BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Weicker, 2015 BCSECCOM 335 Date: 20150828

Robert Frederick Weicker and Amina Umutoni Weicker

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	Gordon Holloway	Commissioner
Hearing date	July 29, 2015	
Date of Decision	August 28, 2015	

Appearing

Jennifer Whately	For the Executive Director
H.R. Anderson	For Robert Frederick Weicker
Patricia A.A. Taylor	For Amina Umutoni Weicker

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. The Findings of this panel on liability dated April 2, 2015 (2015 BCSECCOM 19) are part of this decision.

[2] The panel found that:

a) Robert Frederick Weicker contravened section 57.2(3) of the Act when he informed Amina Umutoni Weicker about an undisclosed material fact in relation to a reporting issuer, Geo Minerals Inc.; and

b) Amina contravened section 57.2(2) when she purchased shares of Geo while she was in a special relationship to Geo (by virtue of her husband Robert's tip) and in possession of material undisclosed information.

[3] The panel dismissed an allegation that Robert contravened section 57.2(2) and dismissed the executive director's request to issue further orders against the respondents on the basis that the conduct of Robert and Amina was contrary to the public interest.

II. Position of the Parties

[4] The executive director seeks the following orders against Amina:

a) under section 161(1)(b) of the Act, that she cease trading in, and is prohibited from purchasing, any securities or exchange contracts of any issuer with whom she is in a special relationship for a period of 10 years;

b) under section 161(1)(g) of the Act, that she and Robert, jointly and severally, disgorge the profits gained from their contraventions of the Act, being $40,132.67; and

c) under section 162 of the Act, that she and Robert, jointly and severally, pay an administrative fine of $100,000.

[5] The executive director seeks the following orders against Robert:

a) that he be banned:
    i) under section 161(1)(b) from trading in or purchasing securities or exchange contracts, except that he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of any decision made by this panel;
    ii) under section 161(1)(d)(ii) from becoming or acting as a director or officer of any issuer or registrant;
    iii) under section 161(1)(d)(iii) from becoming or acting as a promoter;
    iv) under section 161(1)(d)(iv) from acting in a management or consultative capacity in connection with activities in the securities market; and
    v) under section 161(1)(d)(v) from engaging in investor relations activities,

    for a period of 15 years;

b) under section 161(1)(g) of the Act, that he and Amina, jointly and severally, disgorge the profits gained from their contraventions of the Act, being $40,132.67; and

c) under section 162 of the Act, that he and Amina, jointly and severally, pay an administrative fine of $100,000.

[6] Robert submits that the appropriate sanctions in this case are as follows:

a) under section 161(1)(b) that he be prohibited from purchasing or selling any securities or exchange contracts of any issuer with which he is in a special relationship for a period of one year;

b) under section 161(1)(g) that he, jointly with Amina, disgorge the sum of $40,132.67, being the profit gained from their contraventions of the Act; and

c) under section 162 that he pay an administrative fine of $20,000.

[7] Robert submits that the sanctions sought by the executive director are excessive in all the circumstances and are therefore unfair and inappropriate.

[8] Amina submits that the appropriate sanctions in this case are as follows:

a) under section 161(1)(b) that she be prohibited from purchasing or selling any securities or exchange contracts of any issuer with which she is in a special relationship for a period of one year;

b) under section 161(1)(g) that she, jointly with Robert, disgorge the sum of $40,132.67, being the profit gained from their contraventions of the Act; and

c) under section 162 that she pay an administrative fine of $20,000.

III. Analysis

A. Factors

[9] Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 SCC 37.

[10] In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified 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,
- 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.

B. Application of the factors

Seriousness of the Conduct

[11] Insider trading and insider tipping is serious misconduct under the Act. This conduct undermines public confidence in the fairness of our marketplaces.

[12] In *Torudag (Re)*, 2009 BCSECCOM 339 (at paragraphs 10 and 11) this Commission said

> The objective of the Act is to protect investors and the integrity of capital markets. 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 the market.
>
> The Act has several provisions intended to ensure that expectation is met. Section 86 (now 57.2) is one of the most important. It prohibits persons from trading in securities of an issuer while in possession of material information about the issuer that has not been generally disclosed. Trading in contravention of the section is serious misconduct – it damages the public's perception of the fairness of our markets.

[13] Amina submits that she was an inexperienced trader and unfamiliar with securities laws. She submits that the panel did not find that she intentionally contravened the Act or that she was familiar with insider trading rules. She says that she did not try to hide her trading activity, which she conducted in her married (and not maiden) name. She further states that we may conclude from the evidence that her trading did not have an impact on the market price of the Geo shares. All of these submissions are made in support of the notion that while the misconduct is serious, the sanctions requested by the executive director are excessive.

