

Citation: 2015 BCSECCOM 19

Robert Frederick Weicker and Amina Umutoni Weicker

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Nigel P. Cave Audrey T. Ho Gordon L. Holloway	Vice Chair Commissioner Commissioner
--------------	---	--

Hearing Dates September 8 - 12, 2014

Submissions Completed December 12, 2014

Date of Findings April 2, 2015

Appearing

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

Findings

I Introduction

- ¶ 1 This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- ¶ 2 In a notice of hearing issued July 13, 2013 (2013 BCSECCOM 74), the executive director alleges that:
- while in a special relationship with Geo Minerals Ltd. (Geo), Robert Weicker informed Amina Weicker about an acquisition of 100% of Geo's shares before it was generally disclosed, contrary to section 57.2(3) of the Act;
 - while in a special relationship with Geo, and with knowledge of the acquisition of Geo's shares before it was generally disclosed, the respondents purchased shares of Geo, contrary to section 57.2(2) of the Act; and
 - the respondents' conduct described in the notice of hearing is contrary to the public interest.

- ¶ 3 During the hearing, the executive director did not advance any written or oral submissions on the allegation described in paragraph 2(c) above. As a consequence, that allegation is dismissed.
- ¶ 4 The notice of hearing contains a summary of Robert’s prior misconduct that is not related to the allegations in the notice of hearing. Some of the prior misconduct is related to matters regulated by the Commission and some of it is wholly unrelated to securities regulation. It is difficult to understand why a description of any prior misconduct, unrelated to the allegations, should appear in a notice of hearing. This is particularly true for matters that have nothing at all to do with securities regulation.
- ¶ 5 The only purpose for its inclusion must be to prejudicially sway a reader of the document against the respondent, which is inappropriate in the circumstances. To the credit of counsel for the executive director appearing before us, she did not exacerbate this problem by referring to the non-securities law related misconduct nor advanced any submissions on prior misconduct during the liability portion of the hearing. We have ignored this alleged prior misconduct.
- ¶ 6 During the hearing, the executive director called two witnesses, a Commission investigator and the CEO of Geo Minerals, and submitted other evidence, including interview transcripts of the respondents, given under oath, and audio recordings of phone calls. The respondents both testified and were separately represented by counsel at the hearing. They also submitted documentary evidence during the hearing.

II Background

- ¶ 7 Robert and Amina Weicker were residents of British Columbia during the period relevant to the allegations in the notice of hearing. They are married and reside together.
- ¶ 8 Geo was a junior mining company whose shares were listed on the TSX Venture Exchange during the time period relevant to this hearing.
- ¶ 9 Geo was a small mineral exploration company, with properties primarily situated in British Columbia. In the fall of 2010, Geo began to acquire claims in an area of the province known as the Blackwater area. From this time until Geo was acquired by New Gold Inc. (described below), it continued to acquire claims and conduct exploration work in this geographical area.
- ¶ 10 Beginning in the fall of 2010, Robert was a consulting geologist for Geo.
- ¶ 11 Robert had significant previous experience with the Blackwater area through work experience prior to his joining Geo.
- ¶ 12 Amina owns a number of business interests in Rwanda that the Weickers’ say are managed separately by Amina. Amina has also had some involvement in mining. Robert and Amina

are joint shareholders in a company called Multiple Metals Resources Ltd. Multiple Metals is the company through which Robert carries out his geological consulting engagements. Multiple Metals also holds a variety of interests in mineral claims. Amina also previously held a Free Miner's Certificate and has held several mineral claims in her own name.

- ¶ 13 Amina says that she has been interested in the Blackwater area since 2004 when the Weickers visited the area. She also testified that she has followed the public companies that hold property interests in the area since 2005. She says that she has followed the press releases and other public disclosure documents of these public companies.
- ¶ 14 In 2009, 2010 and 2011, the public companies with properties in the Blackwater region were actively promoting their activities in the region with numerous press releases.
- ¶ 15 In 2009, 2010 and 2011, there was also a considerable amount of consolidation activity in the Blackwater area. For example, on April 4, 2011, it was announced that Richfield Ventures Corp. (who had been acquiring interests in properties in the Blackwater area throughout 2009 and 2010), would be acquired by New Gold. New Gold is a TSX listed mining company.
- ¶ 16 Amina says that Richfield was one of the companies that she was following in the years leading up to 2011, as Richfield had been aggressively acquiring property interests in the Blackwater area.
- ¶ 17 Immediately following the April 4 announcement of New Gold's acquisition of Richfield, Geo completed a private placement. Robert and Amina both purchased securities of Geo as part of this offering. The issuance price of these securities was \$.06 per unit. Each unit comprised one common share of Geo and one common share purchase warrant, exercisable for one year to acquire one Geo common share for \$.10.
- ¶ 18 In late June of 2011, New Gold contacted Geo and expressed an interest in Geo's properties in the Blackwater area. This initial expression of interest culminated in a meeting in late July 2011, at which a senior executive of New Gold, Geo's CEO and Robert attended. The evidence from Geo's CEO and Robert was that this initial meeting went well.
- ¶ 19 The discussions between New Gold and Geo, following this initial meeting, concerned New Gold acquiring an interest in Geo's Blackwater properties. New Gold initially proposed an option or a joint venture arrangement. However, Geo preferred a take-over scenario that would see New Gold acquiring all of the shares of Geo.
- ¶ 20 In mid-August, Robert prepared an e-mail for Geo's CEO to send to New Gold proposing the terms on which New Gold would acquire all of the shares of Geo. Geo's CEO forwarded that proposal, materially unaltered, to New Gold. It appears from this point onwards that Geo and New Gold negotiated towards an acquisition of all of Geo's shares

