

2010 BCSECCOM 170

Microline Veneer & Forest Products Corp. and Peter William Arthur Wise

Section 161 of the *Securities Act*, RSBC 1996, c. 418

Panel	Brent W. Aitken Don Rowlatt Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
Date of application	March 25, 2010	
Date of ruling	March 25, 2010	
Date reasons issued	March 31, 2010	
Appearing		
Roderick Anderson	For Microline Veneer & Forest Products Corp. and Peter William Arthur Wise	
Kristine Mactaggart Wright	For the Executive Director	

Reasons for Ruling

- ¶ 1 On March 10, 2010, the executive director issued a notice of hearing and temporary orders against Microline Veneer & Forest Products Corp. and Peter William Arthur Wise (2010 BCSECCOM 137). The notice of hearing alleges that Microline and Wise contravened sections 34(1) and 61(1) of the Act.
- ¶ 2 On March 25, 2010, we dismissed the executive director's application to extend the temporary orders until a hearing is held and a decision is rendered. These are our reasons.

I Background

- ¶ 3 Microline is a forest products business started by Wise, its president. Wise was registered under the Act as a mutual fund salesperson from 1998 until December 2005.
- ¶ 4 The executive director alleges that the respondents distributed securities to 35 investors for proceeds of about \$2.77 million. The executive director alleges that

2010 BCSECCOM 170

the respondents made 27 of these trades, representing proceeds of about \$1 million, in contravention of the Act.

- ¶ 5 A list of subscribers shows that all of the distributions but one occurred in 2007. One trade was on August 28, 2009. The respondents say that, apart from that trade, Microline has not sold securities since May 8, 2007.
- ¶ 6 In mid-January 2008 a Commission staff investigator asked Wise for information about the distributions. In late March 2008, counsel for Microline sent the investigator the information requested.
- ¶ 7 On December 23, 2008 the Commission issued an investigation order.
- ¶ 8 In January 2010, Wise sent a Microline document dated January 14 to Microline's investors. It was headed "Press Release" but it appears to have been distributed only to Microline investors. These are relevant excerpts from this document:

"For a few months now the company has endeavoured to secure financing to ramp up production when the market recovered and to further develop a pellet plant. Our objective has been to raise between four and ten million to pay off the mortgage, build further inventories and construct a 300,000 metric tonnes per year pellet plant operation. Suffice to say it has been a major challenge to raise money for any type of forest related business or any business venture over the past couple years. In the wake of the financial crisis liquidity and credit have virtually evaporated over night.

...

We have pursued many options to access the capital required . . .
Going public will provide the means to access to capital

. . . We have . . . acquired a public company and are moving ahead with the restructure of that company over the next sixty days.

...

The company that has been acquired is called "Incomnet Inc." and trades in the US on what is called the pink sheets over the counter market Over the next couple months we will move the company to a bulletin board listed company. This requires significantly more reporting and auditing but is a more desirable place for the company to continue to facilitate the completion of our financing. . . . Until we make the needed changes and

2010 BCSECCOM 170

restructure this company “DO NOT”, I repeat DO NOT buy any shares in the market.

From here on in we are in the realm of the US Securities Commission and all activity and reporting must first be approved by them.”

- ¶ 9 On February 19, 2010, Commission staff received an email complaint from an investor, DM, who invested on August 28, 2009. The complaint reads, in part:

“I still havnt [*sic*] received any type of documentation regarding my 50000 dollars. I am now writing my story about all of this came about. Do you think i [*sic*] have any chance of getting my money back. If not i [*sic*] would still like to charge him and put him behind bars where he belongs.”

- ¶ 10 On March 10, 2010, the executive director issued the notice of hearing and temporary orders prohibiting trading in Microline securities, prohibiting use of the exemptions by the respondents, and prohibiting Wise from:
- trading in any securities, except in securities in an existing account in his own name, through a registered dealer
 - becoming or acting as a director or officer of any issuer, registrant or investment fund manager
 - acting as a registrant, investment fund manager or promoter
 - acting in a management or consultative capacity in connection with activities in the securities market, and
 - engaging in investor relations activities.

