

# 2012 BCSECCOM 445

## Brookmount Explorations Inc., Peter John Flueck and Zafer Erick Sungur

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

#### Hearing

<b>Panel</b>	Brent W. Aitken Shelley C. Williams Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
<b>Date of hearing</b>	October 22, 2012	
<b>Date submissions completed</b>	November 5, 2012	
<b>Date of Decision</b>	November 29, 2012	
<b>Appearing</b>		
Kristine Mactaggart Wright	For the Executive Director	
Owais Ahmed	For Brookmount Explorations Inc., Peter John Flueck and Zafer Erick Sungur	

#### 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 June 26, 2012 (2012 BCSECCOM 250) are part of this decision.
- ¶ 2 We found that
- Brookmount made misrepresentations, contrary to section 50(1)(d), when it omitted material facts from news releases it issued between February 2005 and June 2007.
  - Brookmount contravened NI 43-101 when it issued those news releases.
  - Flueck and Sungur authorized, permitted and acquiesced in Brookmount's contraventions of section 50(1)(d) and NI 43-101 and accordingly contravened those requirements under section 168.2(1).

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- Flueck and Sungur breached a June 2007 cease-trade order made by the executive director against Brookmount when they sold Brookmount shares in July and August 2007.

### **II Positions of the parties**

- ¶ 3 Following the release of our Findings, the parties filed written submissions on sanction. Flueck and Sungur filed affidavits in support of their submissions. We also held an oral hearing and the parties filed additional submissions after the hearing.
- ¶ 4 The executive director seeks orders prohibiting Flueck and Sungur for 10 years from
- trading securities or exchange contracts
  - acting as directors or officers of any issuer
  - becoming or acting as registrants or promoters
  - acting in management or consultative capacities in connection with activities in the securities market
  - engaging in investor relations activities
- ¶ 5 The executive director also seeks orders requiring each of Flueck and Sungur to pay an administrative penalty of \$100,000 (and requiring the prohibitions to remain in force until the penalty is paid).
- ¶ 6 The executive director seeks no orders against Brookmount on the basis that the June 2007 cease-trade order remains in force.
- ¶ 7 Flueck and Sungur concede that it is appropriate that orders be made against them. However, they say that we should not prohibit them from trading, from acting as registrants or promoters, or from acting in management or consultative capacities in connection with activities in the securities market because those prohibitions are not rationally connected to their misconduct. They say any administrative penalty should not exceed \$40,000 for Flueck or \$20,000 for Sungur.
- ¶ 8 In his affidavit, Flueck says he has been attempting to recruit new directors and officers to take over management of Brookmount. He has been unsuccessful to date, which he attributes to Brookmount's "inability to pay any significant salary". He says, "I do not believe anyone will come forward to take my place."
- ¶ 9 Flueck says that if he is prohibited from acting as a director or officer or in a management or consultative capacity to Brookmount, he does "not believe that the shareholders of Brookmount will ever recoup any part of the value of their investment in the company." With no one to take his place, says Flueck, "Brookmount would eventually lose its interest in the Mercedes 100 Project by failing to pay the fees owed to the Peruvian government."
- ¶ 10 At the hearing on sanction, the panel asked counsel for Flueck to clarify the scope of activities Flueck wishes to undertake on behalf of Brookmount, and asked the parties

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for further submissions on what orders would be appropriate, in light of the scope of those activities.

- ¶ 11 Flueck says his attempts to recover value for Brookmount shareholders include “attempting to sell its assets, including its mining interest in Peru” and taking steps “to maintain Brookmount’s mining interest in Peru”, which we take to mean the making of the necessary payments to the Peruvian government.
- ¶ 12 To do these things, Flueck says he needs the ability to:
- enter into negotiations and agreements with third parties relating to both asset sales and operations
  - hire employees
  - continue operations
  - retain legal counsel
- ¶ 13 Flueck is proposing that he be permitted to act as a director or officer of Brookmount and that any order prohibiting his acting in a management or consultative capacity permit the same. He proposes that the exception to allow him to act as a director or officer of Brookmount restrict him from issuing any news release on behalf of Brookmount without its approval by another director of Brookmount, with the executive director’s consent, or by order of the Commission.
- ¶ 14 The executive director says that if we are persuaded to create an exception in our orders to allow Flueck to act as a director or officer of Brookmount, we should stipulate that he can do so only if another director or officer of Brookmount approves and signs any news releases, or contracts for investor relations and news dissemination. The executive director says he does not review news releases.