[14] Amina's submission that we did not find that she intentionally contravened the Act or that she was familiar with insider trading rules is, strictly speaking, true. However, such intent and knowledge are not requisite elements of a contravention of section 57.2. The panel made no finding, one way or the other, with respect to intent or her knowledge of insider trading rules. With the evidence before us, it is not even possible to make a finding of intent or knowledge, or lack thereof, at this stage of the proceeding.

[15] While acknowledging that his misconduct was serious, Robert submitted that there was no finding that he recommended or encouraged his wife to buy the Geo shares and that his misconduct was limited to telling his wife the undisclosed material information.

Harm to Investors

[16] All parties acknowledged that insider trading and tipping differs from some of the other misconduct prohibited by the Act in that there is no specifically identifiable investor who is harmed by the misconduct.

[17] In *Torudag*, the panel noted that insider trading harms investors in direct proportion to the enrichment of the respondent. We agree.

Enrichment

[18] All parties agreed that Amina and Robert were jointly enriched by their misconduct in the amount of $40,132.67. They were jointly enriched because this amount was deposited into an account jointly held by them.

Aggravating or mitigating factors; past misconduct

[19] Robert has a history of securities regulatory misconduct. In 2007, Robert entered into a Settlement Agreement and Order with the Commission in relation to the contents of several press releases that he signed as an officer and director of an issuer. The nature of the misconduct in the Settlement Agreement is not related to insider trading and tipping.

[20] While the misconduct is unrelated to the case before us, this previous behavior is an aggravating factor and raises concerns for us about whether Robert learned from his previous sanction.

[21] Robert is also an experienced market professional who professed an extensive knowledge of the insider trading provisions of the Act. We find it to be an aggravating factor that an experienced market professional would engage in contraventions of section 57.2.

[22] Amina has no previous history of securities regulatory misconduct.

[23] Amina submits that she is not a legal or a market professional and that she should not be held to a higher standard of conduct that respondents with that background have been held to in prior decisions of this Commission. This is argued as a mitigating factor. We agree that she should not be held to the standards associated with people in those professions. As with Robert, it would be an aggravating factor if she were a member of one of those professions; however, the absence of an aggravating factor is not the same as a mitigating factor.

[24] We do not find there to be any mitigating factors in this case.

Fitness to continue to participate in the capital markets

[25] The misconduct of both the respondents relates to their trading in securities of an issuer with whom they were in a special relationship.

[26] Other than the fact that Robert has a previous history of securities regulatory misconduct, there is nothing in the evidence to raise concerns about the respondents' fitness to continue to participate in the capital markets. If anything, the evidence indicates that Robert played an important role in assisting a junior mining company to complete a significant capital markets transaction. The prior infractions related to misconduct in 2004 and were unrelated to insider trading. As a consequence, we believe that our sanctions should be focused on market prohibitions that relate to the misconduct and not on broad, all encompassing, market prohibitions.

Specific and general deterrence

[27] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous Orders

[28] The executive director directed us to a number of decisions of the Commission that he says involve factual circumstances that are analogous to those before us in this matter. The decisions cited were *Greenway (Re)*, 2012 BCSECCOM 59 and 69 (in relation to both of the respondents, Greenway and Werbes), *Jin (Re)*, 2014 BCSECCOM 424 and *Siddiqi (Re)*, 2005 BCSECCOM 575.

[29] The respondents cited one other sanction decision in an insider trading case for our consideration, *Torudag (Re)*, 2009 BCSECCOM 339, and submit that that case is most analogous to this case.

[30] The *Greenway* case involved separate decisions against the two respondents, Greenway and Werbes. Both respondents were found liable for insider trading. The panel found that their misconduct was unintentional and the amount of the insider trading and personal enrichment was significantly less than the case before us (Greenway's enrichment was $12,785 and Werbes' was $2,047).

[31] Werbes was an experienced securities lawyer. The panel noted that the damage to the capital markets is larger when those participants who should be held to a higher standard fail to meet those standards.

[32] The panel ordered 12-month prohibitions for Greenway and Werbes and only in respect of securities of issuers with whom they were in a special relationship. The executive director did not seek disgorgement orders against either respondent. The panel ordered Greenway to pay an administrative fine of $19,177 (or 1.5 times the amount of his enrichment) and Werbes to pay an administrative fine of $25,000.

[33] The *Jin* case similarly involved a legal professional who was found to have engaged in insider trading resulting in a modest amount of personal enrichment. Jin was enriched in the amount of $4,280 by her misconduct. Jin received a 12-month trading prohibition limited to issuers with whom she had a special relationship. She was ordered to disgorge her $4,280 in trading profits and received a $12,000 administrative fine. In imposing the administrative fine, the panel noted that where the amount of personal enrichment is small, a "multiplier analysis" of the appropriate administrative fine may not lead to a sanction that is large enough to provide an adequate deterrent.

