2012 BCSECCOM 69

David Charles Greenway and Kjeld Werbes

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	Kenneth G. Hanna	Commissioner
	David J. Smith	Commissioner
Hearing date	January 24, 2012	
Date of Decision	March 5, 2012	

Appearing

Joyce Johner	For the Executive Director
Douglas R. Eyford	For Kjeld Werbes

Decision
(Kjeld Werbes)

I Introduction

¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 On July 13, 2011 the executive director issued a notice of hearing, amended January 23, 2012 (see 2011 BCSECCOM 335 and 2012 BCSECCOM 21), alleging that David Charles Greenway and Kjeld Werbes contravened the Act. On February 22, 2012 we issued a decision relating to the allegations against Greenway (see 2012 BCSECCOM 59). This is the decision relating to the allegations against Werbes.

¶ 3 The notice of hearing alleges that Werbes contravened section 57.2(2) of the Act by purchasing 20,000 shares of Global Uranium Corp. while being in a special relationship with Global and with knowledge of a material fact relating to Global that had not been generally disclosed.

¶ 4 The executive director seeks an order prohibiting Werbes from purchasing or trading in securities or exchange contracts of any issuer with whom he is in a special relationship for a period of two and a half years and an order that Werbes pay an administrative penalty of $12,045.

¶ 5 Werbes says there ought to be no trading prohibition and that the administrative penalty should be between $3,000 and $5,000.

II Background

¶ 6 In November 2009 Global, a reporting issuer listed on the TSX Venture Exchange, became interested in a property known as the Anderson property. Global commenced negotiations with its owner and on March 29, 2010 retained Werbes to draft an acquisition agreement in a form acceptable to the Exchange.

¶ 7 On April 8, 2010 Werbes circulated to the parties a draft of the acquisition agreement. Werbes testified that he understood that the agreement reflected the commercial terms and that matters were settled as between Global and the seller, subject only to completing arrangements having to do with directors' and officers' liability insurance.

¶ 8 On April 12 Werbes sent a draft news release to Global.

¶ 9 The draft news release contained a reference to a finder's fee. There was some objection to including a reference to the finder's fee in the news release, so Werbes recommended that the acquisition agreement be amended to include a clause dealing with the fee. On April 13 Werbes sent the parties a signature-ready draft of the acquisition agreement with that amendment.

¶ 10 Werbes says that at that point he believed nothing further was required of him. He expected the parties would see to the agreement's execution, and that Global would attend to the necessary public filings and the issue of the news release.

¶ 11 On April 14 Werbes was contacted by his broker for investment instructions for some cash that had been deposited in his account. Werbes testified about what happened next:

> "Q . . . Can you describe for the panel the circumstances of your purchase of 20,000 Global Uranium shares that day?
>
> A I received a call from a broker that looks after the nominal or token account that I've got at HSBC securities. She said, $36,000 has just been put in your account, what do you want to do with it?
>
> Q And what did you say in response?
>
> A I said, why don't you check on a stock, Global Uranium, GU, let me know what it's doing. She gave me a response that the

> stock had become an active trader. It had nearly doubled in price since the day I last looked at the market. And I thought about it; I said, why don't you buy 20,000 shares at 35 cents or better.
>
> Q When did you last look at the market for Global Uranium?
>
> A I looked at it when I prepared the April 12th version of the news release. I checked to see what the trading price was. It was in the 20 cent range.
>
> Q All right. What did you take from her advice about the market for Global Uranium?
>
> A It's an old saying, the markets don't lie. When you have volume and you have a nearly doubling of the price, there has to be a reason. I concluded that the news release forwarded on April the 12th had been used."

¶ 12 Werbes' broker bought the 20,000 Global shares as instructed, at a total cost of $6,952.50.

¶ 13 On April 15 Werbes received a courier package enclosing one copy of the acquisition agreement signed by the seller, but not by Global. Werbes immediately called Global's president to find out if he had signed another copy. He had not, so Werbes arranged for Global's president to sign the agreement that day. The acquisition agreement was therefore not signed by both parties until April 15.