### III Analysis

#### A Factors to Consider

- ¶ 15 In *Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission discussed the factors relevant to sanction for contraventions of the Act. For the purposes of this case, these factors can be grouped under these headings:
- the seriousness of the respondents’ conduct, the damage done to British Columbia’s capital markets, and the harm suffered by investors as a result of the respondents’ conduct
  - the extent to which the respondents were enriched
  - factors that mitigate or aggravate the respondents’ conduct
  - the respondents’ past conduct
  - the risk to investors and capital markets posed by the respondents’ continued participation in the capital markets
  - specific and general deterrence
  - orders made by the Commission in similar circumstances in the past

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### *Seriousness of conduct; damage done to British Columbia's capital markets; harm suffered by investors*

- ¶ 16 This is a case of a junior mining company that grossly exaggerated in news releases the value of its primary mining property. In our Findings we said:
- 85 . . . For a small mining company engaged in almost continuous financing efforts . . . It is hard to overstate the importance of news releases. They are an important part of communicating information that is accurate and not misleading and that, when the news is good, will excite interest in the company.
- ¶ 17 Considering Flueck's conduct, it is hard to imagine a more serious and flagrant case of misrepresentation relating to a junior mining company. All of the misrepresentations related to Brookmount's key property. Flueck deliberately exaggerated the prospects of that property by cherry-picking favourable statements from the reports available to him. He also failed to disclose qualifying information that would have shown his statements to be quite simply false. On top of that, he included information that was simply made up.
- ¶ 18 Sungur's misconduct in this regard was also serious. He reviewed the news releases and told Flueck when he disagreed with their content. In the case of the false news releases that led to our findings, he knew they were a blatant contradiction of Brookmount's SEC filings, but approved them anyway.
- ¶ 19 The prohibition in section 50(1)(d) against making misrepresentations, and the requirements imposed by NI 43-101, are intended to prevent exactly this kind of public misinformation for junior mining companies. That Flueck failed utterly to understand this is clear from his expressed reason for issuing the false news releases: "To put out a good news release or press release, I guess."
- ¶ 20 The British Columbia venture markets are vital to the provincial and national economies. They are engines of economic growth and employment. Yet they are fragile. By their nature, they carry the investment risks that come with start-up and early-stage ventures. Participants in the venture market know and accept these risks. What they do not accept is the risk of dishonest conduct, and when that happens, it gives pause to those who might otherwise invest in the market.
- ¶ 21 The OTC Bulletin Board market is not located here, nor is it directly regulated by the Commission. Yet many BC-based issuers are quoted on the OTCBB, and BC-based dealers trade shares of OTCBB-quoted issuers. Investors are not always attuned to the distinction of the actual market on which the misconduct takes place. What they see is

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wrongdoing with a connection to a BC-based issuer, or to a BC-based dealer, and that perception taints the reputation of our local market. That reality means that misconduct of OTCBB-quoted issuers, if their securities are traded here, and especially if their offices are located here, damages the reputation of our capital markets.

- ¶ 22 Brookmount's blatant misrepresentations about the value of its key property is therefore at the highest end of the range of misconduct because of the damage it can cause to the integrity of our markets.
- ¶ 23 The respondents say there is no direct evidence of actual harm done to investors.
- ¶ 24 We disagree. The June 2007 cease-trade order includes statements (that the respondents did not challenge) about Brookmount's share price and trading volume during the relevant period.
- ¶ 25 The cease-trade order states that between December 2004 and June 2007, Brookmount traded on the OTCBB at an average price of US\$0.29 with an average daily volume of 41,500 shares, although that does not tell the whole story.
- ¶ 26 The cease-trade order also states that between December 1, 2005 to January 11, 2006, Brookmount's share price "increased from US\$0.19 to an all-time high of US\$1.075 with an average daily volume of 174,000 shares".
- ¶ 27 During this period, Brookmount issued two of the news releases that we found to be false: one on December 14, 2005 stating that the projected revenue from the Mercedes property increased from US\$59 million to US\$98 million, and one on January 9, 2006 in which Flueck manufactured the reserve estimate for the Mercedes property by applying grade information from the Mann report to tonnage estimates from the Coates report.
- ¶ 28 This is evidence of harm to investors. Investors were actively trading Brookmount shares at prices grossly inflated on the basis of the false and misleading information in Brookmount's news releases.
- ¶ 29 It is also reasonable to infer, even in the absence of any evidence about share price and trading volumes, that misrepresentations by a public issuer in news releases about its core business causes harm to investors. In securities regulation it is axiomatic that investors and their advisers rely on an issuer's continuous disclosure record in making investment decisions. The requirement for accurate continuous disclosure is one of the fundamental requirements of securities regulation. It is intended to ensure that investors have available to them accurate and timely information about the issuer.