and not simply towards a transaction based on New Gold acquiring an interest in the Geo properties.

- ¶ 21 Amina opened an online trading account with a bank-owned, online broker on August 27, 2011.
- ¶ 22 Robert and Amina gave different evidence as to Amina's decision to open the trading account. Amina said that it was her idea to open an online trading account and that Robert did not know that she had opened an account. Robert's evidence was that he knew Amina was opening a trading account. In fact, Robert said that he was in the bank with Amina when she went to open the account and that he had suggested that Amina open the online trading account with the bank-owned, online broker that she ultimately used.
- ¶ 23 Amina said she opened an online trading account because of the lower fees that an online trading account offered, that her existing broker at another firm was sometimes difficult to reach and that she wished to trade in Geo shares in her own account. Most of this reasoning was odd, as Amina admitted in cross-examination that her purchase of Geo shares on September 12, 2011 was her first stock trade ever.
- ¶ 24 On September 5, 2011, Robert left on a trip to Africa and returned on September 19, 2011. Amina remained in Vancouver, as she was seven months pregnant at the time.
- ¶ 25 Negotiations between Geo and New Gold progressed. On September 9, 2011, Geo's CEO e-mailed Robert, while Robert was in Africa, the following message:

Just got off the phone with Hannes. He said that he thinks his board would go for 15 cents a share. Leave spinco with \$500k and Newgold would retain (or buy?) and hold around 10% which he suggests would look good on newco as well. Said optically if they paid an 80%-100% premium for us the next company they go to take out will expect same, etc etc. Said wasn't so much the \$. To that, of course, i said a simple solution is for us to move gm to 13 or so. He laughed. I also said 18 cents had been bounced around and that i may have been able to sell that if he came to us with that but that i would suggest his offer and see if i thought i could get enough votes. When i tell him yes he says he will take it to his board but didn't want to if i didn't think id get the vote. I think he is bluffing and that his board already knows but what the heck!

He would like to hear back early next week.

Thoughts?

15 isnt that bad actually ...

Hannes was the lead negotiator for New Gold in the discussions with Geo. Spinco was an entity in the transaction structure that would contain Geo's properties that were not located in the Blackwater area.

¶ 26 On September 10, 2011, Robert responded to this email as follows:

Well played Mike, let me chat with Glen and Wayne (6:10 a.m. here) and get back to you when I arrive in Maputo.

Mike was Geo's CEO. Glen and Wayne were significant shareholders in Geo.

¶ 27 On September 11, 2011, Robert e-mailed Geo's CEO and informed him that he had discussed the proposal with Glen and Wayne and that, while they suggested going back for a higher offer, they were supportive of the transaction at \$.15 as set out in the e-mail of September 9, 2011.

¶ 28 On September 12, 2011, Amina transferred \$60,500 into her on-line trading account from various bank accounts. Those accounts included Robert and Amina's joint accounts, a line of credit and a business account. That same day, immediately after transferring the funds into her account and while she was still standing in the bank following the transfer of funds, Amina commenced purchasing Geo shares. Amina placed her order by calling her online broker. On September 12 and 13, she acquired a total of 583,900 shares at \$0.10 and \$0.105 per share.

¶ 29 The executive director entered the recording (and associated transcript) of each of Amina's calls to her online broker to place orders to acquire Geo shares. Notwithstanding her account being an online account she appears to have placed all her orders by calling the broker and dealing with a representative. Her call on September 12, 2011 indicated the following:

- this transaction was her first use of the trading account;
- she was an inexperienced stock trader;
- she intended to use 100% of the funds (down do the last dollar, if possible) in her account to purchase Geo shares;
- she received a partial fill of her initial order while on the call; the price of the lowest ask then increased and she needed additional funds to purchase the remaining, originally requested shares at the new, higher price – Amina and the representative then proceeded to scour all of her linked corporate and personal accounts, while on the phone, to find the additional funds. Amina even asked if she could use a credit card for payment.

