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

Citation: Re Wood, 2015 BCSECCOM 169 Date: 20150506

Douglas William Falconer Wood

Panel	Judith Downes	Commissioner
	Nigel P. Cave	Vice Chair
	Gordon L. Holloway	Commissioner
	Don Rowlatt	Commissioner
Hearing Date	April 1, 2015	
Submissions Completed	April 1, 2015	
Date of Decision	May 6, 2015	

Appearing

Jennifer L. Whately	For the Executive Director
H. Roderick Anderson	For Douglas William Falconer Wood

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 made on January 15, 2015 (2015 BCSECCOM 28), are part of this decision.

[2] The panel found that Douglas William Falconer Wood:
a) breached s.168.1(1)(a) of the Act when he lied to Commission staff during a compelled interview; and
b) acted contrary to the public interest.

[3] The panel dismissed an allegation brought by the executive director, that the respondent breached section 57.2(2) of the Act when he traded securities of Highland Resources Ltd. between December 8, 2010 and December 13, 2010.

II. Analysis

A. Position of the Parties

[4] The executive director seeks:

a) permanent bans under sections 161(1)(b), (c), (d)(i-iv), (f) and (g) of the Act; and
b) an administrative penalty of at least $250,000 under section 162 of the Act.

[5] Wood submits that the appropriate sanctions in this case are as follows:

a) under section 161(1)(d) of the Act, that he be prohibited from becoming or acting as a registrant for a period of six months; and
b) an administrative penalty of $30,000 under section 162.

B. Factors

[6] 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.

[7] 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.

C. Application of the factors

Seriousness of the Conduct

[8] The respondent lied under oath in a compelled interview. The respondent acknowledges that this is serious misconduct. The respondent further acknowledges that the lies were

intentional and went to the heart of the matter under investigation. The investigative powers of the Commission under the Act are integral to its ability to protect the public. Wood's misconduct was intended to undermine the Commission's investigation and thereby impair the Commission's ability to fulfil its mandate.

[9] The respondent's lies did hinder the Commission's investigation in that it took almost one year for the Commission to discover his beneficial ownership of offshore trading accounts.

[10] There is a pattern to Wood's misconduct. He also lied to his principal regulator, IIROC, and his employer (whose compliance department is the first line of registrant oversight). His offshore trading was structured to hide his trading activity from local oversight, for whatever reason. He repeatedly traded shares that were on his employer's restricted list and while there is no evidence to suggest that he did so at a time when he was in possession of material undisclosed information, this trading is a continuity of behaviour that lacks honesty and integrity.

Enrichment; harm to investors

[11] There is no evidence of harm to investors.

[12] Wood did profit, in a non-material amount, from his trading of securities that were on his employer's restricted list. We did not find this conduct, by itself, to be conduct contrary to the public interest and therefore we do not place much weight in our decision on this enrichment.

Mitigating or aggravating factors

[13] There are no mitigating factors.

[14] It is an aggravating factor that Wood was a registrant at the time of the misconduct. However, in saying this, we must be mindful not to "double count" his being a registrant into the totality of the liability and sanctions findings against him. In our findings we noted that Wood's conduct was contrary to the public interest, in part, due to the standards of conduct (particularly with respect to honesty and integrity) that are expected of registrants. Therefore, our liability findings are founded, in part, on Wood having been a registrant. It would not be proper to place undue weight, as an aggravating factor, on his having been a registrant.

[15] The executive director submits that, even without a finding of a contravention of section 57.2(2), we may infer from Wood's offshore trading structure that his trading was somehow improper. He suggests this is a significant aggravating factor and is the primary basis for the very significant sanctions requested in this case. We do not agree that we may make that inference. Although Wood's offshore trading structure clearly ensured a lack of transparency to that activity, we do not know the reasons for that structure and whether or not it has anything at all to do with activity that we have the jurisdiction to regulate. As is noted below, because we decline to make the inference suggested by the executive director, we reach a different conclusion on sanctions than those requested by the executive director.

Past Conduct

[16] Wood has been a registrant for a significant period of time and there was no evidence of any prior regulatory proceedings against him or other evidence of prior misconduct.

Fitness to be a registrant; Risk to the capital markets

[17] The nature of Wood's misconduct does raise concerns about his fitness to be a registrant and whether he represents a risk to the capital markets. A registrant must act with honesty and integrity or members of the public will be put at risk.

[18] Due to the nature of the misconduct, we think a significant market ban is appropriate but not one that would permanently bar the respondent from ever working in the capital markets again.