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- ¶ 30 The respondents also say there is no direct evidence that any British Columbia investors were harmed, but the fact is their misconduct exposed British Columbia investors to harm. Brookmount traded on the OTC Bulletin Board, a market easily accessed by British Columbia investors, who also had access to Brookmount’s false news releases.

### ***Enrichment***

- ¶ 31 There is no evidence that Flueck or Sungur were enriched as a result of their contraventions of the Act. To the contrary, the evidence is that they both worked for considerable periods without a salary and accepted shares (which they have not sold) in lieu of some of their salary. As a result, Brookmount still owes them significant sums in unpaid salary. Flueck also paid significant corporate expenses personally in order to preserve the Mercedes property and to keep the company going.
- ¶ 32 That said, although enrichment is a factor that tends to increase the level of sanctions, it does not follow that lack of enrichment is a mitigating factor.

### ***Mitigating and aggravating factors; past conduct***

- ¶ 33 The respondents cooperated with the investigation and did not contest some key elements of the allegations: that Brookmount made misrepresentations; that Brookmount contravened NI 43-101; and that Flueck was liable for Brookmount’s contraventions under section 168.2(1). This may have shortened the hearing to some degree.
- ¶ 34 Although Flueck’s and Sungur’s Brookmount share sales were a small fraction of their holdings, the fact remains that they sold shares in breach of the June 2007 cease-trade order. In Sungur’s case, about \$4,000 of his proceeds from selling shares came from his sales in breach of the cease-trade order. In Flueck’s case, all of the proceeds came from the shares he sold in breach of the cease trade order – about \$6,300.
- ¶ 35 This is an aggravating factor. In *Corporate Express Inc.* 2006 BCSECCOM 153, the Commission said this about a breach of a Commission order:

“19 All of the respondents breached the temporary orders. This is extremely serious misconduct. . .

20 The Act provides review and appeal mechanisms for respondents who believe that a temporary order is unfair or who want the order varied or revoked. A respondent who has notice of a temporary order, yet continues the activities prohibited by it, demonstrates a disregard for the regulatory system. This conduct is a significant aggravating factor in considering sanctions.”

- ¶ 36 None of the respondents has any history of regulatory sanctions.

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### *Risk to investors and markets*

- ¶ 37 The respondents' conduct is contrary to the standards expected of the management and conduct of public issuers. They contravened continuous disclosure requirements – one of the most fundamental protections of market integrity – not merely by failing to file information, but by filing false and grossly misleading information.
- ¶ 38 In their affidavits, Flueck and Sungur acknowledge our findings and depose that they take them seriously, and that they “made the mistakes identified by the panel”. To that extent, it appears that they recognize to some extent that their conduct did not meet with the obligations of those charged with the management of public companies. Neither appeared or testified at the sanctions hearing, so we cannot gauge the depth of their contrition.
- ¶ 39 That said, these are not people who belong in the public markets until they have had an opportunity to reflect on their misconduct and to educate themselves on the responsibilities of directors and officers of public companies.

### *Specific and general deterrence*

- ¶ 40 Sanctions must serve as a deterrent both to Flueck and Sungur and to others against future misconduct. Misconduct of this type warrants a significant time out from participation in our capital markets and an administrative penalty.

### *Previous orders*

- ¶ 41 The executive director cited authorities in support of the sanctions he seeks. Those authorities, and those cited by the respondents, show that the respondents accepted in settlements, or the Commission ordered, prohibitions for similar wrongdoing ranging from 18 months to five years (see *XRAYMEDIA* 2005 BCSECCOM 673, *Exotics.com Inc.* 2006 BCSECCOM 710, *Canadian Rockport Homes Int'l Inc.* 2009 BCSECCOM 45, *Brent Glen Jardine* 2007 BCSECCOM 602, *Robert Weicker* 2007 BCSECCOM 465, *Jesse J. Hogan* 2002 BCSECCOM 537, and *Nano World Projects Corporation* 2005 BCSECCOM 648) with two exceptions. The exceptions are *Hogan*, where a panel found misrepresentation and manipulation and imposed 10-year prohibitions, and *Nano World*, where the panel found fraud and imposed 25-year prohibitions.
- ¶ 42 The amounts accepted by these respondents who settled, and the administrative penalties the Commission imposed, ranged from \$25,000 to \$50,000, except for *Nano World* where the panel found fraud and imposed an administrative penalty of \$75,000.