The overall impression created by the call was that Amina was extremely anxious to acquire as many Geo shares as she could as quickly as possible.

- ¶ 30 Notwithstanding this apparent urgency, Amina’s testimony was that she had followed the price of Geo shares for some time and that her price range for the shares was “in the 5 to 10 cents” range. Geo’s share price throughout much of the spring and summer of 2011 was within this range – between \$0.07 and \$0.09 per share. Amina did not acquire any Geo shares during this time period when the price was in her range. Her explanation was that she was in Africa from April to June of 2011.
- ¶ 31 However, this explanation does not explain why she suddenly purchased the Geo shares at a price above her suggested price range or the urgency to her purchase of Geo shares on September 12, 2011, when they were near their peak price for the year. In her evidence, Amina referred to an August 30, 2011 New Gold press release as the reason for her purchase of Geo shares on September 12, 2011. She also said that September 12, 2011 was the day that she received her password for her new trading account.
- ¶ 32 In fact, the press release of August 30, 2011 was a Geo press release which simply stated that Geo had completed an initial work program on its Blackwater property adjacent to the New Gold property. The release did not disclose any results of the work program. Amina gave no reason why this news spurred her to urgently acquire Geo shares twelve days later.
- ¶ 33 On September 16, 2011, New Gold presented a non-binding Letter of Intent for the transaction to Geo’s CEO. That Letter of Intent included a higher per share offer for the Geo shares than suggested by the September 9, 2011 e-mail but also had some different transaction structural terms. The CEO then sent an e-mail to Robert with the following e-mail note:
- We have something in writing. The eagle is landing!!
- ¶ 34 On September 21, 2011, Amina transferred a further \$9,700 into her trading account. On September 30, 2011, she called her online broker and asked why the \$9,700 in her account had not gone to purchasing Geo shares, which suggests an earlier failed order. She then placed an order to acquire a further 86,045 Geo shares at \$0.11 per share to use up the \$9,700 in her account.
- ¶ 35 That call occurred after trading hours. During that call, Amina expressed frustration that the prior order had not been filled. She also wanted to ensure that her new order would be entered for the opening on the next trading day and that her order would consume all of her remaining cash. Again, the call indicates that Amina wanted to acquire as many Geo shares as she could as quickly as possible. This trade was completed when the markets opened on Monday, October 3, 2011.
- ¶ 36 In early October 2011, Geo’s CEO asked Robert to assist him getting certain Geo shareholders to sign lock-up agreements in support of the Geo/New Gold transaction. Amina was one of these shareholders.

- ¶ 37 Robert's evidence was that between October 5 and 12, 2011, he was engaged in getting the lock-up agreements signed. As there was some final negotiation on the contents of this agreement, he started contacting people to sign the agreements near the end of this period. He also says that he was sick and in and out of hospital during this period as a result of a virus that he had picked up in Africa.
- ¶ 38 On October 5, 2011, Robert sent an e-mail to Geo's CEO asking if the lock-up agreements were to include both the private placement shares (from April 2011) and any shares Geo shareholders acquired on the open market. The CEO responded that the agreements were to include all Geo shares, however acquired.
- ¶ 39 There was a dispute over when Amina saw the lock-up agreement and when she signed it. It is clear that Robert sent Amina's signed agreement to Geo's CEO on October 12, 2011. In her compelled interview with Commission staff prior to the hearing, Amina indicated that she had first seen the agreement on the weekend before signing it, which would have been on October 8 or 9. This would have been prior to her last purchase of Geo shares (although not prior to her placing her last order to purchase the shares, which occurred on October 7, 2011). However, at the hearing, she was adamant that she had not seen the agreement until the morning of October 12, immediately before it was sent to the CEO of Geo. As will be set out later, we did not have to resolve this timing issue to deal with the allegations before us.
- ¶ 40 Amina's signed lock-up agreement does not include her Geo shares she purchased through her online trading account, notwithstanding the requirement that the agreement include those shares. Amina's evidence was that Robert explained the lock-up agreement and that she read the document through. That her lock-up agreement did not include her Geo shares acquired through her online account suggests an intention to hide these purchases from public disclosure.
- ¶ 41 Amina transferred a further \$30,000 into her online account on October 7, 2011. The same day, she called her online broker to place a further order to acquire Geo shares. Interestingly, during her October 7 call to the online broker, he indicated that he would have to charge her 2.5% commission on the purchase. Notwithstanding that Amina's expressed reason for opening an online account was lower fees, her response to this commission rate was "I don't mind, really".
- ¶ 42 On that call to the online broker, Amina placed an order for 278,000 Geo shares that would have consumed all of the remaining cash in her account. It was partially filled and Amina acquired 60,000 Geo shares at \$0.105 per share on October 11, 2011.
- ¶ 43 In total, Amina acquired 729,945 Geo shares between September 12, 2011 and October 11, 2011, at prices between \$0.10 and \$0.11 per share.

