2012 BCSECCOM 176

VerifySmart Corp. (formerly known as Verified Capital Corp.), Verified Transactions Corp., Daniel Scammell and Casper de Beer aka Casha de Beer

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Brent W. Aitken	Vice Chair
	Kenneth G. Hanna	Commissioner
	Don Rowlatt	Commissioner
Submissions completed	March 26, 2012	
Date of decision	May 14, 2012	

Submissions filed by

Kristine Mactaggart Wright	For the Executive Director
Patricia A.A. Taylor	For Casper de Beer aka Casha de Beer
Daniel Scammell	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. Our Findings on liability made on December 21, 2011 (2011 BCSECCOM 569) are part of this decision.

¶ 2 We found that

- Verified Transactions Corp. and Daniel Scammell contravened sections 34 and 61(1) of the Act when they distributed securities of Verified Transactions to 49 investors for proceeds of $641,309 in purported reliance on exemptions from the registration and prospectus requirements that were not available; and

- VerifySmart Corp., Scammell, and Casper de Beer contravened sections 34 and 61(1) when they distributed securities of VerifySmart to 50 investors for proceeds of $575,000 in purported reliance on exemptions from the registration and prospectus requirements that were not available.

II Analysis

A Positions of the parties

¶ 3 The executive director seeks orders:

1. under sections 161(1)(b), (c), and (d), prohibiting each of Scammell and de Beer for between 6 and 10 years from:
   - trading or purchasing securities,
   - using the exemptions under the Act,
   - acting as a director or officer of any issuer,
   - acting as a registrant or promoter,
   - acting in a management or consultative capacity in connection with activities in the securities market, and
   - engaging in investor relations activities;

2. under section 161(1)(b), permanently prohibiting all persons from trading or purchasing securities of Verified Transactions and VerifySmart;

3. under section 161(1)(d)(v), permanently prohibiting Verified Transactions and VerifySmart from engaging in investor relations activities;

4. under section 161(1)(g), requiring Scammell and de Beer to pay to the Commission the amount obtained as a result of the illegal distributions; and

5. under section 162, requiring each of Scammell and de Beer to pay an administrative penalty of between $50,000 and $65,000.

¶ 4 Scammell says any prohibitions under section 161(1) against him should be for no more than 6 months; de Beer says any prohibitions against him should be for no more than two years. They each say the prohibitions should be against only

- trading or purchasing securities (with an exception for each to trade for his own account or the account of a family company),
- acting as a director or officer of any issuer (except a family company),
- acting in a management or consultative capacity in connection with activities in the securities market, and
- engaging in investor relations activities.

¶ 5 Scammell and de Beer each oppose an administrative penalty. Neither made any submissions on the issue of an order under section 161(1)(g); we assume they oppose that, too. They both claim financial hardship, although neither provided evidence of that beyond their assertions.

B Factors

¶ 6 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified the factors relevant to sanction as follows (at page 24):

> "In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past."

Seriousness of the conduct; damage to markets

¶ 7 In *Corporate Express Inc.* 2006 BCSECCOM 153 the Commission said:

> "15 We found that all of the respondents contravened sections [34] and 61(1), the foundation investor protections in the Act. Section [34] requires that those who trade in securities be registered. It is the means by which the Act intends to ensure that purchasers of securities are offered only securities that are suitable.

> Section 61(1) requires that those who wish to distribute securities file a prospectus with the Commission. Its intent is that investors and their advisers get the information they need to make an informed investment decision."
>
> 16 Any contravention of sections [34] and 61(1) is therefore inherently serious. . . ."

¶ 8 Scammell was instrumental in raising the funds for Verified Transactions and both he and de Beer were instrumental in raising the funds for VerifySmart. In so doing, without complying with the registration and prospectus requirements of the Act, they engaged in the serious misconduct described in *Corporate Express*.

Enrichment

¶ 9 There is no evidence that Scammell and de Beer were enriched or otherwise benefitted from their misconduct. To the contrary, it appears that both lost money.