II Analysis

- ¶ 11 Section 161(3) says that if the Commission “considers it necessary and in the public interest” it may make an order extending a temporary order until a hearing is held and a decision rendered.
- ¶ 12 In *Sungro Minerals Inc.* 2009 BCSECCOM 585 the Commission confirmed that in circumstances of the nature present in this case, “staff must produce evidence for the Commission to assess whether there is prima facie evidence of the misconduct alleged.” The evidence must be more than staff’s opinion or belief that a respondent breached the legislation or acted contrary to the public interest: *Terry James Minnie and Raymond Patrick Shaw* 2004 BCSECCOM 677.
- ¶ 13 The executive director asked that we extend the temporary orders because:
- there is prima facie evidence that trades to three Microline investors were in contravention of the Act, and

2010 BCSECCOM 170

- the executive director “is apprehensive of future conduct by the respondents” because a trade took place in August 2009 and “there is a plan to list on the pink sheets market”.

¶ 14 Commission staff have not sought an interview with Wise.

Evidence

- ¶ 15 In the discussion that follows, our observations on the evidence are limited to considering whether the evidence meets the *prima facie* test necessary for an extension of temporary orders.
- ¶ 16 The respondents say that the three trades the executive director relies on to prove a *prima facie* contravention of the Act were made in reliance on the private issuer exemption in section 2.4 of National Instrument 45-106 *Prospectus and Registration Exemptions*. Under that exemption, the prospectus and registration requirements do not apply if the trade is in the securities of a private issuer, as defined in the instrument, and the investor meets listed criteria.
- ¶ 17 One of the available criteria is that the investor is an “accredited investor”. An accredited investor is one who, at the time of the trade, had:
- net pre-tax income of \$200,000 (or, in combination with their spouse’s income, \$300,000) for the two most recent calendar years, or
 - alone, or in combination with their spouse, financial assets with a net realizable value of more than \$1 million (financial assets are defined as cash, securities, insurance contracts or deposits).
- ¶ 18 In an affidavit, a Commission staff investigator says that he phoned three of the investors whose subscription agreements indicated that they were accredited investors. We refer to these investors as ND, PR and DM.

The trade to ND

- ¶ 19 The evidence includes account opening forms with a financial institution dated October 2005 showing that ND and her spouse had, at that time, \$1 million in assets that would meet the definition of “financial assets” for the purposes of the accredited investor definition. She signed a Microline subscription agreement stating that she, alone or with her spouse, had financial assets exceeding \$1 million. The subscription agreement describes the facts relevant to the determination of whether an individual is an accredited investor.
- ¶ 20 This is the investigator’s evidence about investor ND:

“According to her Subscription Agreement, [ND] is accredited, but based on our conversation by phone, she is not accredited.”

2010 BCSECCOM 170

- ¶ 21 This falls far short of the facts necessary to establish *prima facie* evidence of a contravention of the Act. The investigator's affidavit does not say when he spoke to ND, what questions he asked her or the answers she gave that led him to conclude that she is not accredited. The affidavit states that she "is not" accredited but does not say whether she was accredited at the time of the trade. Nor does it reconcile why, if she was not accredited, she signed a subscription agreement stating that she was. Whatever she told the investigator over the phone, they were unsworn statements.
- ¶ 22 We find that this evidence, taken as a whole, is not *prima facie* evidence that ND was not an accredited investor.
- ¶ 23 The executive director says that this trade was the second trade in the distribution, and that as a result the private issuer exemption was not available for any other trades thereafter. However, there is no evidence that this was the second trade, apart from the investigator's bare assertion of that, nor did the executive director identify which of the 27 impugned trades would be affected if it were the second trade.

