

# 2012 BCSECCOM 97

**Jo Ann Nuttall**

*Securities Act, RSBC 1996, c. 418*

## Hearing

<b>Panel</b>	Brent W. Aitken Don Rowlatt Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
<b>Date of hearing</b>	February 28, 2012	
<b>Date of Decision</b>	March 29, 2012	
<b>Appearing</b>		
Jeremy Gellis	For the Executive Director	
Patricia Taylor	For Jo Ann Nuttall	

## 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 November 18, 2011 (2011 BCSECCOM 521) are part of this decision.
- ¶ 2 We found that Jo Ann Nuttall made false or misleading statements to Commission staff, contrary to section 168.1(1)(a) of the Act, when she gave false and misleading evidence to Commission staff investigators in a compelled interview.
- ¶ 3 In her submissions on sanction, Nuttall argued that the circumstances surrounding the issuance of a freeze order under section 151 by the Chair of the Commission and the subsequent revocation of that order were relevant to the issue of sanction. On January 30 we ruled that they were not (2012 BCSECCOM 29). This decision includes our reasons for that ruling.

### II Analysis

- ¶ 4 The executive director seeks orders under section 161(1) prohibiting Nuttall for 15 years from:
- trading or purchasing securities,

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- acting as a director or officer of any issuer, registrant or investment fund manager,
- acting as a registrant, investment fund manager or promoter,
- acting in a management or consultative capacity in connection with activities in the securities market, and
- engaging in investor relations activities.

¶ 5 The executive director also seeks, under section 162, an administrative penalty against Nuttall of \$75,000.

¶ 6 Nuttall says the only order we should make under section 161(1) is a reprimand, and that any administrative penalty should not exceed \$5,000.

### **A Factors**

¶ 7 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:

- 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,

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- 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*

- ¶ 8 Nuttall lied under oath in a compelled interview. This is serious misconduct. The Commission’s investigative powers under the Act are one of the most powerful tools at the Commission’s disposal to protect the public interest. A witness who fails to tell the truth puts at risk the effective exercise of those powers.
- ¶ 9 Nuttall’s failure to tell the truth was not inadvertent. We found that she chose to conceal information under the guise of not remembering.
- ¶ 10 What makes this sort of misconduct serious is the potential impact on an investigation. Giving false or misleading information in an interview could hinder or frustrate an investigation in several ways. If, as here, the witness keeps information from investigators, the information withheld could be what investigators need to know to determine if wrongdoing has occurred (and if so, how much and by whom), or what they need to know to avoid following false leads.
- ¶ 11 Here, there is no evidence that Nuttall’s false statements hindered or frustrated the investigation, which the executive director acknowledges.
- ¶ 12 Indeed, Nuttall argued throughout this hearing that her trading in shares of Dynamic Ventures was not relevant to the main object of the investigators’ interest – trading in shares of Impala Mineral Exploration Corp. That was not relevant for the purposes of liability, but it is relevant to the consideration of the seriousness of her conduct for the purpose of determining sanctions. There is no evidence that she traded Impala shares.
- ¶ 13 The Commission investigator testified at the hearing that he found Nuttall to be “somewhat evasive” during the interview and that he was not finding the interview “overly productive” and so “decided to end it for the day.” The executive director describes the end of the interview for these reasons as “an unfortunate result” and argues that, although there is no way to determine where the investigation might otherwise have led, investigative paths “could have been lost” because of Nuttall’s untruthful responses.
- ¶ 14 In essence, it appears, the executive director is inviting us, absent evidence that Nuttall’s false statements hindered or frustrated the investigation, to speculate

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that, because of her false and misleading statements, investigative paths were not followed, and to impose sanctions accordingly. (Presumably we are also to assume those paths would have been fruitful.)

- ¶ 15 We decline the invitation. Nuttall's misconduct does not attract the scope and severity of sanction that would follow evidence that the misconduct hindered or frustrated the investigation. That said, her conduct is inherently serious and the sanctions must reflect that.