¶ 10 Scammell says that the half a million or so dollars that he raised in the early stages came from "family and friends". Scammell also says he loaned Verified Transactions about $900,000 of his own money, financed by mortgaging his house. He said at the time of his interview with Commission staff that Verified Transactions had repaid him only about $350,000.

¶ 11 de Beer says he and his family paid over $93,000 of the corporate respondents' expenses.

Harm to investors

¶ 12 There is evidence of significant harm to investors. The respondents raised over $1.2 million from investors. There is no market for the securities the investors purchased, nor is there any evidence that their investments have any present or future value.

Mitigating or aggravating factors

¶ 13 Scammell and de Beer both say they did not intentionally contravene the Act. In the absence of evidence to the contrary, we accept these submissions. That said, this is not a mitigating factor. Were the facts otherwise, that would be a significant aggravating factor; the absence of that aggravating factor is not a mitigating factor.

¶ 14 Scammell and de Beer also both say that they relied on legal advice provided by a law firm and specifically a partner of the firm who was also a director and shareholder of the corporate respondents.

¶ 15 Scammell and de Beer both say that the lawyer prepared and reviewed the subscription agreements and that they relied on him to ensure compliance with the requirements of the Act.

¶ 16 Scammell says he "sought and received" the lawyer's advice "regarding the requirements necessary for the Company to rely upon the friends, family and business associates exemption" and that the lawyer confirmed to him that it was the lawyer's "legal obligation to go through the subscription agreements before the funds could be released to the Company."

¶ 17 These submissions are of limited use to us in determining sanctions. The lawyer was not called as a witness, and there is no other evidence as to the particulars of the legal advice that Scammell and de Beer say he or his firm gave the respondents. In these circumstances, we cannot consider the legal advice that Scammell and de Beer say they received to be a mitigating factor.

Past conduct

¶ 18 There is no evidence that any of the respondents has any regulatory history.

Risk to investors and markets

¶ 19 *Solara* (see 2010 BCSECCOM 163 and 357) was an illegal distribution case in which Solara Technologies Inc. and William Dorn Beattie raised $790,000 from 46 investors in 56 trades in purported reliance on exemptions that were not available (but for one trade).

¶ 20 In its decision in *Solara*, the Commission considered the conduct of the respondents in the context of their purported reliance on the registration and prospectus exemptions under the Act:

> "23 Although we did not find that Solara or Beattie knowingly contravened the Act, they were sloppy about ensuring that the exemptions were available. Their carelessness and demonstrated failure to ensure compliance with requirements when raising capital suggests the potential for significant risk to our capital markets were they to continue to participate in them unrestricted."

¶ 21 In our opinion, the same line of reasoning applies here.

Specific and general deterrence

¶ 22 The sanctions we impose must be sufficiently severe to ensure that the respondents and others will be deterred from raising capital without being registered and filing a prospectus unless exemptions from those requirements are available.

Previous orders

¶ 23 The executive director cited two Commission decisions and two settlements with the executive director. Neither Scammell nor de Beer cited any decisions or settlements in addition to those cited by the executive director.

¶ 24 Of the cases cited by the executive director, we consider *Solara* the most relevant. In that case, the Commission ordered five-year prohibitions against Beattie. In doing so, it noted that his reliance on others did not relieve him of his responsibility to ensure that Solara complied with the requirements of the legislation.

C Sanctions

¶ 25 The executive director applied for orders against Scammell and de Beer denying them the use of the registration and exemptions under the Act. Because we are prohibiting Scammell and de Beer from trading and purchasing securities, those orders are not necessary.

¶ 26 The executive director applied for orders under section 161(1)(b) that no one trade or purchase securities of the corporate respondents. We agree that this is appropriate.

¶ 27 The executive director also applied for orders under section 161(1)(d)(v) that the corporate respondents not engage in investor relations activities. Because we are ordering that no one may trade or purchase the securities of the corporate respondents, it is not necessary to make an order under section 161(1)(d)(v).

