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

Citation: New Point Exploration, 2023 BCSECCOM 445 Date: 20230912

Bam Bam Resources Corp., formerly known as New Point Exploration Corp., and Bryn Gardener-Evans

Panel	Gordon Johnson	Vice Chair
	Deborah Armour, KC	Commissioner
	James Kershaw	Commissioner
Submissions completed	July 28, 2023	
Date of decision	September 12, 2023	

Parties

Derek Chapman Audrey Tait	For the Executive Director
H. Roderick Anderson	For Bam Bam Resources Corp., formerly known as New Point Exploration Corp.
Bryn Gardener-Evans	For himself

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the Securities Act, RSBC 1996, c .418 (Act). The findings of this panel on liability made on April 14, 2023, reported at 2023 BCSECCOM 170 (Findings), are part of this decision. The definitions adopted in the Findings are used herein.

[2] We found that:

a) Through its public disclosure leading up to the summer of 2018, New Point created a strong expectation in the market that, if New Point raised a significant amount of new capital, the majority of the funds would be allocated to the Majuba Hill project and to a lesser extent to other projects;

b) In its July 6 News Release and August 9 News Release, both issued in the summer of 2018, New Point made announcements about having closed a private placement for aggregate proceeds of $1,668,250 and $4,651,000, respectively. Both of those statements were misleading because they omitted the fact that only a minority of the capital raised, and in the case of the August 9 News Release only a very small minority of the capital

raised, would be spent as expected because the majority of the funds had already been spent on or committed to paying consultants;

c) The misleading omissions were repeated in two material change reports;

d) The omissions were material and New Point ought to have known that the omissions would make the statements misleading;

e) The misleading statements were breaches of section 50(1)(d) of the Act in the case of the News Releases and 168.1(1) in the case of the material change reports;

f) Gardener-Evans authorized, permitted or acquiesced in New Point's contraventions of the Act and therefore, by operation of section 168.2 of the Act, also contravened those sections.

[3] Each of the executive director and the respondents made written submissions on the appropriate sanctions in this case.

II. Positions of the parties

A. Executive Director

[4] The executive director submits that misrepresentation is among the most serious forms of misconduct in the Act and that these particular misrepresentations were serious because they deprived investors of the opportunity to make informed investment decisions and to accurately value New Point's share price.

[5] The executive director references some of the arguments made by Gardener-Evans in the liability portion of this proceeding and submits that the arguments made by Gardener-Evans suggest a continuing lack of awareness by Gardener-Evans of the seriousness of his misconduct on behalf of New Point.

[6] The executive director compares the misrepresentation by omission which was present here to other cases of false disclosure made in news releases or financial statements and management discussion and analysis. The executive director looks to those cases as precedents and recommends against Gardener-Evans market prohibitions for a period of seven years and an administrative penalty of between $60,000 and $70,000.

[7] As against New Point, which later changed its name to Bam Bam Resources Corp. and which may have changed its name again since this proceeding began, the executive director submits that it is not in the public interest to order any sanctions. As in the Findings, we predominately refer to the corporate respondent as New Point in this decision, as that was its name during the majority of the relevant events, prior to changing its name.

B. Respondents

[8] New Point supports the submission of the executive director that it is not in the public interest to impose sanctions against it. New Point submits that the Commission does not typically order

separate penalties against a director of a company and the company itself where the company did not act independently of its director. New Point notes that it agreed to the facts that were relevant to the outcome of this proceedings as a part of a settlement with the executive director and submits that it has acted to achieve a fair and efficient settlement. New Point notes that it does not have a history of securities regulatory misconduct.

[9] Gardener-Evans submits that the sanctions recommended by the executive director are unduly harsh. He references his 25 years of experience in the investment business with no history of securities misconduct. He submits that the lack of disclosure in question was not made with an intention to harm anyone or to withhold information. He says he recognizes now that he "should have put forward more information regarding the consultants in the press release than was required by the BCSC so that all activities being conducted by New Point would have been more informative".

[10] Gardener-Evans submits that he is no threat to anyone.

[11] Gardener-Evans submits that far from gaining from the conduct in question, he has lost his investment in New Point, his home, his car, his savings, his furnishings and nearly lost his marriage.

[12] Gardener-Evans submits that an appropriate sanction is a limited prohibition for three years and an administrative penalty of $15,000.

III. Analysis

A. Introduction

[13] Section 161(1) orders are protective and preventative in nature and prospective in orientation. This means that, when it crafts its orders, the Commission aims to protect investors, promote the fairness and efficiency of the capital markets, and preserve public confidence in those markets.

[14] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 at page 24, the Commission provided a non-exhaustive list of factors relevant to making orders under sections 161 and 162 of the Act:

> 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 the 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.

[15] We address the factors which are relevant under the following headings.

B. Seriousness of Conduct

The Commission held in *Re Michaels*, 2014 BCSECCOM 457 at para. 8 that misrepresentation is among the most serious forms of misconduct in the Act:

> Not far behind fraud, in the scale of seriousness of misconduct, stands misrepresentation. Those who operate and profit in the capital markets by misstating material facts (through commission or omission), undermine the confidence of the public in one of the cornerstones of capital markets regulation, the provision of accurate and complete information for investors to make informed investment decisions.

[16] A contravention of section 168.1(1)(b) of the Act is also a serious breach of the Act. Accurate and timely disclosure is fundamental to the operation and integrity of the capital markets. As an officer and director of New Point, Gardener-Evans occupied a position of trust and responsibility. Ensuring compliance with regulatory disclosure requirements is a critical aspect of the role of those appointed as directors or officers of publicly-listed issuers.

C. Harm to investors

[17] In this case, the result of the conduct in question was that investors were presented by management of New Point with a misleading picture of New Points' financial situation. Many investors would naturally have believed that, with new funding in place, New Point would advance work on at least the Majuba Hill project and perhaps on other projects as well. We do not have evidence to substantiate if specific investors lost money at the time because they decided to buy shares of New Point or decided not to sell shares of New Point based on the misleading information presented. However, we conclude that both individual investors and the market generally are harmed when misleading disclosure undermines their confidence in the integrity of public markets.

D. Enrichment of respondents

[18] Gardener-Evans submits that he was not enriched by the breaches of the Act in question. There is no evidence suggesting otherwise.

E. Aggravating factors, mitigating factors

[19] It is a mitigating factor in favour of New Point that by agreeing to facts and legal conclusions in advance of the hearing, New Point streamlined these proceedings.

F. Past misconduct

[20] Neither New Point nor Gardener-Evans has a history of misconduct.

G. Fitness to participate in capital markets and hold positions

[21] Gardener-Evans submits that he is no threat to public markets or to anyone and he submits he has "learned a grave lesson in all of this". In his written submissions, he acknowledges his role in the breaches of New Point. However, some of his other comments suggest, as the executive director submits, that Gardener-Evans does not accept that his conduct was wrong.

[22] Gardener-Evans states he has recognized with the benefit of hindsight that he should have put forward more information regarding the consultants "than was required by the BCSC".

[23] No fraud or attempt to obtain funds through false statements was alleged and the evidence would not support such allegations. There is no evidence of prior conduct by Gardener-Evans suggesting a level of dishonesty or a degree of serious intentional misconduct which establishes that a risk to the public exists unless Gardener-Evans' involvement in public markets is permanently prohibited. However, Gardener-Evans led the company for which he was President, CEO, director and primary decision maker into committing serious breaches of the Act. He approved news releases which he should have known were misleading. We conclude that Gardener-Evans would pose some risk to capital markets if he were soon to be restored to a position of influence with another issuer.

[24] Gardener-Evans needs to understand that although some disclosure questions are hard, it is the responsibility of the issuer and its directors and officers to put out news releases and provide material change reports which are accurate. Gardener-Evans had the information needed at the key moments to recognize that the representations in question were misleading. In his submissions, he acknowledged his own discomfort with the consequences of the cheque swap arrangement as it was unfolding. If he had done his job properly, no breaches of the Act would have occurred.

[25] Gardener-Evans is not fit at this time to hold positions in capital markets.

[26] We do not conclude from the evidence in this proceeding that trading activity by Gardener-Evans would pose a risk to public markets. Our order will therefore not limit Gardener-Evans' trading activities.

H. Specific and general deterrence

[27] The purpose of deterrence is to discourage future misconduct by the individual wrongdoer specifically and society generally. Specific and general deterrence are factors for a panel to consider when determining the appropriate sanctions. The panel in *Re Smith,* 2021 BCSECCOM

486, at para. 22 described specific and general deterrence as:

> Specific deterrence and general deterrence are related but not identical concepts. Specific deterrence discourages this respondent from participating in future misconduct. General deterrence discourages others from participating in misconduct similar to that in the subject case. Both goals are legitimate in the crafting of a sanction which properly balances all of the factors which are relevant in any particular case.

[28] In *Cartaway Resources Corp. (Re)*, 2004 SCC 26, at para. 55, the Supreme Court of Canada stated that, in the capital markets, general deterrence "has a proper role to play in determining whether to make orders in the public interest and, if they choose to do so, the severity of those orders."

[29] Panels need to balance specific deterrence and general deterrence and consider the effect that the misconduct has on the integrity of the public markets when assessing administrative penalties. The sanctions imposed should be sufficient to deter respondents and others from engaging in similar conduct in the future.