¶ 44 On October 17, 2011, both Geo and New Gold issued press releases saying that they had entered into an agreement whereby New Gold would acquire all of the outstanding Geo shares at \$0.16 per share.

¶ 45 On December 7, 2011, Amina sold all of the Geo shares in her account for \$0.16 per share, earning a profit of approximately \$40,000. The cash from that sale was withdrawn and deposited into the Weickers' joint chequing account. Those funds were then used by the Weickers to fund their exercise of options and warrants that they held in Geo.

¶ 46 The transaction between Geo and New Gold closed on December 21, 2011.

III Credibility of Witnesses

Amina's Credibility

¶ 47 We place no weight on Amina's oral testimony. We come to this conclusion due to:

- a) inconsistencies in her evidence at her compelled interview with Commission staff;
- b) inconsistencies between her evidence at her compelled interview and at the hearing;
- c) inconsistencies between her evidence and Robert's; and
- d) certain evidence given during the hearing which was not credible when considered in light of all of the evidence.

¶ 48 Examples of the above issues are as follows:

- a) at her compelled interview, Amina said
 - i. that part of her occupation included buying and selling stocks - yet she could not recall what kind of stocks she purchased or sold;
 - ii. she considered herself to be a sophisticated investor - yet she could not explain what a short sale was; Robert, in his compelled interview, said that Amina was not a sophisticated investor;
 - iii. she had discretionary trading authority over a corporate trading account at Canaccord – Robert, in his compelled interview, denied this;
 - iv. she could not say whether she knew that Robert worked as a consultant for Geo at any time at 2011 – yet she had participated in a significant way in the April 2011 private placement by Geo, an offering that, according to Robert, was largely arranged by Robert on Geo's behalf.

It is simply not believable that Robert's affiliation with Geo would not have come to Amina's attention in the context of this investment.

At the hearing, she contradicted her evidence in her compelled interview and admitted she knew Robert worked as a consultant for Geo from October 2010 onwards;

- v. she did not tell Robert that she opened a new trading account in August of 2011 – yet Robert gave evidence at his compelled interview and at the hearing that he was in the bank when Amina opened her new trading account;
- b) at the hearing, Amina said she had never purchased any stocks on the open market prior to her September 12, 2011 purchase of Geo shares – this was clearly inconsistent with her evidence in her compelled interview;
- c) her expressed reasons for opening the new trading account during the hearing (lower fees and an inability to reach her existing advisor) made little sense in the context of her other evidence of a lack of previous stock trading – why would these be concerns of hers if she had not previously been trading?
- d) her evidence that the August 30, 2011 press release of New Gold (actually Geo's press release) spurred her to purchase the Geo shares on September 12, 2011 was not credible given the contents of that disclosure;
- e) her evidence of when she was presented with and executed the Lock-up Agreement changed between her compelled interview and the hearing;
- f) her evidence at the hearing was that she never told her husband about her market purchases of Geo shares until late December – it is not credible that she would not have mentioned the trading success at the time of signing the Lock-up Agreement as this represented a significant profit on her first market trading activity; one of her stated reasons for not telling Robert, that it was her investment, is also inconsistent with the original source of the cash and the subsequent deposit of the sale proceeds into a joint account;
- g) finally, Amina spent a great deal of time in her examination in chief during the hearing to explain her interest and expertise in following the public companies that were exploring in the Blackwater area – yet, in cross-examination her purported interest and expertise became extremely vague and disingenuous. When cross-examined about the importance of various press releases or her understanding of portions of management discussion and analysis, it became apparent that Amina did not really understand their content or their significance. She could not identify what she felt was important to her, as an investor, in the disclosure that she said that she followed closely.