¶ 28 In our opinion, an administrative penalty against each of Scammell and de Beer is appropriate having regard to all of the factors relevant to sanction. We are also of the opinion that a penalty at the level the Commission imposed against Beattie in the *Solara* case is appropriate, given the similarities between Beattie's misconduct in *Solara* and Scammell's and de Beer's misconduct in this case.

¶ 29 The executive director applied for an order under section 161(1)(g) that Scammell and de Beer pay to the Commission the amount raised from the investors. (These are known colloquially as disgorgement orders.) As a matter of principle, we agree that if capital is raised in contravention of the Act, it follows that it is appropriate that the amount raised be disgorged to the Commission. We have accordingly made an order to that effect against all of the respondents.

¶ 30 Both Scammell and de Beer made submissions to the effect that they have no current ability to pay an administrative penalty (or, presumably, an amount under section 161(1)(g)). Neither of them provided any evidence to prove that assertion.

Even if they were to do so, that would not be proof of their inability to comply with those orders in the future were their circumstances to change.

III Orders

¶ 31 Considering it to be in the public interest, we order:

Scammell

1. under section 161(1)(b) of the Act, that Scammell cease trading in, and be prohibited from purchasing, securities, except he may trade and purchase securities through accounts in his own name at one registered dealer, provided that he gives a copy of this decision to the registered dealer;

2. under sections 161(1)(d)(i) and (ii), that Scammell resign any position he holds as, and is prohibited from becoming or acting as, a director or officer of any issuer, other than an issuer all the securities of which are owned by Scammell or by members of his immediate family;

3. under section 161(1)(d)(iii), that Scammell is prohibited from becoming or acting as a registrant or promoter;

4. under section 161(1)(d)(iv), that Scammell is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

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

6. under section 161(1)(g), that Scammell pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the Act, which we find to be not less than $1.2 million;

7. under section 162, that Scammell pay an administrative penalty of $50,000;

8. the orders in paragraphs 1 through 5 remain in force until the latest of May 14, 2017, the date that the amounts in paragraphs 6, 14, 18 and 20 are paid, and the date Scammell pays the amount in paragraph 7;

de Beer

9. under section 161(1)(b) of the Act, that de Beer cease trading in, and be prohibited from purchasing, securities, except he may trade and purchase securities through accounts in his own name at one registered dealer, provided that he gives a copy of this decision to the registered dealer;

10. under sections 161(1)(d)(i) and (ii), that de Beer resign any position he holds as, and is prohibited from becoming or acting as, a director or officer of any issuer, other than an issuer all the securities of which are owned by de Beer or by members of his immediate family;

11. under section 161(1)(d)(iii), that de Beer is prohibited from becoming or acting as a registrant or promoter;

12. under section 161(1)(d)(iv), that de Beer is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

13. under section 161(1)(d)(v), that de Beer is prohibited from engaging in investor relations activities;

14. under section 161(1)(g), that de Beer pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the Act, which we find to be not less than $1.2 million;

15. that under section 162, that de Beer pay an administrative penalty of $50,000;

16. the orders in paragraphs 9 through 13 remain in force until the latest of May 14, 2017, the date that the amounts in paragraphs 6, 14, 18, and 20 are paid, and the date de Beer pays the amount in paragraph 15;

Verified Transactions

17. under section 161(1)(b), that all persons permanently cease trading in, and be prohibited from purchasing, securities of Verified Transactions;

18. under section 161(1)(g), that Verified Transactions pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the Act, which we find to be not less than $1.2 million;

VerifySmart

19. under section 161(1)(b), that all persons permanently cease trading in, and be prohibited from purchasing, securities of VerifySmart;

20. under section 161(1)(g), that VerifySmart pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the Act, which we find to be not less than $1.2 million; and

Maximum disgorgement

21. that the aggregate amount paid to the Commission under paragraphs 6, 14, 18, and 20 not exceed the greater of $1.2 million and the actual amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the Act.

¶ 32 May 14, 2012

¶ 33 **For the Commission**

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner

Don Rowlatt
Commissioner