2007 BCSECCOM 773

Hearing

James Terrence Alexander, Anne Christine Eilers and JT Alexander and Associates Holding Corporation

Sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418

Panel	Robin E. Ford Commissioner Neil Alexander Commissioner John K. Graf Commissioner
Date of sanctions hearing	December 3, 2007
Date of decision	December 31, 2007
Appearing	
Mark L. Hilford and Lisa D. Ridgedale	For the Executive Director
Robin N. McFee, Q.C. and Craig P. Dennis	For James Terrence Alexander and JT Alexander and Associates Holding Corporation
Submissions filed by	
Michael J. Hewitt	For Anne Christine Eilers

Decision

Introduction

¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. This decision should be read with our findings made on October 24, 2007 (2007 BCSECCOM 645).

¶ 2 From 1989 to 1995, James Terrence Alexander held a controlling interest in Arakis Energy Corporation, a reporting issuer listed on the Vancouver Stock Exchange, now the TSX Venture Exchange. Alexander served for varying periods as a director, chairman, president and CEO of Arakis. The executive director investigated Alexander's trading in Arakis shares and other matters. On February 23, 1999, Alexander, JT Alexander and Associates Holding Corporation (JTA)

and the executive director entered into a settlement in which Alexander agreed that, while he was a director and officer of Arakis, he had committed numerous breaches of the Act including:

- contravening the Act by causing Arakis to file one false press release and failing to file six press releases and material change reports, so concealing his direction and control of Arakis shares through various entities, contrary to section 85 of the Act;
- trading more than 25 million shares in Arakis when he knew or ought to have known that seven material facts or changes had not been disclosed, contrary to section 86 of the Act;
- failing to file insider reports, contrary to section 87 of the Act;
- causing Arakis to issue misleading Form 20s; and
- causing Arakis to breach sections 34 and 61 of the Act.

¶ 3 Alexander paid $1,200,000 to the BCSC and consented to an order by the executive director under section 161(1) of the Act. Under the order, for a period of 20 years from the date of the order:

a. the trading exemptions described in sections 44 to 47, 74, 75, 98 and 99 of the Act do not apply to Alexander and JTA;
b. Alexander must resign and is prohibited from acting as a director or an officer of any issuer; and
c. Alexander is prohibited from engaging in investor relations activities.

¶ 4 Alexander, through his family holding company JTA, was a major shareholder of Pinewood Resources Ltd. He was a director of Pinewood from November 3, 1993 to May 15, 1998, and was president during part of that time. Pinewood, then in the mineral exploration business to "review projects of merit for investment", was listed on the CDNX, now the TSX Venture Exchange.

¶ 5 At the beginning of 2000, Pinewood was a shell company that had limited assets and no operating business. In May 2000, after the consent order, Ian Neilson presented an oil opportunity in Ethiopia to Alexander. In July, they agreed to pursue the opportunity as a Pinewood project.

¶ 6 Anne Christine Eilers was Alexander's assistant and business associate. At various times, she was a director and officer of JTA and a director of Pinewood and its subsidiary Gambela Petroleum Corporation (GPC).

¶ 7 Prior to the hearing, Alexander pleaded guilty in Provincial Court Act to four counts of breaching the consent order by acting as a director and officer of four private issuers. On October 25, 2005, he was convicted and fined $2,000.

Findings

¶ 8 We found that, from June 2000 to June 2001, Alexander was involved in managing:

- expenditures,
- the organizational structure,
- the exploration program,
- contracts,
- budgets,
- relationships with the Ethiopian government,
- Neilson (as president, CEO and a director of Pinewood's subsidiary, GPC), and
- financing,

for Pinewood.

¶ 9 Therefore, we found that Alexander was acting as a *de facto* director and officer of Pinewood and so contravened the consent order and acted contrary to the public interest. We also found that Alexander engaged in investor relations activities for Pinewood, and so contravened the consent order and acted contrary to the public interest.

¶ 10 In addition, Alexander admitted that he continued to be, or was appointed as, a director and officer of six private companies, including JTA, after the date of the consent order. We found that, in acting as a director and officer of the six private issuers, Alexander contravened the consent order and acted contrary to the public interest.

¶ 11 We dismissed the allegations against JTA.

¶ 12 Eilers admitted that she was a "figurehead" director of JTA and that Alexander was the directing mind of JTA. We found that Eilers acted contrary to the public interest by assisting Alexander to contravene the consent order by allowing him to direct JTA's affairs while she was its sole director and officer of record.

Analysis

Positions of the parties

¶ 13 The executive director seeks an order permanently prohibiting Alexander from acting as a director and officer of any issuer and from engaging in investor relations activities, as well as an administrative penalty of at least $150,000.