Robert's Credibility

- ¶ 49 Robert's oral testimony was generally more credible; however, we do not accept his evidence on certain key points.
- ¶ 50 His evidence changed in one critical respect between his compelled interview and the hearing. At his interview, Robert said that he did not communicate with his wife between September 5 through 19, 2011, when he was in Africa. At the hearing, he admitted that he was in contact with Amina during that period, via hotel e-mail and through a mobile device of one of his travelling companions.
- ¶ 51 Robert testified that he did not learn of Amina's Geo share purchases until the middle of December 2011, when the couple were preparing their finances for a trip to Africa (Amina testified that Robert did not learn of the purchases until the end of December when the couple were dealing with year-end tax matters). We do not find this evidence credible as this would require us to accept that:
- a) he did not notice that nearly \$100,000 had been removed by Amina from various joint bank and corporate accounts during the period from September through December 2011, to fund Amina's Geo share purchases - as noted above, Amina emptied all of the couple's joint accounts to fund her initial Geo share purchases on September 12, 2011. Robert was in Africa for the first week of this time period and his evidence is that he was sick for some period thereafter due to a virus; however, even allowing for all of that, it is not credible that Robert would not have noticed and asked about the missing funds at some point during this time period;
 - b) he did not notice or enquire about the over \$100,000 Amina transferred from her online account into their joint checking account, which they then immediately used to exercise Geo warrants and options – it is not credible that this could have occurred without Robert asking where the money came from;
 - c) Amina did not mention the Geo share purchases to him at the time of signing the Lock-up Agreement (which is not credible for all the reasons noted above)
- ¶ 52 As a result, although parts of Robert's testimony were credible, we did not find his evidence on these critical issues credible and have given them no weight. It also raises questions about the reliance we should place on the other aspects of his testimony.

IV The Law

- ¶ 53 Section 1(1) of the Act defines "material fact" as,

a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

¶ 54 Section 3 of the Act provides:

3 For the purposes of section 57.2 and 136, a person is in a special relationship with an issuer if the person

...

- a) is engaging in or is proposing to engage in any business or professional activity with or on behalf of the issuer ...

- e) knows of a material fact or of a material change with respect to the issuer, having acquired the knowledge from another person at a time when
 - (i) that other person was in a special relationship with the issuer, whether under this paragraph or any of paragraphs (a) to (d), and
 - (ii) the person that acquired the knowledge of the material fact or material change from that other person knew or reasonably ought to have known of the special relationship referred to in subparagraph (i).

¶ 55 Robert admitted that he was in a special relationship with Geo during the relevant time.

¶ 56 Section 57.2(2) of the Act provides:

(2) A person must not enter into a transaction involving a security of an issuer . . . if the person

- (a) is in a special relationship with the issuer, and
- (b) knows of a material fact or material change with respect to the issuer, which act or material change has not been generally disclosed.

¶ 57 Section 57.2(3) of the Act provides:

(3) An issuer or a person in a special relationship with an issuer must not inform another person of a material fact or material change with respect to the issuer unless

- (a) the material fact or material change has been generally disclosed, or
- (b) informing the person is necessary in the course of business of the issuer or the person in the special relationship with the issuer.

¶ 58 Geo was an issuer for the purposes of sections 57.2 and 57.3.

¶ 59 The executive director alleges that the undisclosed material fact in this case was the potential acquisition of Geo by New Gold. Because that transaction did not become a binding arrangement until on or about October 17, 2011, after the last of Amina's purchases of Geo shares, we presume the executive director alleges that the material fact was that Geo and New Gold were negotiating the sale of Geo to New Gold. The executive director did not argue that the undisclosed material information constituted a material change.

V Positions of the Parties

¶ 60 Robert says he did not contravene either section 57.2(2) or 57.2(3) of the Act as:

- a) the undisclosed fact was not a material fact until after Amina made her last purchase of Geo shares on October 7, 2011;
- b) he was not aware of the details of the ongoing negotiations between Geo and New Gold after September 9, 2011 and did not learn of the details of the plan of arrangement until October 17, 2011;
- c) he did not discuss the Geo/New Gold transaction with Amina prior to October 12, 2011; and
- d) he did not enter into any transactions involving a security of Geo during the relevant time.

¶ 61 Amina says she did not contravene section 57.2(2) of the Act as:

- a) the alleged material information was not a material fact until October 12, 2011 at the earliest, when the executed lock-up agreements from significant Geo shareholders were delivered;
- b) Amina was not in a special relationship with Geo at the time of her purchases of Geo shares in September and October of 2011, as she did not receive the undisclosed material fact regarding Geo from a person who was in a special relationship with Geo at the time of the disclosure; and
- c) Amina did not receive any material undisclosed information about Geo until after her last purchase of Geo shares.

¶ 62 The executive director submits that:

- a) the information relating to the Geo/New Gold transaction was a material fact as of September 9, 2011. This was the date Geo's CEO e-mailed Robert and told him that he had spoken with New Gold's lead negotiator who had confirmed that the New Gold board would approve an offer for Geo's shares at \$0.15;

- b) Amina's trading activity was so substantial, uncharacteristic and timely that the panel may infer that Amina traded with knowledge of the undisclosed information about the Geo/New Gold transaction; and
- c) the panel may infer that Robert was the only reasonable source of the material undisclosed information, meaning Robert contravened section 57.2(3) of the Act and Robert and Amina contravened section 57.2(2) of the Act.