### *Enrichment; harm to investors*

- ¶ 16 There is no evidence that Nuttall was enriched or otherwise benefitted from her misconduct.

- ¶ 17 There is no evidence of harm to investors. In cases where the misconduct involves illegal distributions, fraud, market manipulation, illegal insider trading, or other market misconduct, panels have consistently held that harm to investors can be inferred in the absence of evidence. In this case, there is no basis to infer that Nuttall's misconduct harmed investors.

### *Mitigating or aggravating factors*

- ¶ 18 There are no mitigating factors.
- ¶ 19 The executive director says that Nuttall's testimony before us was an opportunity to clear the record, but instead she simply repeated the misleading statements she gave to the investigators at the interviews. The executive director does not go so far to say that her testimony at the hearing is an aggravating factor, but he asks us to consider it.
- ¶ 20 We did not find that Nuttall repeated at the hearing the false and misleading statements she gave to the investigators at the interview. We found that she was not credible in explaining the answers she gave at the interview. We stated that we based our finding that she did not answer truthfully the questions that were the subject of the notice of hearing solely on the transcript of the interview. The significance of her testimony and demeanour at the hearing, we said, served only to confirm that finding.

### *Past conduct*

- ¶ 21 There is no evidence that Nuttall has any regulatory history.

### *Risk to investors and markets*

- ¶ 22 The executive director says that Nuttall's behaviour "shows a calculated contempt for securities regulation and makes her a real risk to investors and to the capital

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markets.” This appears to be the basis on which the executive director seeks prohibitions under section 161(1).

- ¶ 23 Nuttall lied to investigators at the interview. Her testimony to us about whether or why she did that was not credible. To that extent, we agree with the executive director that she showed contempt for the securities regulatory process.
- ¶ 24 All of that is serious, but in our opinion it is a considerable leap to conclude, based on that alone, that she presents a risk to investors and our markets to the extent that all of the prohibitions the executive director seeks under section 161(1) are justified.
- ¶ 25 In determining sanctions, there must be a connection between the nature of the misconduct and the nature of the sanction imposed. That connection can be established through the nature of the conduct or by its seriousness.
- ¶ 26 Nuttall’s misconduct is serious, but the executive director has not shown a connection between her misconduct and all of the prohibitions he seeks. He seems to suggest that her dishonesty in the interview is sufficient grounds to bar her from the markets for all purposes for 15 years.
- ¶ 27 We disagree. Nuttall lied in her interview, but there is no evidence that as a result she hindered or frustrated the investigation. There are no aggravating factors. There is no evidence on which to base a conclusion that she ought to be subject to the exceedingly broad prohibitions the executive director seeks.

### *Specific and general deterrence*

- ¶ 28 We agree with the executive director that the sanctions we impose must be sufficiently severe to ensure that both Nuttall and others will be deterred from making false and misleading statements to investigators.

### *Previous orders*

- ¶ 29 The executive director cited one decision, *Hu* (2011 BCSECCOM 514), and two settlements (see 2010 BCSECCOM 620 and 2011 BCSECCOM 241) related to *Sungro* (see 2011 BCSECCOM 379). None of these is useful.
- ¶ 30 *Hu* was found to have intentionally misled commission staff with the intention of frustrating the investigation, and the statements he made were about critical evidence that linked him to the illegal insider trading that he was found to have done.
- ¶ 31 *Sungro* is an alleged manipulation case and the individuals who settled had direct involvement in the alleged manipulation. In addition, settlements are generally of

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limited use to hearing panels because they represent a negotiated outcome arising from a certain set of facts. The facts are generally stated as part of the settlement, but the other circumstances relevant to the parties' respective motivations to settle are not known.