¶ 14 Also on April 15 Global asked Werbes to make some minor edits to the news release. Werbes did so and it was released the next day, April 16. The closing price of the Global common shares on April 16 was $0.45. It continued to rise until it reached a peak of $0.59 on April 23.

¶ 15 Werbes admits that:

- on April 14, 2010 he was a person in a special relationship with Global,
- the acquisition agreement for the Anderson property was a material fact or material change in relation to Global,
- when Werbes purchased Global shares on April 14 he had knowledge of the acquisition agreement that had not been generally disclosed,
- the acquisition agreement was generally disclosed by the close of the trading on April 16, 2010, and
- his share purchase on April 14 contravened section 57.2(2) of the Act.

¶ 16 Werbes testified that it was some time before he realized that he had purchased the Global shares before the news release was issued:

> "Q . . . When did you realize that you had in fact bought Global Uranium shares before the press release about the Anderson property transaction had been published?
>
> A You know, it's, there was a confirmation of trade slip that came through. I do not believe it was received by me in the week of the news release. I actually believe it was received in the week following, but even if it was received in that week of the 6th, or following the 16th, I opened it and I looked at it. And there's a date at the bottom, which was April 19th. I concluded the purchase had happened with an open order on April the 19th. I next looked at it, and the account statement from HSBC, it referred to the cash coming in on the 14th, and it referred to the purchase as being the 19th, and for the longest time I concluded that the purchase was an open order that got filled on the 19th. It wasn't until late October, November, when a lot of issues arose with respect to filings made by Global Uranium that I took care to look at more thoroughly, and in actual fact, the date I had looked at was the settlement date, in the top left-hand corner of the trade slip was the purchase date. That's when I realized that the trade had occurred on the 14th.

¶ 17 Werbes testified that he had done very few trades with the HSBC broker who bought the Global shares, and that "in every case where she'd ever initiated trades, she'd call me back once the order is executed." He says she did not call back to confirm that his purchase order for Global shares had been filled.

¶ 18 Werbes admitted on cross-examination that on April 15 he knew, when he was asked to make changes to the news release, that it had not been issued. He testified that he did not check the status of his order the day before because he had not received the telephone confirmation from his broker that his purchase order for the Global shares had been filled.

¶ 19 Werbes is 66 years old. He was admitted to the bar in 1973. He describes his practice as a corporate and commercial law practice based on mining, oil and gas, and securities transactions. At the relevant time he had practiced in this field for about 35 years.

¶ 20 Werbes testified in examination-in-chief about his failure to take steps to confirm that the news release had been published:

> "Q Did you take any steps to confirm whether in fact the news release had been published?
>
> A No. And in hindsight, it's probably one of the biggest mistakes I've ever made in my life. It created a situation that I never expected to be in, in my professional career or in my life. And I've given a lot of thought to the situation. All I can state is that I had every opportunity to do independent checking. It was an unintentional oversight. I didn't. The carelessness arose out of a lack of foresight and thoroughness, and I readily admit that there is a greater standard on me as a practicing solicitor to go beyond just what a broker would say under those circumstances. Especially the way the account – especially given the way that I dealt with [the HSBC broker], she is not a person that would under normal circumstances execute orders on the TSX Venture Exchange.
> . . .
> Q You indicated that a greater standard can be expected of a lawyer. Can you, Mr. Werbes, identify the steps you could have taken that day to satisfy yourself . . . whether or not the press release had in fact been published?
>
> A Had I walked into the office that day intending to place a purchase order, I would have probably looked up Stockwatch. If it didn't show on Stockwatch, I would have phoned a broker with realtime. . . . I would have done my own investigations, and if it didn't show, no matter what the circumstances were, I wouldn't have placed that order."

¶ 21 On cross-examination, he testified:

> "In hindsight, I readily admit that there's a greater duty of care . . . I readily admit that it was carelessness on my part, and there's a greater standard, and I should not have initiated that order. I readily admit that."