[34] The *Siddiqi* decision involved a respondent who was found liable of insider trading but also of other misconduct, including conducting trading activity that resulted in the misleading appearance of trading in, and an artificial price for, the shares of a listed issuer. As a consequence, the decision is not directly analogous to that before us.

[35] The panel estimated that Siddiqi's was enriched from his misconduct by less than $33,000. Siddiqi received broad market prohibitions for six years and an administrative fine of $60,000.

[36] Lastly, *Torudag* involved a respondent found liable of insider trading only. The respondent was an experienced market professional. Torudag's personal enrichment from his misconduct was $24,514. The panel ordered a one-year trading prohibition limited to the securities of issuers with whom Torudag was in a special relationship. The executive director did not seek disgorgement. The panel ordered an administrative fine against Torudag in the amount of $36,771 or 1.5 times the amount of his enrichment.

Analysis and application of previous orders

[37] In this case, the parties have agreed that the market prohibition against Amina should be limited to a trading ban in respect of issuers with whom she has a special relationship. The parties also agree that a disgorgement order, made jointly against the respondents, in the amount of the respondents' enrichment, is also appropriate.

[38] The parties do not agree on (i) the breadth of the market prohibitions against Robert (whether it should be limited to a trading prohibition only or broad market prohibitions); (ii) the length of the market prohibitions (regardless of how broad they are); and (iii) the amount of the administrative fines.

[39] The *Jin* and *Greenway* decisions are analogous to this case, but the amount of Robert and Amina's enrichment is significantly in excess of that of Jin, Greenway and Werbes. The *Torudag* case is the closest comparison to this case, but the amount of Robert and Amina's enrichment is still in excess of that of Torudag.

(i) Breadth of market prohibition

[40] All of these cases (*Jin*, *Greenway*, and *Torudag*) suggest that a targeted market prohibition, limited to a prohibition against trading in securities of an issuer with whom the respondent has a special relationship, is the appropriate market prohibition sanction for insider trading misconduct. The executive director says that Robert's previous securities regulatory misconduct makes an order imposing broader market prohibitions more appropriate. We do not agree. We agree that that history is an aggravating factor and one that does have an impact on our orders, but we do not agree that in the circumstances of this case, that history warrants broadening the scope of our order for market prohibitions. Robert's current misconduct is tipping (and thereby tied to insider trading) and our orders should focus on deterrence of that misconduct.

(ii) Length of market prohibition

[41] The executive director has asked for a trading prohibition against Amina for 10 years and a broad market prohibition against Robert for 15 years. None of the decisions submitted by the executive director support sanctions even remotely close to these. We do not see any public interest reason to depart from the range suggested as appropriate by the cases cited. The misconduct here is more serious than that of Jin, Greenway, Werbes and Torudag and the length of the prohibitions should reflect that. Robert's previous securities regulatory misconduct and his being an experienced market professional, means that the length of his prohibition should be longer than that for Amina. We find that a two-year trading ban on Amina and a three year trading ban on Robert is appropriate in the circumstances.

(iii)Administrative penalty

[42] The executive director has asked for a $100,000 administrative fine to be ordered jointly against Robert and Amina. The concept of a joint administrative fine is not one that ordinarily makes sense in the context of securities regulatory sanctions. A joint fine could result in one respondent paying the whole amount of the fine and another respondent paying none of it. Each respondent's sanction should be separately assessed as to what is appropriate.

[43] Robert and Amina's enrichment was greater than the respondents in any of the analogous cases. As noted above, the impact on our capital markets by insider trading is proportionate to the amount of a respondent's enrichment. The amount of the administrative fines should reflect this more serious market impact. We also find that Robert's previous securities regulatory misconduct should result in his receiving a larger administrative fine. We find that an administrative fine of $40,000 for Amina and $60,000 for Robert is appropriate in the circumstances.

IV. Orders

[44] Considering it to be in the public interest, we make the following orders with respect to Amina:

a) under section 161(1)(b) of the Act, that she cease trading in, and is prohibited from purchasing, any securities or exchange contracts of any issuer with whom she is in a special relationship for a period of two years;

b) under section 161(1)(g) of the Act, that she and Robert, jointly and severally, pay to the Commission $40,132.67; and

c) under section 162 of the Act, that she pay an administrative fine of $40,000.

[45] Considering it to be in the public interest, we make the following orders with respect to Robert:

a) under section 161(1)(b) of the Act, that he cease trading in, and is prohibited from purchasing, any securities or exchange contracts of any issuer with whom he is in a special relationship for a period of three years;

b) under section 161(1)(g) of the Act, that he and Amina, jointly and severally, pay to the Commission $40,132.67; and

c) under section 162 of the Act, that he pay an administrative fine of $60,000.

August 28, 2015

For the Commission

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Gordon Holloway
Commissioner