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### **B Appropriate Orders**

#### ***Relative misconduct of Flueck and Sungur***

- ¶ 43 In making the orders in the public interest, we considered whether Flueck and Sungur should be treated differently. In our opinion, they should be.
- ¶ 44 Although the misconduct of both was serious, Flueck is the one who concocted the news releases. He was the one who created the misleading information in a manner most calculated to excite investor interest. Although Sungur reviewed and approved the releases, it was Flueck who was the main architect of the deception.

#### ***Trading ban***

- ¶ 45 Flueck and Sungur say that a trading prohibition is not rationally connected to the misconduct. This overlooks their trading in breach of the June 2007 cease-trade order, which they did through a registrant in their personal trading accounts. In these circumstances, we are ordering a trading and purchasing prohibition relating to shares of issuers with whom they are in a special relationship.
- ¶ 46 The executive director asks for no orders against Brookmount on the basis that its securities are still cease-traded under the executive director's June 2007 cease-trade order.
- ¶ 47 We note that the June 2007 order was made under section 164 of the Act. The grounds for making an order under section 164 are failure to file a record required to be filed under the Act, or filing a record that is required but has not been completed in accordance with the regulations. The section requires that the order must be revoked as soon as the record required to be filed has been filed or rectified. The June 2007 order itself says it will be revoked once Brookmount files a technical report on the Mercedes property that complies with the Act and the regulations.
- ¶ 48 We have found that Brookmount made serious misrepresentations in contravention of the Act. It appears to have no management (except, for now, Flueck). In these circumstances, we do not think its securities should automatically resume trading should it file a technical report. There may well be other matters relevant to the issue of whether it ought to resume trading that cannot be identified or dealt with now. We are therefore making a cease-trade order against Brookmount under section 161(1) as a sanction for its contravention of the Act, and are revoking the section 164 order under section 171.

#### ***Other prohibitions***

- ¶ 49 We agree with Flueck and Sungur that there is no connection between their misconduct and a prohibition from acting as registrants.



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¶ 50 We do not agree that there is no connection between their misconduct and a prohibition against acting as promoters. (Sungur makes the same argument about a prohibition against his acting in a management or consultative capacity in connection with activities in the securities market.) Flueck and Sungur caused Brookmount to issue false and grossly misleading information about its principal mining property. This misconduct is the opposite of the conduct expected of a promoter, or of a person acting in a management or consultative capacity in connection with activities in the securities market.

### *Role of Flueck*

¶ 51 We acknowledge Flueck's desire to keep enough authority to direct Brookmount's affairs in order to realize some benefit for its shareholders. That said, we have no evidence that the Mercedes property has any real value. To the contrary, the reports described in the Findings, and Brookmount's SEC filings, say the property has no reserves. We are therefore sceptical about what value there is to be preserved for Brookmount shareholders.

¶ 52 In addition, Flueck's past conduct suggests caution, to say the least, about relying on him to exercise business judgement in a manner consistent with the obligation of managements of public companies.

¶ 53 We are reluctant to make orders that could have the effect of impairing the possibility, remote though it may be, of recovering value for Brookmount's shareholders, especially in light of Flueck's apparent sincerity in attempting to do that. That said, we are mindful of the seriousness of Flueck's misconduct.

¶ 54 We are therefore permitting Flueck to act as a director and officer of Brookmount for a period of six months for the purpose of selling or winding up the company.

¶ 55 The executive director says any Brookmount news release or investor relations contract ought to be approved by a director or officer of Brookmount other than Flueck. The orders address those concerns. Flueck is prohibited from engaging in investor relations activities, which means he is not entitled to enter into investor relations contracts on behalf of Brookmount, nor is he entitled to issue any news releases other than those that Brookmount would be required to issue under timely disclosure requirements.

