at an affordable cost. Simply put, we provide offshore benefits at an onshore cost". We find that Gibraltar engages in activities similar to a registrant, including "holding ... itself out as engaging in, the business of advising another with respect to investment in or the purchase or sale of securities".

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- ¶ 38 The evidence shows that Gibraltar made multiple trades for at least 8 BC residents. We find that Gibraltar acted as an intermediary for BC residents for trades of securities.
- ¶ 39 The evidence shows that at least 26 clients resident in BC requested Gibraltar to provide trading services for them. We find that Gibraltar provided trading services with repetition, regularity and continuity.
- ¶ 40 On its website, Gibraltar offers to provide brokerage and investment services at an “affordable cost. Simply put, we provide offshore benefits at an onshore cost.” Elsewhere, it offers these services for “low trading commissions”. We find that Gibraltar expected to be remunerated for its activities as a registrant and was compensated.
- ¶ 41 Gibraltar’s website invites potential clients to create accounts “in just a few minutes”. The website provides a blank account opening form and invites clients “to contact us anytime. We at Gibraltar Global Securities Inc. look forward to helping you achieve your investment goals.” Companion Policy 31-103 in section 1.3 states that “solicitation includes contacting someone by any means, including advertising that proposes buying or selling securities or participating in a securities transaction or that offers services or advice for these purposes”. In our opinion, this is correct guidance for determining whether solicitation has occurred. Gibraltar advertises itself as a “broker/dealer, investment management and advisory firm whose mission is to provide comprehensive, quality brokerage and investment services...” We find that Gibraltar solicits clients for its trading and advising services.
- ¶ 42 We find that Gibraltar held itself out as being in the business of trading and advising in BC and was in the business of trading in BC without being registered to do so, contrary to section 34 of the Act.

V Analysis and findings – failure to provide information

- ¶ 43 Despite BCSC staff’s requests, Gibraltar has refused to provide the names of its BC clients and their account statements.
- ¶ 44 Gibraltar argues that it is prevented from responding to BCSC staff’s requests for information in 2009 by the secrecy laws of the Bahamas.
- ¶ 45 In *Hypo Alpe-Adria-Bank (Liechtenstein) AG* [2008 BCSECCOM 257], the Commission addressed the refusal of an offshore bank to provide the names of its clients trading through its accounts with securities dealers in British Columbia. The Commission reinforced the principle that the privacy laws of foreign jurisdictions do not take precedence over the fact that this Commission is

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empowered to enforce securities laws in British Columbia. At paragraph 25, the commission said

“The banking secrecy laws of foreign jurisdictions cannot serve as a shield against the legitimate exercise by the commission of its powers to enforce securities regulation in British Columbia, as stated by the commission in *Stephen C. Sayre et al* [2000] 21 BCSC Weekly Summary 75 in language approved by the British Columbia Court of Appeal (see *Exchange Bank & Trust Inc. v. British Columbia Securities Commission*, 2000 BCCA 389 (QL) at paras. 14, 15; *Exchange Bank & Trust Inc. v. British Columbia Securities Commission*, 2000 BCCA 549 (QL)):

‘ . . . It would be an utter abandonment of the public interest if we were to conclude that a party subject to secrecy laws in another jurisdiction could use those laws to shield themselves from the legitimate exercise of powers to enforce securities regulation in British Columbia. In short, the Nevis privacy laws are not relevant.’ ”

¶ 46 We find that BCSC staff was authorized under the Act to request the information they did, and that the secrecy laws of the Bahamas are no basis for not complying with BCSC staff’s requests.

¶ 47 We find that Gibraltar’s refusal to provide the BCSC with the names, account information, and account statements for all British Columbia residents who have beneficially held accounts with it makes Gibraltar unsuitable to engage in securities related activities in, or connected with, British Columbia.

VI Findings and analysis - the freeze order application

¶ 48 Section 151 of the Act provides as follows:

“(1) The commission may make a direction under subsection (2) if

(a) it proposes to order an investigation in respect of a person under section 142 or during or after an investigation in respect of a person under section 142 or 147,

(2) in the circumstances described in subsection (1), the commission may direct, in writing,

(a) a person having on deposit, under control or for safekeeping any funds, securities, exchange contracts or other property of the person referred to in subsection (1), to hold those funds, securities, exchange contracts or other property, and

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- (b) a person referred to in subsection (1)
(i) to refrain from withdrawing any funds, securities, exchange contracts or other property from any person having them on deposit, under control or for safe-keeping.”

¶ 49 Gibraltar argues that even if the Commission finds that it ought to have been registered or that it failed to provide information which it was required to provide, those findings cannot support the continuation of the freeze order. In the absence of any trading irregularities or regulatory concerns with Gibraltar’s Global accounts the freeze order should be set aside.

¶ 50 At the time the commission issued the freeze order, BCSC staff were investigating whether Gibraltar was complying with our securities laws and they produced evidence that

- BC residents had accounts with Gibraltar,
- Gibraltar was registered with the SCB,
- Gibraltar had accounts with Global Securities Corporation,
- Gibraltar was not registered under the Act,
- Gibraltar was taking instructions from clients for its trading in its Global accounts,
- Gibraltar’s Global accounts showed it was an active trader, both buys and sells, predominantly in shares that trade on the TSX Venture Exchange,
- Gibraltar BC clients were subjects of past and ongoing investigations for suspected market manipulation and one had been convicted of securities fraud and that Gibraltar had refused to comply with BCSC staff’s requests for information about their BC clients.

¶ 51 None of that has changed and now we have found that Gibraltar has contravened the Act.

¶ 52 Considering that to revoke the freeze order would be prejudicial to the public interest, we refuse Gibraltar’s application to revoke the freeze order.

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VII Summary of findings

¶ 53 We have found that:

1. Gibraltar held itself out as being in the business of trading and advising in securities in British Columbia and carried out both activities without being registered to do so, contrary to section 34 of the Act, and
2. Gibraltar's continued refusal to provide the commission with the names, account information and account statements for all British Columbia residents who have beneficially held accounts with it makes Gibraltar unsuitable to engage in securities related activities in, or connected with, British Columbia.

VIII Cease trade order

¶ 54 The commission has a broad public interest mandate to protect investors and maintain confidence in our capital markets, a mandate that has found strong support in our courts.

¶ 55 We consider that Gibraltar's continued refusal to provide the commission with the names, account information and account statements for all British Columbia residents who have beneficially held accounts is contrary to the public interest.

¶ 56 Considering it in the public interest, we order under section 161(1)(b) of the Act that Gibraltar cease trading in, and is prohibited from purchasing, any securities until we have rendered our decision in this matter.

IX Submissions on sanction

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

By June 13, 2012 The executive director delivers submissions to Gibraltar and to the secretary to the commission.

By June 27, 2012 Gibraltar deliver response submissions to the executive director and to the secretary to the commission. Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the commission.

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By July 5, 2012

The executive director delivers reply submissions, if any, to Gibraltar and to the secretary to the commission.

¶ 58 May 22, 2012

¶ 59 **For the commission**

Bradley Doney
Commissioner

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner