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

Citation: Re Pierce, 2016 BCSECCOM 264 Date: 20160805

Gordon Brent Pierce

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

Hearing date	June 24, 2016
Submissions completed	June 24, 2016
Decision date	August 5, 2016
Appearances	
Stephen M. Zolnay	For the Executive Director
E. David Crossin, Q.C.	For Gordon Brent Pierce

Ruling

I. Introduction

[1] On May 19, 2015, the executive director applied for orders against Gordon Brent Pierce under section 161(1) of the Act, relying on section 161(6)(c).

[2] On September 23, 2015, Pierce applied for a temporary stay of proceedings in respect of the executive director's application.

[3] On February 11, 2016, we denied Pierce's application for a temporary stay of proceedings (2016 BCSECCOM 44).

[4] On April 6, 2016, the panel asked the parties for submissions on the following two issues:

1. whether the panel can make an order under section 161(1) and 161(6)(c) of the Act which is more onerous than the order made by another securities regulatory authority upon which the application is based (First Issue); and, if so,

2. whether in this case, it is in the public interest for the panel to make an order that is more onerous in light of the facts and the case law relating to similar conduct that is at issue in this case (Second Issue).

[5] On May 4, 2016, Pierce applied to make submissions on the First Issue, have the panel render a decision, and then subsequently make submissions on the Second Issue. His request was on the basis that, should we decide that we have the ability to grant the requested orders, the evidence and submissions that he might adduce on the Second Issue may be influenced by our reasons given in connection with the First Issue.

[6] We granted that application and on May 25, 2016, we heard submissions from the parties on the First Issue only.

[7] On June 1, 2016, we issued a ruling confirming that we may make an order that is more onerous than the underlying order. We further ordered the parties to make submissions on the Second Issue on June 23, 2016 (2016 BCSECCOM 188).

[8] On June 24, 2016, we heard submissions from the parties on the Second Issue. This is our decision and reasons in respect thereof.

II. Background

[9] Pierce is currently a resident of British Columbia.

[10] Pierce is the subject of two US Securities and Exchange Commission (SEC) orders which include sanctions for securities related misconduct in the United States.

A. First SEC Order

[11] On June 5, 2009, an administrative law judge issued a decision against Pierce which included sanctions for securities related misconduct. On July 8, 2009, the SEC issued an order making the administrative law judge's June 5, 2009 decision final.

B. Second SEC Order

[12] On July 27, 2011, another administrative law judge issued a decision against Pierce which included further sanctions for securities related misconduct. Pierce applied to the SEC to appeal the administrative law judge's July 27, 2011 decision. The SEC's appeal process proceeded on a *de novo* basis on a review of the record. Pierce's appeal was denied by the SEC appeal panel on March 7, 2014. Pierce filed a motion with the SEC for a reconsideration of its March 7, 2014 denial of his appeal. On May 15, 2014, the SEC denied Pierce's motion for a reconsideration of his appeal.

[13] Pierce filed a petition for a review of the SEC's March 7, 2014 decision with the US Court of Appeals. On March 22, 2015, Pierce's petition for review of the SEC's decision was denied by the US Court of Appeals. On July 6, 2015, Pierce filed a petition to the US Court of Appeals seeking a rehearing of his petition for review of the SEC's decision. On August 3, 2015, the US Court of Appeals denied Pierce's application for a rehearing.

[14] On August 10, 2015, Pierce filed a motion with the US Court of Appeals to stay its mandate in order to allow him further time to file a petition to the Supreme Court of the United States and to allow time for the SEC to consider a further motion brought by Pierce challenging both administrative law judges' decisions. On September 1, 2015, the

US Court of Appeals denied Pierce's motion to stay its mandate and on September 9, 2015, the US Court of Appeals' judgment became final.

[15] On November 2, 2015, Pierce filed a petition to the Supreme Court of the United States for a review of the US Court of Appeals decision. On April 25, 2016, that petition was denied by the Supreme Court of the United States.

[16] Pierce filed an application with the SEC to vacate its prior orders on the basis that the administrative law judges who presided over his original hearings that led to the First and Second Orders were not appointed in a manner consistent with the US constitution. On April 18, 2016, the SEC denied Pierce's application.

[17] On June 15, 2016, Pierce filed a petition with the United States Court of Appeals to overturn the SEC's April 18, 2016 denial of his application.

[18] The executive director is seeking orders under section 161(1) of the Act, relying on 161(6)(c), using the two SEC orders (SEC Orders) as the basis for his application. The executive director has not asked for a disgorgement order under section 161(1)(g) of the Act.

C. Prior securities regulatory history in British Columbia

[19] On June 8, 1993, Pierce entered into a settlement agreement with the Commission in which he admitted the following

a) he was the control person behind a private company called Valet Video and Pizza Services Ltd. (Valet Video), while his nominee served as Valet Video's president and sole director;
b) a public company called Bu-Max Gold Corp. (Bu-Max) raised $210,000 from investors under a prospectus for the stated purpose of funding a mineral exploration program;
c) Bu-Max paid $100,000 to Valet Video for purposes that did not benefit Bu-Max and were not disclosed in the prospectus; and
d) during the course of Commission staff's investigation of the matter, Pierce provided documents to staff that were not genuine.

[20] In that settlement agreement, Pierce consented to an order of the Commission that

a) removed his ability to rely on trading exemptions for 15 years;
b) prohibited him from acting as a director or officer of a reporting issuer for 15 years; and
c) prohibited him from acting as an officer or director of any company that provides management and administrative, promotional or consulting services to any reporting issuer for 15 years.

[21] The above listed orders expired in June 2008.

III. Positions of the Parties

Executive director

[22] Counsel for the executive director says that it is appropriate and in the public interest to make market prohibition orders against Pierce and, in particular, that those prohibitions should last not less than 25 years.

[23] Counsel for the executive director makes this submission on an analysis of the *Eron* factors (described below) that the Commission normally employs in determining sanctions against respondents.

[24] In particular, the executive director says that Pierce's misconduct in the US, that resulted in the SEC Orders, can be analogized to our regulatory regime as follows

a) Pierce engaged in unregistered distributions of shares for total proceeds of more than US $9.3 million – this misconduct is substantially similar to a contravention of section 61 of the Act;
b) Pierce failed to report his share ownership and trading activity in shares of a reporting entity – this misconduct is substantially similar to a contravention of our early warning and insider reporting obligations in our local legislation; and
c) Pierce lied under oath to SEC staff, filed false and misleading documents with SEC staff and failed to provide records in response to a subpoena from the SEC – this misconduct is substantially similar to a contravention of section 168.1(1) of the Act.

[25] The executive director submits that misconduct of the nature described in

a) paragraph 24(a), would warrant a market prohibition of at least 10 years;
b) paragraph 24(b), would warrant a market prohibition of five years; and
c) paragraph 24(c), would warrant a market prohibition of at least 10 years.

[26] The executive director submits that, on this basis, we should conclude that market prohibitions of at least 25 years would be appropriate in the circumstances.

[27] Further, the executive director submits that Pierce's prior history of significant securities regulatory misconduct in British Columbia must be taken into account. She says that it is an important factor that the misconduct carried out by Pierce in the United States occurred during a period of time in which he was under market prohibitions in British Columbia and that rather than being deterred by our original sanctions, he simply shifted the field of his misconduct to the United States.

[28] Finally, the executive director says that there is significant similarity between certain of the misconduct underlying his original order in British Columbia and that leading to the SEC Orders in the US. In particular, the executive director highlights that Pierce, both here and in the US, provided false documents in an effort to frustrate the regulatory investigations and has generally shown himself to be untruthful when dealing with securities regulators.

Pierce

[29] Pierce maintained his position that we do not have the jurisdiction to make orders against him until all of his current efforts to vacate the SEC Orders in the US are exhausted. We previously addressed that issue in our February 11, 2016 ruling, denying Pierce's application for a stay of proceedings.

[30] Notwithstanding this, Pierce did make "without prejudice" submissions. He says that market prohibitions in the 15-18 year range would be appropriate in the circumstances.

[31] He says that "stacking" the terms of market prohibitions for multiple elements of misconduct is not appropriate in the regulatory context. He says that a singular term must be derived for the totality of the misconduct with a view to the preventative and protective nature of Commission sanctions.

[32] He says that due to his age (59), market prohibitions of 15-18 years would give him a "faint hope" of returning to the capital markets and that a prospect for rehabilitation should be one of the factors to consider.

[33] He says that we should not consider lack of contrition as a factor as he is currently attempting to vacate the SEC Orders and we must respect his right to do so. He says that a current admission of wrongdoing and corresponding contrition are inconsistent with these appeal rights.

[34] Finally, he says that there is no evidence of financial loss associated with his misconduct in the United States and that that must be a consideration in sanctioning.

IV. Analysis

Reciprocal orders provisions

[35] The executive director has applied for orders against Pierce pursuant to section 161(6)(c) of the Act. That provision provides as follows:

> (6) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person
>
> …
>
> (c) is subject to an order made by a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, imposing sanctions, conditions, restrictions or requirements on the person, …

Factors

[36] Orders under sections 161(1) 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.

[37] 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.

Application of the factors

Seriousness of the Conduct

[38] There is no doubt Pierce's misconduct that resulted in the SEC Orders was very serious. This was the finding of both of the administrative law judges who originally issued sanctions in the United States against Pierce. His misconduct was also recurrent and carried out over a period of time. In its 2014 decision against Pierce (p.31) (*Gordon Brent Pierce* - United States Securities and Exchange Commission, Securities Act Release No. 9555/March 7, 2014), the SEC found

> Pierce's violations were very serious. He reaped millions of dollars in profits by selling shares of stock without registration, causing harm to investors and the marketplace by depriving investors of the full disclosure that would have allowed them to make informed investment decisions. The misconduct was both recurring and long-lasting, consisting of numerous sales made over an eight-month period. Pierce's concealment of his involvement in these sales shows a high degree of *scienter*, and he shows no recognition that this conduct was wrongful. Based on Pierce's disciplinary history, the [Section 5] violations at issue, and Pierce's lack of contrition, we find there is a significant likelihood of future violations.

[39] Illegal distributions, failing to file timely early warning and insider trading reports and lying to Commission investigators are all serious misconduct in this jurisdiction. All of it is conduct that harms both investors and the integrity of the capital markets.

Harm to investors

[40] Pierce submits that there is no evidence of financial loss suffered by investors in connection with his misconduct in the US.

[41] We agree that there is no evidence of financial loss suffered by investors. However, investors have been harmed by Pierce's misconduct. The registration delivery requirement in the US (and the equivalent prospectus delivery requirement in British Columbia) is a fundamental element of investor protection in securities legislation. Its purpose is to ensure that investors are provided with adequate disclosure about the securities that they purchase. A failure to comply with this requirement denies investors one of their fundamental protections in the capital markets.

[42] Similarly, the early warning and insider trading reporting requirements ensure that investors know when persons with a significant connection to a reporting issuer are trading in that issuer's securities and have acquired an ownership interest that may affect control of that issuer. Failure to comply with these requirements deprives investors of critical information and damages the capital markets.

Enrichment

[43] Pierce was enriched by his misconduct. Pierce's trading profits from his illegal distributions were almost US$9.3 million. Pierce argues that his enrichment should not be considered since he was ordered to disgorge profits in the US proceedings and he has repaid the first disgorgement order. We disagree. Pierce obtained a benefit from his misconduct and therefore was enriched. The fact that he may no longer have that benefit, or has been ordered to disgorge it, is not relevant to our consideration of whether we should order market prohibitions.