### **B Sanctions**

- ¶ 32 Considering all the factors as stated above, the facts of this case do not justify ordering the scope and extent of the prohibitions the executive director seeks under section 161(1), nor the amount he seeks under section 162.
- ¶ 33 Here, the most significant factors are the seriousness of Nuttall's conduct and the need to address specific and general deterrence. Those who enjoy access to our capital markets are expected to respect the regime that regulates those markets. When they engage in conduct that puts at risk the effectiveness of the regulatory regime, in this case the effective exercise of the Commission's power of investigation, they, and others in the market, must appreciate that the consequences of that conduct will be commensurately serious.
- ¶ 34 In our opinion, the sanctions best suited to Nuttall's misconduct are a reprimand, a short trading ban, and a sufficient administrative penalty.
- ¶ 35 Determining the quantum of an administrative penalty in these circumstances is not an exact science. We have imposed a penalty that in our opinion reflects the seriousness of the misconduct and, in combination with the trading ban, is high enough to deter individuals from making false and misleading statements to commission investigators.

### **III The Freeze Order**

- ¶ 36 The executive director filed submissions on sanction on December 2, 2011 in which, as noted above, he sought, among other things, an administrative penalty of \$75,000.
- ¶ 37 On December 30 Nuttall filed submissions on sanction as well as submissions arguing that the circumstances surrounding the issuance and revocation of the freeze order were relevant to the issue of sanction.
- ¶ 38 Nuttall says it is "incomprehensible" that there was no communication among the executive director, the Chair and the panel about "the entire revocation process".
- ¶ 39 It is startling that she would make an assertion of that gravity in the absence of any evidence.

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- ¶ 40 On December 6, the executive director applied *ex parte* to the Chair of the Commission for an order under section 151 freezing certain of Nuttall's assets with an aggregate value of about \$80,000.
- ¶ 41 The Chair issued the freeze order on December 8.
- ¶ 42 On Friday December 9, Nuttall applied to us to have the freeze order revoked. This was the first we became aware that the freeze order had been issued. We did not have the opportunity to deal with Nuttall's application that day. On Monday December 12, the Chair revoked the order. Commission staff published the revocation of the freeze order and thereby we learned that the Chair had revoked the order. Nuttall's application then became moot. We therefore never considered Nuttall's application, nor the circumstances relating to the issue of the freeze order or its revocation.
- ¶ 43 Nuttall says that the freeze order created "an unfairness and jeopardy" to Nuttall that could not be remedied by its revocation because it amounted to a direction from the Chair to the panel to issue sanctions in the amount proposed by the executive director. This is so, Nuttall says, because the Chair "inserted herself into an ongoing proceeding, thereby seeking to influence" the panel's decision. Nuttall says a reasonable person would conclude that the Chair had determined that an administrative penalty of \$75,000 was appropriate.
- ¶ 44 We disagree. The objective of a freeze order is to preserve assets for the execution of statutory or common law rights of action, as well as regulatory orders made under the Act: *Patel* 2012 BCSECCOM 91. In our opinion, a reasonable person would consider the issuance of a freeze order as nothing more than a step the Chair considered appropriate to preserve assets in case the panel chose to impose an administrative penalty.
- ¶ 45 Commission hearing panels are comprised of independent and impartial adjudicators who make their decisions based solely on the evidence entered, and the submissions made, as part of the hearing process. They do not take direction from the Chair or anyone else about the appropriate outcome of matters before them.

### IV Orders

- ¶ 46 Considering it to be in the public interest, we order:
1. under section 161(1)(b) of the Act, that Nuttall cease trading in, and be prohibited from purchasing, securities until the later of September 29, 2012 and the date she pays the amount in paragraph 3 of these orders;

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2. under section 161(1)(j), that Nuttall is reprimanded; and
3. under section 162, that Nuttall pay an administrative penalty of \$15,000.

¶ 47 March 29, 2012

¶ 48 **For the Commission**

Brent W. Aitken  
Vice Chair

Don Rowlatt  
Commissioner

Suzanne K. Wiltshire  
Commissioner