¶ 14 In Alexander's view, the Provincial Court convicted him and imposed a fine and, for those breaches of the order, that should be the end of it. Alexander says that the appropriate sanction for the breaches related to his activities for Pinewood is an increase in the period of prohibition under the consent order from 20 years to 22 years. He says an administrative penalty, if appropriate at all, should not exceed $15,000.

¶ 15 For Eilers, the executive director seeks a prohibition on acting as a director or officer of any issuer for at least ten years. Eilers says that we should impose no sanctions on her.

Retrospectivity

¶ 16 Section 162 of the Act says that if the Commission, after a hearing, determines that a person has contravened the Act, the regulations or a decision, it can order the person to pay the Commission an administrative penalty. When Alexander first breached the consent order in 1999, the maximum administrative penalty under section 162 of the Act was $100,000. Section 162 was amended to increase the maximum penalty to $250,000 effective on May 9, 2002. Effective on May 18, 2006, the maximum penalty was increased again to $1 million.

¶ 17 Alexander was in breach of the consent order from February 23, 1999 to August 24, 2005. On December 8, 2003, the notice of hearing was issued. The evidentiary portion of the hearing ran from May 19, 2006 to June 16, 2006. On December 21, 2006, submissions on liability completed. On October 24, 2007, we issued our findings. On November 7, 2007, the executive director submitted written argument on sanctions.

¶ 18 On November 16, 2007, we asked the parties for submissions on our jurisdiction to make an order under section 162 of the Act as amended. Alexander and the executive director both argue that we have jurisdiction under the amended section 162 only if the conduct in question continued after the date of the amendment. The executive director says that the conduct continued after the date of the first increase to $250,000 (May 9, 2002); Alexander says it did not. Both parties argue that the presumption against retrospectivity applies to the amendment increasing the maximum penalty to $1 million because it took effect after the conduct had ceased.

¶ 19 In contemplating an appropriate sanction in particular cases under the Act, Commission panels consider what measures are required to protect investors and the integrity of our capital markets by discouraging the recurrence of the misconduct. The orders we make are not intended to punish respondents for their past conduct, but rather to deter them (specific deterrence) and others (general deterrence) from repeating the misconduct in the future.

¶ 20 We agree with our Commission in *Ian Gregory Thow*, 2007 BCSECCOM 758. It follows from the principles articulated in *Brosseau v. Alberta (Securities Commission)*, [1989] 1 SCR 301, and *Re Cartaway Resources Corp*, [2004] 1 SCR 672, that all the remedies in sections 161 and 162 of the Act are available from the date they come into force, unless this would be unfair. The executive director argues that it would be unfair to assess an administrative penalty under the current section 162 in this case. Alexander agrees with her submissions.

¶ 21 We disagree. There is no evidence of any unfairness to Alexander in proceeding under the current section 162. Alexander had the opportunity to make an application to us during the sanctions hearing with a view to correcting any particular unfairness, but did not do so. In these circumstances, it is not unfair to apply the current section 162.

Factors to consider

¶ 22 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,
- 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.

Application of the Eron factors to Alexander's conduct

¶ 23 Alexander is already prohibited from trading and purchasing securities, from acting as a director and officer of an issuer, and from engaging in investor relations activities for 20 years from the date of the consent order (February 23, 1999). The parties agree that we should impose an additional period of prohibition. The executive director asks for a lifetime ban and an administrative penalty of at least $150,000. Alexander says that adding two years and imposing an administrative penalty not exceeding $15,000 would be more appropriate.

Seriousness of the conduct

¶ 24 In assessing the seriousness of Alexander's conduct, we considered the importance of the provisions he contravened, as well as the frequency and duration of the contraventions and other aggravating factors.

¶ 25 While Alexander's conduct would not have breached securities laws but for the order, the fact is that, once the order was made, it became law. The breach of a Commission order, intended to keep a person out of our securities markets, is inherently serious. In addition, as the Commission pointed out in *Corporate Express Club*, 2006 BCSECCOM 153 (dealing with breach of a temporary order under section 161 of the Act), a respondent who has notice of the order, yet continues the activities prohibited by it, demonstrates a disregard for the regulatory system and such conduct is a significant aggravating factor.

¶ 26 Alexander's conduct was particularly aggravating. He acted as a director and officer for seven companies, over a lengthy period, as well as engaging in investor relations activities, all contrary to the order. While his activities as a director and officer of the six private companies were relatively minor because the companies were largely inactive, he was extensively involved with Pinewood, a public company and reporting issuer, both as a *de facto* director and officer and by engaging in investor relations activities.

¶ 27 Moreover, Alexander began to breach the order almost as soon as it was signed. It took him more than six years fully to come into compliance with the order on August 24, 2005. This after:

- in 1999, he was advised by his lawyers to resign and not to act as a director and officer of any issuer,
- in 2000, the president of Pinewood asked him not to get involved in investor relations activities,
- in 2001, when his business premises were searched, he was told he was being investigated for breach of the order,
- the notice of hearing in these proceedings was issued in 2003, and
- quasi-criminal charges were laid in August 2004.