Aggravating factors

[44] There is a significant aggravating factor that runs throughout the findings in the SEC Orders, that of Pierce structuring his activities to hide his involvement in the affairs of a reporting issuer and to attempt to hide his illegal trading activity. This was also a component of his earlier misconduct in our jurisdiction.

[45] This demonstrates a clear and concerted effort to circumvent and evade securities laws. Pierce's misconduct in the US did not arise as a result of careless or reckless behavior, but rather misconduct carried out with intent.

Previous Orders

[46] The executive director made submissions on a number of Commission decisions involving misconduct similar to that of Pierce's in the US. With respect to the illegal distributions she referred us to *Re HRG Healthcare*, 2016 BCSECCOM 5 and *Re Streamline Properties Inc.*, 2015 BCSECCOM 66. With respect to the failure to file insider reports in a timely manner she referred us to *Re McLeary*, 2016 BCSECCOM 191. Finally, with respect to lying to securities regulators she referred us to *Re Hu*, 2011 BCSECCOM 514 and *Re Sungro*, 2015 BCSECCOM 281.

[47] We have considered all of these decisions with respect to the orders that we make as set out below.

Orders

[48] The parties have suggested a range of time periods for market prohibitions to last between 15 years and at least 25 years.

[49] Our orders, made in the public interest, are to be protective and preventative. We agree with Pierce that a purely formulaic approach to determining the appropriate sanctions for the three different elements of his misconduct is more consistent with a penal framework than our public interest framework. Our public interest framework requires a more comprehensive approach to determining what is required to achieve our purposes. That comprehensive approach requires us to consider the totality of the misconduct, the *Eron* factors, and the specific circumstances of the respondent. However, the decisions provided by the executive director are informative; they provide guidance for our analysis and highlight that significant sanctions are appropriate in the circumstances.

[50] In our view, Pierce represents a very grave risk to our capital markets, based on the following:

a) Pierce has a significant history of securities regulatory misconduct, including three separate orders (one from our Commission and the First and Second Orders) setting out sanctions against him – without any evidence of these orders having a deterrent effect or resulting in rehabilitation;

b) it is significant that Pierce's misconduct in the US occurred during the time period in which his sanctions from this Commission were operative. Rather than being deterred by our order, he simply carried on with securities related misconduct in another jurisdiction. This suggests that Pierce will not allow himself to be regulated. Participation in the capital markets is a highly regulated activity. Those who will not allow themselves to be regulated and adhere to orders of securities regulators should not be allowed to participate in that highly regulated conduct;

c) there are similar elements to his history of misconduct, including, most significantly, lying to securities regulatory authorities and engaging in schemes designed to conceal his misconduct in the capital markets – Pierce's lack of honesty and transparency makes him a very grave risk to the investing public; and

d) the SEC was of the view that Pierce is a significant risk to reoffend (as set out in the passage quoted above).

[51] Given the serious nature of Pierce's misconduct in the United States, the damage caused by him to the capital markets and the investing public, his significant prior history of securities regulatory misconduct and our view that he represents a grave risk to our capital markets, we find it to be in the public interest to permanently ban Pierce from our capital markets. Permanent market prohibitions also are necessary to accomplish our goals of specific and general deterrence.

[52] Considering it to be in the public interest, and pursuant to section 161 of the Act, we order that under sections 161(1)(b),(c) and (d)(i) through (v)

a) Pierce cease trading in, and is permanently prohibited from purchasing, any securities or exchange contracts,

b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Pierce,

c) Pierce resign any positions he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant,

d) Pierce is permanently prohibited from becoming or acting as a registrant or promoter,

e) Pierce is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market, and

f) Pierce is permanently prohibited from engaging in investor relations activities.

August 5, 2016

For the Commission

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Gordon Holloway
Commissioner