VI Analysis

¶ 63 We must decide the following issues:

- a) Was the Geo/New Gold transaction material?
- b) If so, were the negotiations leading to the transaction a material fact, at some point prior to October 11, 2011 (the date Amina last purchased Geo shares), and if so, when did they become a material fact?
- c) Did Robert or Amina enter into a transaction in respect of Geo shares while in possession of the material fact and while in a special relationship with Geo?
- d) Did Robert inform Amina of the material fact?

A) Materiality of Geo/New Gold negotiations

¶ 64 The law on materiality has been canvassed by this Commission recently in the decisions of *Siddiqi (Re)*, 2005 BCSECCOM 416 and *Canaco Resources Inc. (Re)*, 2013 BCSECCOM 310.

¶ 65 In *Siddiqi*, 2005 BCSECCOM 416, in paragraphs 87 and 88, the Commission further considered the question of what constituted a material fact in the context of negotiations for a transaction and stated as follows:

Whether information is material depends on the facts of each case. The test is the expected impact the information would have on the market price or value of the issuer's securities. Where transactions are involved, it is not enough to consider only the materiality of the transaction itself, but also the materiality of the information that negotiations are underway that could lead to a possible transaction. In some cases, the existence of negotiations would or could reasonably be expected to affect the stock price, and is therefore material. (Of course, the existence of negotiations about a proposed transaction can be material only if the underlying transaction itself, if completed, would be material.)

Whether information about negotiations is material requires a consideration of the uncertainty of outcome inherent in any negotiation

process. This depends on both the likelihood that the event will happen, and the expected impact of the event on the market price or value of the issuer's securities if it were to happen. For example, at the outset of negotiations it is usually uncertain whether the transaction will occur. As a result, information about negotiations at their early stage may not be material because the potential materiality of the transaction is offset by the uncertainty of whether it will happen. The evidence that is relevant to the issue of when negotiations reach the point that the information becomes material includes the evidence of parties and observers to the negotiations and the surrounding circumstances, including the parties' conduct.

- ¶ 66 As the Commission outlined in its decision in *Canaco Resources Inc.*, the test for materiality is an objective, market impact test, assessed from the point of view of the reasonable investor, and not with the benefit of hindsight: *Canaco Resources Inc.*, 2013 BCSECCOM 310, paragraphs 2 to 6.
- ¶ 67 In this case, the proposed acquisition of all of Geo's shares by New Gold, at a price significantly in excess of their trading price, would objectively, through the eyes of the reasonable investor, be a material fact.
- ¶ 68 The remaining question then is whether the negotiations leading up to this transaction were a material fact and if so, when.
- ¶ 69 The respondents say that the negotiations did not become a material fact, due to the uncertainty of completion of the transaction, until October 12, 2011 at the earliest, when the Geo shareholder lock-up agreements were delivered. In support of this they point to testimony of Geo's CEO who said that he had no idea if the parties "would do a deal" as of September 15, 2011.
- ¶ 70 The executive director says that the negotiations became a material fact on September 9, 2011, as a result of conversations between Geo's CEO and the lead negotiator for New Gold. In support of this, he points to e-mails from September 9 to 11, 2011 between Geo's CEO and Robert. Those e-mails establish that the lead negotiator for New Gold had proposed a transaction structure and price (purportedly one that the New Gold negotiator believed would be supported by the New Gold board) that was acceptable to senior management of Geo and some of its material shareholders.
- ¶ 71 We agree with the executive director that the negotiations became a material fact by September 11, 2011. We reach that conclusion considering the following factors:
- a) New Gold had recently completed its acquisition of Richfield, from this we can infer that:

(i) New Gold was clearly motivated and able to consolidate property interests in the Blackwater area; and

(ii) New Gold had a high level of familiarity with the Geo properties and the Blackwater area (one of Geo's properties in the area was directly adjacent to a material Richfield/New Gold property),

these circumstances would have eliminated some of the uncertainty that there might have been unforeseen due diligence issues with the transaction and also support that the discussions were more advanced than typical "early stage" negotiations between parties;

- b) New Gold's lead negotiator communicated that he believed the New Gold board would support an offer to acquire all of the Geo shares at \$0.15 per share;
- c) Geo's senior management was clearly supportive of the transaction structure and general price of the offer – a share transaction was the clear preference of Geo management; and
- d) Robert consulted with two significant Geo shareholders to determine if the share acquisition at \$0.15 per share would be supported and was able to confirm this during the September 9 through 11, 2011 time period.

¶ 72 As of September 11, 2011, there was agreement (albeit non-binding) on transaction structure and an acceptable price, far and away the two most significant business terms in a take-over transaction, expected support from the board of New Gold, a knowledgeable and capable buyer, and support of senior management and material shareholders of Geo. Given this, a reasonable investor would have concluded that the negotiations between Geo and New Gold were a material fact as of September 11, 2011.

¶ 73 Even if we were wrong about this conclusion, we would have found that the negotiations were a material fact as of October 5, 2011, at the latest. The evidence was that the process of obtaining Geo shareholder lock-up agreements commenced on October 5, 2011. In our experience, in order to get shareholders to execute lock-up agreements in support of a transaction of this kind you must be able to explain to the shareholders the agreement that they are being asked to support in a binding lock-up agreement.

¶ 74 Further, presentation of a lock-up agreement to shareholders will generally require them to go into "blackout", due to them having received the information regarding the transaction. Issuers do not wish to impose this obligation on their shareholders without a high level of certainty regarding the transaction. The negotiations between New Gold and Geo must have reached a very definitive point in order for the process of collecting lock-up agreements to commence.

B) Entering into a transaction in respect of Geo shares while in possession of the material fact and while in a special relationship with Geo

Robert's conduct

- ¶ 75 The executive director acknowledges that there is no evidence that Robert purchased any shares of Geo, provided any instructions to Amina or her broker to purchase Geo shares, or in any other way directly engaged in a transaction in respect of Geo shares between September 11 and October 17, 2011.
- ¶ 76 The executive director's only argument that Robert engaged in a transaction in respect of Geo shares was that the funds Amina used to purchase Geo shares came from joint accounts and the proceeds of sale of the Geo shares from Amina's online account were to a joint account. This, in and of itself, is not sufficient to find that Robert engaged in any transaction with respect to Geo shares during the relevant period.
- ¶ 77 As a consequence, we dismiss the allegation against Robert pursuant to section 57.2(2) of the Act.

Amina's conduct

- ¶ 78 Amina clearly purchased Geo shares between September 11 and October 11, 2011. The question is whether she had knowledge of the undisclosed material fact at the time of the trades and whether she obtained that information while in a special relationship with Geo.

Amina's knowledge of the negotiations

- ¶ 79 There is no direct evidence that Amina had knowledge of the negotiations. She denied that she had knowledge of the Geo/New Gold negotiations at the time of the purchases but, as set out above, we place no weight on her evidence.
- ¶ 80 The executive director submits that we can infer that Amina had knowledge of the negotiations by virtue of her significant, highly uncharacteristic and timely trading in Geo shares. Insider trading cases often require panels to consider inferences. We may make inferences, we cannot speculate. In drawing inferences, we must ensure that we do not assume a fact that has not been proven and that any inference that we make is reasonable based on the facts that have been proven.
- ¶ 81 The executive director cites the following from this Commission's decision in *Re Bennett*, COR#96/170 (at page 90) in support of the inference he asks us to make:

Here we have two brothers whose assets are mostly in real estate and who were unfamiliar with the stock market, each make an unsolicited investment in Doman shares, not recommended by their brokers, that was substantial in absolute terms, that represented a significant part of each of their net worths, that one broker thought was "very substantial" and the other had never handled purchases of this magnitude in his 41 years in the

business, that both brokers thought were made with knowledge of something, and where both brothers borrowed the money to make the purchases on terms we found outside banking industry practice, with annual interest charges that neither could meet beyond a few months without selling assets, including the Doman shares. We find that there is nothing ordinary about these circumstances, in fact, we find that taken together these circumstances were most unusual...

¶ 82 We agree with the executive director and find that Amina's trading activity was most unusual. This is based upon the following:

- a) Amina's purchases of Geo shares were substantial – she drained their available bank and line of credit accounts prior to her September 12, 2011 purchases and even considered using a credit card to fund further purchases; her investment (her first ever open market purchases) in Geo shares totalled nearly \$100,000;
- b) Amina's purchases were unsolicited (without recommendation) and done through an on-line trading account that avoided suitability advice;
- c) both of the above were highly unusual in that she was clearly an unsophisticated investor and had limited or no previous experience in stock trading;
- d) Amina's purchases were highly risky – Geo was a junior mining company trading on the TSXV;
- e) Amina's purchases were unusual in the urgency she expressed; her desire to have all funds invested in one stock and her lack of concern over being charged a 2.5% commission on her last Geo share purchase; and
- f) there was no public information disclosed proximate to Amina's purchases that would support or explain purchases of Geo's shares in the unusual manner she did.

¶ 83 In and of itself, the above facts support one of the two following inferences:

- a) that Amina knew of the undisclosed negotiations between Geo and New Gold; or
- b) that someone recommended, or encouraged, her to buy Geo shares.

¶ 84 This case turns on the above inference because in order for Amina to have contravened section 57.2(2) she must have had knowledge of the undisclosed material fact (negotiations) at the time of her purchase(s) of Geo shares.