¶ 22 Werbes bought the Global shares through an account in his own name at a Vancouver investment dealer. He still owns the shares. He testified at the hearing that they were then worth about $3,000.

III Analysis

A Factors to Consider

¶ 23 There are three recent precedents from this Commission that involve insider trading: *Torudag* (2009 BCSECCOM 145; 2009 BCSECCOM 439, aff'd. 2011 BCCA 458); *Hu* (2011 BCSECCOM 355; 2011 BCSECCOM 514); and *Greenway*, the decision arising out of the same notice of hearing as this case.

¶ 24 In *Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22 the Commission discussed the factors relevant to sanction for contraventions of the Act. In *Torudag*, *Hu* and *Greenway*, the Commission grouped the *Eron* factors under these headings:

- the seriousness of the respondent's conduct and the damage done to British Columbia's capital markets
- the harm suffered by investors as a result of the respondent's conduct and the extent to which the respondent was enriched
- factors that mitigate or aggravate the respondent's conduct
- the respondent's past conduct
- the risk to investors and capital markets posed by the respondent's continued participation in the capital markets
- specific and general deterrence
- orders made by the Commission in similar circumstances in the past

Seriousness of conduct; damage done to British Columbia's capital markets

¶ 25 In *Greenway*, we said:

> "22 Illegal insider trading is serious, even when small amounts are involved, and the conduct is not intentional or done in ignorance of the rules. 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. When people in a special relationship with an issuer trade while in possession of material information about the issuer that has not been generally disclosed, the public's perception of the fairness of our markets is damaged.
>
> 23 This is especially so when it comes to the conduct of those who seek to earn a living by earning finder's fees from, and vending assets to, public companies, and by acting as a director or officer of those companies. These individuals are in a position to do great harm to the integrity of our markets if they act inappropriately. . . ."

¶ 26 The same can be said with even greater emphasis about the conduct of securities lawyers who act for public companies and in so doing become privy to

undisclosed material information. Market participants depend on these professionals to ensure that transactions are done properly and to act with the highest integrity. When one of them engages in illegal insider trading, the reputation of the market suffers. Werbes is a senior and experienced securities lawyer.

Harm to investors; enrichment

¶ 27 In *Torudag*, the Commission held that investors are harmed by illegal insider trading in direct proportion to the degree to which the trader is enriched. The Commission stated the measurement of enrichment as follows:

> "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."

¶ 28 Applying that method, we have subtracted Werbes' acquisition cost of the 20,000 Global shares he purchased ($6,952.50) from the value of those shares ($9,000) at the Global share price ($0.45) after the Anderson property acquisition agreement had been generally disclosed. The result is $2,047.50.

Mitigating and aggravating factors; past conduct

¶ 29 As in *Torudag*, Werbes' trading may not have been intentional, but it was careless. Werbes assumed, based on the volume and price of the Global shares on April 14, that the news release about the Anderson property acquisition had been issued and the information generally disclosed. He admits, as an experienced securities lawyer, that he knew the rules and ought to have confirmed that the news release had been issued before placing the order for Global shares. He acknowledges that "he had every opportunity to independently check but did not do so because of carelessness and lack of foresight and thoroughness." In our view, his failure to do so, as a knowledgeable and experienced securities lawyer, is an aggravating factor.

¶ 30 According to Werbes, it apparently took some time – about six months – for him to realize that he had purchased the Global shares before the news release was issued. We find this aspect of his testimony puzzling. He knew on April 15, when he received the partially-executed agreement and a request to amend the news release, that the acquisition had not yet been disclosed. He had to have remembered that only the day before he had placed his order to buy Global shares.

¶ 31 We wonder why, regardless of his expectation that his broker would phone to confirm his purchase, he did not call the broker to learn the status of his order, knowing that he had placed it before the news release had been issued.