[19] The respondent is not currently working as a registrant and has not been working in the capital markets since being terminated by his employer as discussed in our Findings. The respondent suggests that this "time out" of the market should be taken into account in determining the length of our market prohibitions. In effect, the respondent is suggesting that we apply something akin to a "time served" concept in our sanctions determination. First, there was no temporary order imposed by the Commission in this case. There has been no regulatory restriction on Wood working in the capital markets. In addition, we have no evidence as to why the respondent has not been working as a registrant or otherwise in the capital markets. The respondent suggests his lack of employment as a registrant is a result of the current proceeding. However, there was no evidence to support that submission. Furthermore, we cannot infer that the length of the current proceedings have contributed to his inability to work as a registrant. There are many reasons why a Commission proceeding takes the length of time that it does to reach a conclusion, some of which are in the control of a respondent. We do not see the factual or public interest basis for taking Wood's "time out" of the industry into account in determining the length of the market prohibitions in this case.

Specific and general deterrence

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

Previous orders and application

[21] The executive director submits that the decision in *Hu (Re)*, 2011 BCSECCOM 514 is analogous to the current case. In that case, Hu was found to have engaged in substantial insider trading in contravention of what is now section 57.2(2). Hu was substantially enriched by his trading activity. He also lied to Commission investigators with the intention of frustrating and concealing his insider trading. Hu received a permanent market ban, a $1 million administrative penalty for his insider trading and a $500,000 administrative penalty for his breach of section 168.2 and to reflect his conduct generally.

[22] The problem with using *Hu* as a precedent for sanctions in this case is that here, unlike in *Hu*, there is no serious misconduct tied to the lying to investigators. The executive

director asked us to make that inference but we have declined. We do not see *Hu* as applicable to setting sanctions in this case.

[23] The respondent points to the decisions in *Re Edward Bernard Johnson,* and *Re Nuttall*, 2012 BCSECCOM 97 as indicative of the appropriate sanctions in this case. The facts in *Johnson*, 2007 BCSECCOM 437 are very analogous to the circumstances of this case. Johnson was a registrant that accepted instructions for trades in a brokerage account from a different party than the account holder. The person providing the trading instructions was the subject of a market ban imposed by the executive director. Johnson then lied to Commission staff about this conduct on several occasions.

[24] In *Johnson*, as is the case here, a registrant without a prior history of misconduct conducted himself in a manner that was far below that expected of a registrant and then intentionally lied about that conduct to regulators. The panel found that there was no evidence of harm to investors but Johnson was found to have been enriched by the conduct through the commissions earned on the trading activity. The panel imposed a 6 month suspension on Johnson acting as a registrant, a period of strict supervision for the first 6 months after employment by a firm after the end of the suspension and an administrative fine of $68,000. The $68,000 was determined by doubling the amount of the commissions earned by Johnson and then adding $20,000 for having lied to investigators.

[25] In *Nuttall,* the respondent intentionally lied during a compelled interview. The panel found that she continued to lie during the hearing. Similar to this case, there was no evidence that Nuttall was enriched by her behaviour or had any history of regulatory misconduct. Interestingly, in that case the executive director similarly cited *Hu* and invited the panel to infer that the respondent's lying frustrated investigations into other potential misconduct. That panel similarly declined to make that inference. Nuttall received a 6 month trading ban and was ordered to pay an administrative penalty of $15,000.

D. Sanctions

[26] Wood has been found to have contravened section 168.1 and that misconduct can attract sanctions under both sections 161 and 162. The finding that Wood acted contrary to the public interest may only be considered for sanctions under section 161 – no administrative penalty can be attributed to that conduct.

[27] We think it appropriate and in the public interest to generally follow the sanctions imposed in *Johnson* and *Nuttall.* Those decisions suggest market prohibitions in the range of 6 months for a breach of section 168.1. We would impose a further 6 month ban in respect of the finding that Wood acted contrary to the public interest. In this case, we do not think it necessary to impose prohibitions on Wood as it relates to trading in securities. His misconduct was not connected to those activities. As a consequence, we would not impose any sanctions under section 161(1)(b) or (c). We also do not think it necessary to impose any restrictions on his being a director or officer of an issuer and so do not impose any sanctions under sections 161(1)(d)(i) or (ii). Further, the executive director's request for a ban under section 161(1)(g) does not make sense as that section is

the disgorgement provision of the Act. We do not make any order under section 161(1)(g). We agree with the respondent that an administrative penalty of $30,000 is appropriate in the circumstances.

[28] Considering it to be in the public interest, we order:

a) under section 162, Wood pay an administrative penalty of $30,000; and

b) under:

   i) section 161(1)(d)(iii), that Wood be prohibited from becoming or acting as a registrant;

   ii) section 161(1)(d)(iv), that Wood be prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and

   iii) section 161(1)(f), that Wood's registration be suspended,

   in each case for a period ending one year from the date of this Order.

May 6, 2015

For the Commission

Judith Downes
Commissioner

Gordon L. Holloway
Commissioner

Nigel P. Cave
Vice Chair

Don Rowlatt
Commissioner