[30] As we noted in *Re QcX Gold Corp.*, 2022 BCSECCOM 422, referencing a submission from counsel which in turn cited *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273, specific and general deterrence are both important factors and the weight to be given to each will vary with the circumstances of a given case. We noted the following at paragraph 46:

> It can be very challenging for a panel to properly reflect the importance of the factor that sometimes parties who have committed serious breaches of the Act might have very limited resources available to pay a financial sanction. We are seeking to craft an appropriate sanction in order to protect the public. This suggests that significant weight should be placed on the factor of general deterrence. At the same time, there are limits on the public benefit achieved by the imposition of massive penalties which the party who committed the breach has no realistic ability to pay.

[31] In this case, Gardener-Evans submits that he has lost his home and other assets as a result of events related to this proceeding. Gardener-Evans is submitting that he has no resources to pay a significant administrative penalty. Gardener-Evans has provided no income tax returns, other records or other information which will allow us to assess his ability to pay over time.

[32] In the absence of evidence from Gardener-Evans relating to his financial and personal circumstances, we are ordering an administrative penalty commensurate with the breaches of the Act, the other factors considered above and the prior decisions outlined below.

I. Prior decisions

[33] The two decisions identified to us as having the most relevance to a misrepresentation case such as this are *Re Brookmount Explorations Inc*,. 2012 BCSCCCOM 441 and *Re Mountainstar Gold Inc*., 2019 BCSECCOM 123.

[34] We have summarized those two cases, as well as the Alberta decision *Re Ironside, 2007 ABASC 824* cited within them, in the chart below:

Case Name	Relevant factors	Other Considerations
Re Brookmount Explorations Inc., 2012 BCSECCOM 445	Junior mining company grossly exaggerated the value of its mining property in news releases contrary to s. 50(1)(d). Director and president, Flueck, and director and COO, Sungur, were vicariously liable for the issuer's contraventions. Flueck deliberately exaggerated prospects of the issuer in the releases and Sungur reviewed and approved the content. The panel held that it was "hard to imagine a more serious and flagrant case of misrepresentation" by a president and director. Further, this type of conduct warranted a significant amount of time out from participating in the capital markets. Sungur received five-year market prohibitions and a $45,000 monetary sanction. Flueck received eight-year market prohibitions and a $65,000 monetary sanction.	The executive director submits that the misrepresentations in *Brookmount* were more serious than those at issue here. The respondents cooperated with the Commission investigation and did not contest some key elements of the allegations. They also acknowledged the seriousness of the allegations against them. The panel found that sales of shares by the individual respondents was aggravating. The monetary sanction was a global amount and not attributed to individual breaches of the Act, and the panel considered a settlement agreement – which is no longer the practice followed by the Commission. The executive director submits that given this context, the amount ordered in the current matter should fall between what was ordered against Sungur and Flueck.
Re Mountainstar Gold Inc., 2019 BCSECCOM 123	Mining company repeatedly contravened s. 168.1(1)(b) by making disclosure in its MD&A concerning Chilean mining rights and related legal proceedings. The CEO and director Johnson was vicariously liable under s. 168.2(1).	The executive director submits that the failure to comply with regulatory requirements over three years in Mountainstar exceeds what took place in this matter. Further the refusal to cooperate with the investigation or to recognize the authority of the Commission were

	The conduct was exacerbated through repetition over three years. The respondent was not cooperative, refusing to provide required documents and dared the Commission to file contempt charges against him. At the sanctions hearing Johnson continued to argue against the findings of the Commission which the panel found troubling. The panel ordered permanent market prohibitions against Johnson as well as a sanction of $150,000.	significant aggravating circumstances not at issue here. Beyond just a specific deterrent against Johnson's conduct, the panel held that other senior officers and directors of public issuers must be made aware that failure to comply with regulatory requirements, especially over a long period of time, will attract significant sanctions.
Re Ironside, 2007 ABASC 824	Individual respondents Ironside and Ruff were senior officers (Ironside was also a director) and were found to have contravened the Alberta Securities Act and acted contrary to the public interest when they prepared and disseminated materially misleading disclosure relating to an issuer's operations and financial position. Ironside received permanent market prohibitions and an administrative sanction of $180,000. Ruff's role was considered less serious by the panel. The panel ordered a seven year market prohibition and a monetary sanction of $50,000.	The maximum penalty under the Alberta legislation at the time was $100,000 for each contravention. In this matter, the panel found two contraventions for a maximum potential sanction of $200,000. Ironside remained unrepentant and unwilling to accept he acted improperly – resulting in the panel finding him to be an extremely serious threat to the capital markets. Ruff acknowledged the seriousness of the allegations and his role in the misconduct.