¶ 85 Further, there is no allegation in the notice of hearing that Robert (or anyone else) has contravened section 57.2(5) of the Act which prohibits a person in a special relationship

with an issuer, with knowledge of an undisclosed material fact in respect of that issuer, from encouraging or recommending to a person the purchase of that issuer's securities.

- ¶ 86 We find, on a balance of probabilities, that the inference in paragraph 83(a) is more likely than the inference in paragraph 83(b). We do so for the following two reasons:
- a) the significant purchase orders made by Amina happen to coincide exactly with the two critical events in an acquisition transaction – at the time the deal is conceptually struck (and becomes a material fact) and right before announcement (when all or nearly all risk of the transaction occurring has been eliminated);
 - b) a recommendation or encouragement to buy does not adequately explain the unusual trading activity carried out by Amina.
- ¶ 87 Amina's trading was unnaturally timely in that her first and largest purchases of Geo shares on September 12 and 13, 2011 occurred immediately following (the morning after) the negotiations between Geo and New Gold becoming a material fact and immediately following Robert learning of the material fact.
- ¶ 88 Secondly, Amina's last and next most significant purchase order (which only got partially filled) on October 7, 2011 occurred just as Robert was assisting Geo to get shareholders to sign lock-up agreements. The commencement of the process of collecting lock-up agreements would mean that the transaction was almost certain to become binding and that it was very near the time for the public announcement of the Geo/New Gold transaction.
- ¶ 89 Had someone merely encouraged or recommended to Amina to purchase Geo shares we do not see that as a cogent explanation for the timing and urgent manner of her trading activity. Amina had already acquired a large number of Geo shares in April 2011 through the private placement. She must have thought them to be a good investment. She said that she was following the shares to buy them at \$.06 to \$.10 throughout the summer of 2011. She said one of the reasons that she opened her new online trading account was to trade in Geo shares. This was an investor who did not need encouragement or a recommendation to buy the shares, she had already formed an opinion that they were a good investment. We therefore do not see how encouragement or a recommendation to buy the Geo shares (even a timely one) would have produced the trading activity carried out here.
- ¶ 90 The respondents did not submit that the trading activity was explainable as a result of encouragement or a recommendation to buy the Geo shares and they pointed to no evidence in support of this.
- ¶ 91 Instead, the respondents submit that Amina's Geo share purchases were all part of normal trading activity, triggered by an area play in the Blackwater area. Given Amina's highly unusual trading, which we describe above, this submission is not credible.

Was Amina in a special relationship

- ¶ 92 The executive director relies on subsection 3(e) of the definition of “special relationship” with respect to Amina. The executive director argues that Amina was in a special relationship because she acquired a material fact about Geo (the negotiations) from Robert who was in a special relationship with Geo. As noted above, Robert admits he was in a special relationship with Geo.
- ¶ 93 We have found that Amina had knowledge of the undisclosed material fact at the time of her purchases. However, there is no direct evidence that Amina acquired knowledge of the negotiations from Robert. The executive director submits that if we infer that Amina knew of the negotiations, then it is further reasonable to infer that Robert told her that information. If she obtained this information from Robert, then she was in a special relationship with Geo, and contravened section 57.2(2) of the Act, and Robert contravened section 57.2(3) of the Act.
- ¶ 94 In support of the inference that Robert told Amina the information, the executive director points to the following evidence:
- a) the Geo CEO said that he had not discussed the transaction with Amina prior to the announcement of the transaction;
 - b) Amina said that she had not spoken with any other person in a special relationship with Geo, other than Robert;
 - c) Amina and Robert both testified that Amina did not have access to Robert’s computer or his password – thereby eliminating the possibility of Amina having inadvertently seen an e-mail addressed to Robert containing the material fact; and
 - d) Robert testified at the hearing that he was in contact with his wife while in Africa in September 2011.

The respondents tendered much of this evidence. We conclude that if Amina knew the undisclosed material fact, she could only have learned that fact from Robert. The above evidence eliminates other possible sources of the information.

- ¶ 95 The respondents did not suggest an alternative source of the material information – to the contrary, they simply denied that Amina had the information.
- ¶ 96 We find that Robert communicated the material fact to Amina.
- ¶ 97 As a consequence, Amina was in a special relationship when she acquired Geo shares between September 12, 2011 and October 11, 2011 and therefore she contravened section 57.2(2). This conclusion also leads us to find that Robert contravened section 57.2(3) by informing Amina of the undisclosed material fact.

VI Submissions on Sanction

¶ 98 We direct the parties to make their submissions on sanctions as follows:

By April 23, 2015 The executive director delivers submissions to the respondents and to the secretary to the Commission.

By May 7, 2015 The respondents deliver response submissions to each other, the executive director and to the secretary to the Commission. Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).

By May 14, 2015 The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

¶ 99 April 2, 2015

¶ 100 **For the Commission**

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Gordon Holloway
Commissioner