¶ 32 We also wonder why, a few days later when he looked at the trade confirmation, he would take comfort in his mistaken belief that the purchase date was April 19. He knew that the news release was not issued until April 16 and that he had placed his order before the release had been issued. Not to mention that by April 19 the Global share price was well beyond his "35 cents or better" order.

¶ 33 These misgivings do not lead us to find that Werbes did not testify truthfully. However, they do temper the mitigating effect of his response once he realized what had happened. He did the right thing: he retained counsel and gave instructions to cooperate with the Commission staff investigation, and to report the matter to the Law Society of British Columbia. However, had he been paying attention more closely on April 15, 2010 to what was happening, he could have taken these steps much sooner.

¶ 34 Werbes cooperated with the investigation and admitted to the allegations in the notice of hearing, thereby shortening the hearing.

¶ 35 Werbes has no regulatory history.

Risk to investors and markets

¶ 36 Werbes' response, when he eventually became aware he had engaged in illegal insider trading, shows that he took it seriously, and evinces a desire to do the right thing in the circumstances. His testimony shows contrition, and in our opinion his participation in our capital markets at some point in the future would not pose any undue risk to investors or markets.

Specific and general deterrence

¶ 37 Sanctions must serve as a deterrent both to Werbes and to others against future misconduct. Misconduct of this type, even in comparatively benign circumstances, warrants a time-out from trading securities of issuers with whom the respondent has a special relationship, as well as a significant administrative penalty.

Previous orders

¶ 38 In *Torudag* and *Greenway*, the amounts involved were not great, and the panel did not find intentional wrongdoing. Of the two, *Torudag* is closer to the facts here than *Greenway*. *Hu* is clearly inapplicable – the amounts were much larger and the panel found that Hu acted intentionally.

¶ 39 In *Torudag*, the panel imposed a one-year prohibition against purchasing or trading securities generally, with some exceptions.

¶ 40 The *Torudag* panel determined the administrative penalty under section 162 by multiplying his enrichment (determined as described above) by 1.5, a multiplier Torudag and the executive director agreed was appropriate.

¶ 41 The circumstances here are similar to those in *Torudag*. The panel found that Torudag was an experienced and sophisticated trader, and was fully aware of the prohibition against persons in a special relationship trading on undisclosed material information. Werbes is an experienced securities lawyer and knew all about the insider trading rules.

¶ 42 Torudag not only knew the rules, he turned his mind to them when he decided whether it was appropriate to trade. So did Werbes.

¶ 43 The circumstances here differ from *Torudag* in one important respect. Werbes is an experienced securities lawyer and, as he acknowledges, is accordingly held to a higher standard. We stated above the expectations that market participants have of professionals like Werbes and the damage to the reputation of the market when those expectations are not met.

¶ 44 In *Greenway*, the executive director asked us to consider a different approach from *Torudag*, and suggests the same here: that instead of a general trading ban, we prohibit Werbes only from trading in securities of issuers with whom he is in a special relationship. We were persuaded by the executive director's argument in *Greenway* and made an order accordingly. We think the same approach is appropriate here.

¶ 45 In *Torudag*, the administrative penalty was determined by multiplying Torudag's enrichment ($24,514) by 1.5, yielding a penalty of $36,771. The executive director said in *Greenway*, and says here, that applying the multiplier approach from *Torudag* does not necessarily yield an appropriately severe financial sanction, and in these types of cases, could amount to a free pass for misconduct. The executive director proposes that we impose an administrative penalty consisting of Werbes' enrichment (determined under the *Torudag* methodology) plus an additional $10,000.

¶ 46 In *Greenway* we did not accept this approach to the administrative penalty. We said,

> "42 In this case, the multiplier approach yields a significant penalty in the circumstances. We see no need to depart from *Torudag* on this aspect of the sanctions. That said, as noted in *Torudag*, there is no formula for determining an administrative penalty. It remains open to the executive director to seek a penalty determined on another basis in circumstances where the multiplier approach would not yield an appropriate outcome."

¶ 47 As stated by the panels in *Torudag* and *Greenway*, there is no formula for determining an administrative penalty.