The trade to PR

- ¶ 24 The evidence includes an account opening form with a financial institution dated April 2006 showing that PR had "liquid assets" of \$400,000 and an annual income of \$70,000. She signed a Microline subscription agreement stating that she, alone or with her spouse, had financial assets exceeding \$1 million. The subscription agreement describes the facts relevant to the determination of whether an individual is an accredited investor.
- ¶ 25 In an affidavit, Wise says that PR told him that, in addition to the assets disclosed on the account opening form, she had an interest in some commercial and industrial real estate, "which held considerable value".
- ¶ 26 This is the investigator's evidence about investor PR:
- "Another example where an investor is not accredited as claimed, based on documents obtained, in addition to our phone conversation, is [PR]. . . ."
- ¶ 27 The investigator then cites the statements from PR's account opening form.
- ¶ 28 For this trade, the evidence is equivocal. The information in her account opening form dated about 10 months before she subscribed does not support her eligibility as an accredited investor, assuming she chose to disclose her entire net worth on

2010 BCSECCOM 170

that form. Even if she did have an interest in commercial real estate, that would not count as “financial assets”. That said, she represented in her subscription agreement that she was accredited, and that agreement described the criteria for accredited investors.

- ¶ 29 The investigator’s affidavit makes passing reference to his conversation with PR, but does not say what, if anything, he relied on from that conversation. His affidavit does not say when he spoke to PR, what questions he asked her or the answers she gave that led him to conclude that she is not accredited. The affidavit states that she was not accredited at the date of her account opening forms but does not say whether she was accredited at the time of the trade. Nor does it reconcile why, if she was not accredited, she signed a subscription agreement stating that she was. Whatever she told the investigator over the phone, they were unsworn statements.
- ¶ 30 We find that this evidence is not *prima facie* evidence that PR was not an accredited investor.

The trade to DM

- ¶ 31 In his affidavit, Wise says that he met DM through a mutual friend in July or August of 2009. He says that DM asked him about investment opportunities. Wise says that he told DM about Microline but that it was not soliciting investments from individuals. He says DM told him that he had sold a strip mall, owned a night club and the building it was in, and that his net income was \$40,000 to \$50,000 per month.
- ¶ 32 DM signed a subscription agreement and represented that he, alone or with his spouse, had financial assets exceeding \$1 million.
- ¶ 33 This is the investigator’s evidence about investor ND:

“On February 23, 2010, I phone [DM]. Based on our discussion, he is not accredited as indicated on his Subscription Agreement . . .”

- ¶ 34 Again the evidence falls short of *prima facie* evidence of a contravention of the Act. The investigator’s affidavit does not say what questions he asked DM or the answers he gave that led him to conclude that he is not accredited. As with ND, the affidavit states that he “is not” accredited; it does not speak to whether he was accredited at the time of the trade. And, as with ND and PR, it does not reconcile why, if he was not accredited, he signed a subscription agreement stating that he was.

2010 BCSECCOM 170

¶ 35 In addition, it appears from DM's complaint to the Commission that he is unhappy with Wise, saying he belongs "behind bars". This raises an issue of credibility regarding any evidence he gave to the investigator, particularly because his statements, like those of ND and PR, are unsworn.

¶ 36 We find that this evidence, taken as a whole, is not *prima facie* evidence that DM was not an accredited investor.

Necessity and the public interest

¶ 37 The staff investigator says he is "concerned" that Microline may still be distributing securities, but there is no evidence of any distributions after May 8, 2007, other than the trade to DM in August 2009.

¶ 38 The executive director argues that the Microline "press release" dated January 14, 2010 shows an intended affiliation with the pink sheets and an intention to take steps that will allow illegally distributed shares to be publicly traded.

¶ 39 We have found no *prima facie* evidence that Microline securities have been illegally distributed, and the information in Microline's press release does not lead us to conclude that it is necessary to extend the temporary orders.

¶ 40 The press release talks about the company's plans to enter the public markets. It talks about its acquisition of a company now quoted on the pink sheets. The executive director made submissions about the poor disclosure practices and attendant risks to investors of some pink sheet companies, but the press release makes it plain that the company's intent is to take the public vehicle to the OTC Bulletin Board, where the disclosure and filing requirements are more onerous.

¶ 41 The press release warns investors not to buy shares of the public vehicle until the reorganization is complete, and includes a reference to the need to comply with US securities laws.

¶ 42 The executive director has provided no evidence that it is necessary and in the public interest to extend the temporary orders.

2010 BCSECCOM 170

¶ 43 We therefore dismissed the application.

¶ 44 March 31, 2010

For the Commission

Brent W. Aitken
Vice Chair

Don Rowlett
Commissioner

Suzanne K. Wiltshire
Commissioner