¶ 28 We agree with the executive director that Alexander has shown an incredible disdain for the order and the regulatory system. Alexander had long been involved in raising capital and served for many years as a director and officer of public and private companies prior to the consent order. He should know what his responsibilities are. We found that the breaches were deliberate. Alexander chose to ignore the order. The breaches were utterly inexcusable.

¶ 29 We add a further aggravating factor. Alexander used Eilers not only to allow him to act as *de facto* director and officer of JTA, but also to provide some of the administrative support for the activities that we found made him a *de facto* director and officer of Pinewood. He exploited her. He also misled the directors of Pinewood when he concealed what he was doing and failed to disclose his relationship with Neilson. He abused his position.

Harm suffered by investors

¶ 30 We have no evidence of any losses or harm to individual investors as a result of Alexander's conduct.

Damage to British Columbia's capital markets

¶ 31 While Alexander's conduct as a director and officer damaged BC's capital markets only to the extent that he did not disclose his activities, as the Commission said in *Corporate Express* (at para 22):

> … If those who are subject to Commission orders could breach them with impunity, the enforcement function of the Commission would be rendered ineffective. This would cause significant damage to the markets of British Columbia, for they would be perceived as essentially unregulated. …

¶ 32 Alexander breached the order persistently for more than six years. Such behaviour brings the securities market into disrepute as unregulated and damages the capital markets accordingly.

Enrichment

¶ 33 There is no evidence that Alexander was enriched, but not for want of trying. He said he hoped to find financing for the oil project and earn a finder's fee. In putting the oil opportunity through Pinewood and continuing to search for financing for Pinewood, he aimed to increase the value of his Pinewood shares, which he held through JTA.

Mitigating factors

¶ 34 Alexander says that we should consider his admissions as a mitigating factor, and that we should also consider the embarrassment and cost he has borne in connection with the hearing.

¶ 35 We disagree. Alexander's admissions had no real impact on the efficiency of the hearing process. His admissions made before the hearing simply acknowledged that he had acted as a director and officer of the four private companies with respect to which he had already been convicted, and two others. He could not have reasonably argued that he had not so acted; the evidence was clear.

¶ 36 We do not regard embarrassment and cost to be mitigating factors. These are merely consequences of the hearing process. We do not find anything unusual in Alexander's circumstances. Nor do we view the fact that we dismissed some of the allegations against him as a mitigating factor.

¶ 37 Alexander also asks us to take into account the fact that he did not hide his role as a director and officer of the private companies. In most cases, his role was publicly disclosed in company records. In our opinion, this could also be viewed as a blatant flaunting of the order.

¶ 38 Finally, Alexander says we should treat his quasi-criminal convictions as a mitigating factor. While we have taken them into account for their contribution to deterrence (see below), we do not view them as a mitigating factor.

Past conduct

¶ 39 While Alexander has not previously contravened an order, we view him as a repeat offender. He admitted to many contraventions of the Act in connection with his involvement with Arakis, accepted a significant market ban, and paid a substantial amount to the BCSC. Alexander suggests that his history with Arakis is of only marginal relevance. We disagree. His conduct overall shows a pattern of behaviour where securities laws are not treated seriously or are ignored.

Risk that Alexander poses to British Columbia investors and markets

¶ 40 We agree with the executive director that Alexander poses a significant risk to investors and capital markets. He is a repeat offender who flagrantly disregarded securities laws. He ignored legal advice, concealed his activities, and showed no regard for the impact of his activities on Eilers and Pinewood's directors. His testimony before us was not open, it was self-serving and partial and, many times, we did not believe it. Alexander has shown no remorse for his actions.

¶ 41 Alexander has demonstrated a pattern of behaviour that, in our view, is not likely to change. This risk, taken with the seriousness of the breaches, requires a sanction with a significant element of specific deterrence.

Fitness to be a director and officer

¶ 42 Alexander remains unfit to act as a director or officer of an issuer other than one in which he and his immediate family are the sole shareholders. His less than forthright and evasive stance during his testimony, as well as his record as a repeat offender, goes to fitness and has a bearing on our assessment of his integrity and his likely future attitude toward compliance.

Need to deter those who participate in the capital markets from engaging in inappropriate conduct

¶ 43 We must make orders against Alexander that will demonstrate the consequences of his conduct and have an appropriate deterrent effect on him and others who participate in our capital markets.

¶ 44 A 20-year ban and a payment of $1,200,000 in 1999 were not sufficient to deter Alexander. Merely adding two years to the ban now will not go far enough. In our view, even a lifetime ban on acting as a director and officer and engaging in investor relations activities will not be enough to deter Alexander from future misconduct. While the stigma of his quasi-criminal convictions will contribute to his deterrence, in our view, a relatively high administrative penalty is also needed.