¶ 48 Enrichment is only one factor in the determination of an administrative penalty – all of the other factors described above are also relevant to penalty. The significance of enrichment to the quantum of the penalty is to ensure that persons who engage in illegal insider trading cannot profit from their wrongdoing. From this perspective, it is generally not sufficient to impose a penalty that merely removes the profit – the penalty must exceed the profit by a margin commensurate with the seriousness of the conduct. In that sense, the multiplier serves to establish a minimum administrative penalty. In *Torudag*, that turned out to be $36,771.

¶ 49 The impact of the enrichment factor on the administrative penalty depends on the degree of enrichment. If the enrichment is significant that factor alone may, after applying the appropriate multiplier, yield a penalty that is high enough to be appropriate in light of all the factors relevant to the penalty determination. Indeed, in those circumstances, the penalty could be higher than would be a penalty determined solely on the remaining factors.

¶ 50 In *Greenway* the enrichment factor alone yielded an appropriate penalty. We said:

> "48 In this case we have applied a multiplier of 1.5 times the amount we have found he was enriched. This results in an administrative penalty that significantly exceeds Greenway's enrichment and reflects the seriousness of the misconduct and the other factors relevant to sanction."

¶ 51 In *Greenway* we ordered an administrative penalty, applying a 1.5 multiplier to his enrichment, of $19,177.

¶ 52 However, in cases where the enrichment is not significant, the relative importance of the enrichment factor to the overall administrative penalty will diminish. In such cases, the administrative penalty determined by the consideration of the other

factors as well will be higher than the amount derived from the enrichment factor alone.

¶ 53 We agree with the executive director that, whatever methodology is employed, it must be clear to the markets that illegal insider trading will not be tolerated in any circumstances. It follows that the administrative penalty must be a significant part of that message. In the circumstance of this case, we agree with the executive director that the multiplier approach alone would not yield an appropriate outcome. In our opinion, Werbes' conduct warrants an administrative penalty greater than one derived from the enrichment factor alone.

B Appropriate Orders

¶ 54 Werbes' misconduct, although serious, is towards the low end of the range of misconduct for illegal insider trading. The number of shares he purchased and the dollar amounts involved were low. His contravention was careless rather than intentional. When it became apparent to him that his trading was improper, he took steps to cooperate with the Commission investigation and notified the Law Society.

¶ 55 That said, Werbes failed to meet the expectation that securities lawyers who become privy to undisclosed material information in the course of representing public companies will not trade on that information, no matter what.

Trading ban

¶ 56 Our orders prohibit Werbes only from purchasing or trading securities or exchange contracts of any issuer with whom he is in a special relationship. In the circumstances of this case, where there are mitigating factors, we consider a one-year prohibition to be appropriate.

Administrative penalty

¶ 57 Here, the difference in the administrative penalty proposed by the executive director ($12,045) and the high end of the range proposed by Werbes ($5,000) is significant. This difference of opinion arises from whether a multiplier approach is appropriate in the circumstances of this case.

¶ 58 For the reasons we have stated above, in our opinion, neither proposal is sufficient.

¶ 59 Werbes' enrichment was only about $2,000. Applying a 1.5 multiplier, which in our view would be appropriate to deal with the enrichment factor, would alone yield a penalty of only about $3,000. In our opinion, that would be too low after giving consideration to all of the other factors relevant to sanction. The penalty we have determined is one that significantly exceeds Werbes' enrichment and

reflects the seriousness of the misconduct and the other factors relevant to sanction.

IV Orders

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

1. under section 161(1)(b) of the Act, that Werbes cease trading in, and is prohibited from purchasing, any securities or exchange contracts of any issuer with whom he is in a special relationship until the later of March 5, 2013 and the date Werbes pays the amount described in paragraph 2; and

2. under section 162, that Werbes pay an administrative penalty of $25,000.

¶ 61 March 5, 2012

¶ 62 **For the Commission**

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner

David J. Smith
Commissioner