### *Administrative penalty*

¶ 56 In determining the administrative penalty, we considered the authorities cited to us. Of these, *Canadian Rockport*, a settlement, is fairly recent and has similar facts. Canadian Rockport, under the direction of its CEO and another person who was a director and officer, made misrepresentations that omitted material information with the result that the company's claims about its future prospects were "overly optimistic" and "not objectively verifiable".

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- ¶ 57 Canadian Rockport was a private issuer that raised US\$4.4 million on the basis of information that included its misrepresentations.
- ¶ 58 The CEO and the other director and officer undertook, in settlement of the matter, to pay to the Commission \$50,000 and \$40,000 respectively. It is worth noting that *Canadian Rockport* is a settlement. Settlements generally reflect a “discount” compared to the sanctions that may apply if the matter were to go to a hearing,
- ¶ 59 Here, we have found that Brookmount’s news releases contained deliberate and blatant misrepresentations and that this misconduct is at the high end of the range of seriousness. Any issuer that raises funds from the public is held to a high standard of conduct, and for public companies the standard is even higher. We also know that millions of Brookmount shares traded at grossly inflated prices as a result of Brookmount’s misrepresentations. For these reasons, and taking into account that *Canadian Rockport* was a settlement, the administrative penalties we have imposed on Flueck and Sungur are higher than those in *Canadian Rockport*.

### IV Orders

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

#### *Brookmount*

1. under section 161(1)(b) of the Act, that all persons permanently cease trading in, and are permanently prohibited from purchasing, any securities of Brookmount;
2. under section 171, that the cease-trade order against Brookmount made by the executive director on June 20, 2007 is revoked;

#### *Sungur*

3. under section 161(1)(b) that Sungur cease trading in, and be prohibited from purchasing, any securities or exchange contracts of any issuer with whom he is a person in a special relationship;
4. under section 161(1)(d)(i), that Sungur resign any position that he holds as a director or officer of any issuer;
5. under section 161(1)(d)(ii), that Sungur is prohibited from becoming or acting as, a director or officer of any issuer;
6. under section 161(1)(d)(iii), that Sungur is prohibited from becoming or acting as a promoter;

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7. under section 161(1)(d)(iv), that Sungur is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
8. under section 161(1)(d)(v), that Sungur is prohibited from engaging in investor relations activities;
9. the prohibitions in paragraphs 3 and 6 through 8 apply until the later of November 29, 2017, and the date Sungur pays the amount specified in paragraph 11;
10. the prohibition in paragraph 5 applies until the latest of November 29, 2017, the date that Sungur successfully completes the Simon Fraser University course *Public Companies: Financing, Governance and Compliance*, and the date Sungur pays the amount specified in paragraph 11;
11. under section 162, that Sungur pay an administrative penalty of \$45,000;

### ***Flueck***

12. under section 161(1)(b) that Flueck cease trading in, and be prohibited from purchasing, any securities or exchange contracts of any issuer with whom he is a person in a special relationship;
13. under section 161(1)(d)(i), that Flueck resign any position that he holds as a director or officer of any issuer, except that he is not required to resign as a director and officer of Brookmount until May 29, 2013;
14. under section 161(1)(d)(ii), that Flueck is prohibited from becoming or acting as a director or officer of any issuer, except that he may act as a director and officer of Brookmount until May 29, 2013, for the sole purpose of arranging a sale of Brookmount or its assets, or facilitating a winding-up of Brookmount;
15. under section 161(1)(d)(iii), that Flueck is prohibited from becoming or acting as a promoter;
16. under section 161(1)(d)(iv), that Flueck is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, other than to the extent he does so under the exception in paragraph 14;
17. under section 161(1)(d)(v), that Flueck is prohibited from engaging in investor relations activities;
18. the prohibitions in paragraphs 12 and 15 through 17 apply until the later of November 29, 2020 and the date Flueck pays the amount specified in paragraph 20;

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19. the prohibition in paragraph 14 applies until the latest of November 29, 2020, the date that Flueck successfully completes the Simon Fraser University course *Public Companies: Financing, Governance and Compliance*, and the date Flueck pays the amount specified in paragraph 20; and

20. under section 162, that Flueck pay an administrative penalty of \$65,000.

¶ 61 November 29, 2012

¶ 62 For the Commission

Brent W. Aitken  
Vice Chair

Shelley C. Williams  
Commissioner

Suzanne K. Wiltshire  
Commissioner