¶ 45 General deterrence is also an important factor in deciding sanctions in the public interest. In *Cartaway*, at para 55, Justice LeBel noted the conventional view that participants in capital markets are rational actors. He stated that this is probably more true of market systems than it is of social behaviour, and it is therefore reasonable to assume that general deterrence has a proper role to play in determining the severity of orders made in the public interest.

¶ 46 Part of the Commission's mandate is to deter future misconduct by those against whom orders have been made. Any penalty which will effectively speak to all participants in the capital markets must be relatively severe to be meaningful. As

the Alberta Securities Commission said in *Re Capital Alternatives Inc*, 2007 ABASC 482 (at paras 29-30):

> . . . Stated simply, an administrative penalty sends the message, to the particular respondent and to other market participants, that future conduct similar to that being sanctioned is not tolerated and will come at a direct financial cost. …

¶ 47 Taken with Alexander's quasi-criminal convictions, this is not to "double-sanction" or punish Alexander. The role of the Commission under the Act is different from that of the Provincial Court. While they overlap to some extent, the factors that we consider are different from those considered by the Provincial Court and our sanctions are aimed at different public interest outcomes. In addition, the allegations we addressed and our findings of liability in these proceedings went well beyond the matters addressed by the Provincial Court (and we heard far more evidence).

Previous orders and other authorities

¶ 48 We have considered the cases submitted by the parties. In none of them does the conduct considered correspond to Alexander's conduct, taking into account his regulatory history, including his disregard of securities laws. The previous cases do not provide much guidance.

Certain exceptions

¶ 49 We asked the parties for submissions on whether there were public interest reasons why we should prevent Alexander from trading on his own behalf and acting as a director and officer of private companies owned by him or his immediate family. Alexander supported such exceptions. The executive director did not. In our view, protection of the public interest does not require us to prevent Alexander from so acting.

Application of the Eron factors to Eilers' conduct

¶ 50 Eilers acknowledges that our finding against her is serious, but asks us to take into account the fact that she allowed Alexander to operate an inactive company in a manner that caused no harm to anyone. She had admitted her role to BCSC staff and believed, correctly, that any transaction involving JTA would have to be approved by the Commission. There is no evidence that she was aware of Alexander's lawyer's advice that it would be unwise to appoint her as a director.

¶ 51 She notes that she has suffered disproportionate hardship as a result of the BCSC investigation.

¶ 52 We accept that the ten-year prohibition on acting as director or officer sought by the executive director is too long in the circumstances. We have also taken into account the fact that Eilers was used by Alexander to further his own ends, and that she has no history of misconduct.

¶ 53 On the other hand, Eilers was an experienced administrator and an experienced director and officer of both private and public companies. She knew about the consent order and that she was acting as a figurehead director and officer of JTA. She allowed Alexander to act as a *de facto* director and officer of JTA in negotiating the sale of its Pinewood shares. She misunderstood her duties and responsibilities as a director and officer.

¶ 54 In our view, a short prohibition is appropriate, with a condition that she complete a course on the duties and responsibilities of directors and officers.

Decision

¶ 55 Considering it to be in the public interest, under section 171 of the Act, we revoke the consent order of February 23, 1999 and we order:

Alexander

1. under section 161(1)(b) of the Act, that Alexander cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts, except:

   (a) through one account in Alexander's own name, and one account in the name of any private issuer of which Alexander is permitted to be a director or officer, and

   (b) solely through one dealer registered to trade in securities under the Act, to which Alexander has given a copy of this order before any trade or purchase takes place;

2. under section 161(1)(d)(i), that Alexander resign any position he holds as a director or officer of an issuer, except an issuer all the securities of which are owned beneficially by him or his immediate family, and which does not engage in investor relations activities;

3. under section 161(1)(d)(ii), that Alexander is prohibited permanently from becoming or acting as a director or officer of any issuer, except an issuer all the securities of which are owned beneficially by him or his immediate family, and which does not engage in investor relations activities;

4. under section 161(1)(d)(v), that Alexander is prohibited permanently from engaging in investor relations activities;

5. under section 162, that Alexander pay an administrative penalty of $200,000; and

Eilers

6. under sections 161(1)(d)(i) and (ii) of the Act, that Eilers resign any position that she holds as a director or officer of any issuer and is prohibited from becoming or acting as a director or officer of any issuer, except an issuer all the securities of which are owned beneficially by her or her immediate family, until the later of:

   (a) one year from the date of this order; and

   (b) the date that Eilers successfully completes a course of study satisfactory to the Executive Director concerning the duties and responsibilities of directors and officers.

¶ 56 December 31, 2007

¶ 57 **For the Commission**

Robin E. Ford
Commissioner

Neil Alexander
Commissioner

John K. Graf
Commissioner