IV. Conclusions Regarding Appropriate Sanctions

A. Market prohibitions

[35] We conclude that it is in the public interest to order prohibitions against Gardener-Evans. He failed in his obligations to ensure the public had the necessary disclosure to make informed investment decisions. We also conclude, for the reasons set out above, that Gardener-Evans has not demonstrated a clear recognition of what his responsibilities were. We conclude that there is a continuing risk that further breaches might follow if Gardener-Evans is allowed to perform a role of responsibility in capital markets in the near future.

[36] We conclude that the appropriate duration of the prohibition is 6 years. We base that conclusion primarily on the seriousness of the conduct and the lack of sufficient insight demonstrated by Gardener-Evans, and also based on the precedents that have been brought to our attention.

[37] We agree that the public interest is not served by ordering prohibitions against New Point's participation in public markets. This accords with two past decisions of the Commission, namely *Re Wong*, 2016 BCSECCOM 208 and QcX *Gold Corp.*, *supra.* In *Wong*, the panel declined to impose any sanctions on the corporate respondent where that respondent admitted key facts and liability and did not operate independently from the individuals who created the corporate entity to perpetrate the fraud.

[38] In *QcX Gold Corp.*, the Commission declined to impose sanctions against the corporation given that the individual respondent and former CEO was no longer with the company. The panel found in QcX at para. 71 that:

> As has been noted, no sanctions are sought against QcX. We are prepared to accept the executive director's position in that regard. The group of people who faced the highest risk of harm due to the conduct of Voisin and Archibald were the shareholders of QcX. Any financial sanction imposed would potentially be paid by that same group of people. In addition, there is a new management team in place and no allegations of wrongdoing have been made against any of the new team.

[39] In the matter before us, New Point is under new management, both officers and directors, and there is no suggestion current members of management are connected to the prior breaches.

[40] We are not suggesting that in every case where there has been a change of management after a breach, a corporate respondent should receive reduced or no sanctions. We are focused here on some specific circumstances which, taken in totality, lead us to accept the submissions of the executive director and New Point that no sanctions should be imposed on New Point. The key factors are:

a) the breaches of the Act in issue here were not the result of some long standing, systemic failure by the issuer. According to the evidence before us, the breaches arose because of specific decisions made by specific individuals to first accept the cheque swap arrangement and then to omit disclosure about how the proceeds of the private placement were spent. The individuals in question are being held responsible for the breaches;

b) there is a new management team and board of directors in place;

c) New Point has made the hearing process more efficient by admitting important facts and legal conclusions and that conduct should be taken into account in the evaluation of what sanction is appropriate;

d) it is open to us to give some weight to the submission of the executive director. In this case the submission of the executive director attracts our attention because it is rare that the executive director, having proven breaches of the Act by a respondent, submits that no sanction should follow; and

e) there is a public interest in encouraging the executive director and respondents to reach full or partial agreements regarding the facts, regarding the efficient conduct of a hearing and regarding what sanction is appropriate. The executive director and New Point have reached an agreement here, including regarding the recommended sanction, and the sanction proposed is reasonable. While we are obviously not bound by the recommendation placed before us, we are influenced to

some extent by a desire to avoid creating a disincentive for the parties to reach future agreements of the nature accepted by the executive director and New Point.

B. Administrative penalties

[41] For the reasons we have set out above, we agree that the public interest is not served by ordering that New Point pay an administrative penalty.

[42] In the case of Gardener-Evans we order that he pay an administrative penalty of $40,000.

V. Orders

[43] It is not clear on the evidence before us whether New Point has again changed its name, or when. Normally the executive director is careful to put before us evidence regarding all name changes up to the time of the making of our sanctions order. In this case it may be that the issue is moot because we are not making a sanction order naming New Point. If it emerges that there is a benefit to updating our order to include a new name for New Point other than Bam Bam, we give the parties leave to raise that with us.

[44] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

a) under section 161(1)(d)(i), Gardener-Evans resign any position he holds as a director or officer of an issuer or registrant;

b) Gardener-Evans is prohibited for a period of 6 years:

(i) under section 161(c), from relying on any exemptions set out in the Act, the regulations, or a decision;

(ii) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;

(iii) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(iv) under section 161(1)(d)(iv), from advising or otherwise acting in a management or consultative capacity in connection with activities in the securities or derivatives markets;

(v) under section 161(1)(d)(v) of the Act, from engaging in promotional activities by or on behalf of an issuer, security holder or party to a derivative, or another person that is reasonably expected to benefit from the promotional activity;

(vi) under section 161(1)(d)(vi), from engaging in promotional activities on his own behalf in respect of circumstances that would reasonably be expected; and

c) Gardener-Evans pay to the Commission an administrative penalty of $40,000 under section 162.

September 12, 2023

For the Commission

Gordon Johnson
Vice Chair

Deborah Armour, KC
Commissioner

James Kershaw
Commissioners

NOTICE: The orders made against Bryn Gardener-Evans in this matter may automatically take effect against them in other Canadian jurisdictions, without further notice to them.