

# 2012 BCSECCOM 48

**Andrew Gordon Walker, Dale Michael Paulson  
and Giuliano Angelo Tamburrino**

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

## **Hearing**

<b>Panel</b>	Brent W. Aitken Bradley Doney Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
<b>Date submissions completed</b>	January 20, 2012	
<b>Date of decision</b>	February 14, 2012	
<b>Submissions filed by</b> Kristine Mactaggart Wright	For the Executive Director	
L. John Alexander	For Andrew Gordon Walker	

## **Decision**

### **I Introduction**

- ¶ 1 On October 7, 2010 we issued a decision (2010 BCSECCOM 578) in which we made orders under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418 against Andrew Gordon Walker, Dale Michael Paulson, and Giuliano Angelo Tamburrino.
- ¶ 2 The decision followed our Findings of July 12, 2010 (2010 BCSECCOM 401) in which we found that, among other things, Walker, Paulson and Tamburrino perpetrated a fraud on Panterra Resource Corp. in contravention of sections 57(b) and (c) of the Act and, under section 168.2, contravened section 168.1(1)(b) when they authorized, permitted, or acquiesced to Panterra's filing of false and misleading information.
- ¶ 3 Walker and Tamburrino appealed our decision to the British Columbia Court of Appeal. The Court dismissed Tamburrino's appeal. The Court allowed Walker's appeal (2011 BCCA 415) only to the extent of requiring us to reconsider the expiry date that applies to the prohibitions we imposed on Walker. It was not

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apparent to the Court whether we considered as a mitigating factor a decision made in August 2006 by the TSX Venture Exchange that limited Walker's ability to act as a director or officer of Exchange-listed companies.

- ¶ 4 The executive director and Walker made submissions about the decision we should make in light of the Court's judgement.

### **II Analysis**

#### **A Our Decision**

- ¶ 5 Paragraph 46 of our decision imposed these orders against Walker:

“46 Considering it to be in the public interest, we order:

...

7. under section 161(1)(b) of the Act, that Walker cease trading, and is prohibited from purchasing, securities or exchange contracts, except that Walker, or an issuer all the securities of which are owned by him or members of his immediate family may trade or purchase securities for his or its own account (other than in consideration for services rendered, finders fees, or for vending assets to public issuers) through not more than two accounts with a registrant, if he gives the registrant a copy of this decision;

8. under section 161(1)(d)(i), that Walker resign any position he holds as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

9. under section 161(1)(d)(ii), that Walker is prohibited from acting as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

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

11. under section 161(d)(v), that Walker is prohibited from engaging in investor relations activities;

12. under section 162, that Walker pay an administrative penalty of \$60,000;

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13. that the orders in paragraphs 7 and 9 through 11 of these orders remain in force until the later of October 7, 2020 and the date Walker pays the amount in paragraph 12 of these orders”

### **B The Court’s Judgement**

¶ 6 These are the portions of the Court’s judgement that are relevant to our reconsideration of the expiry date of the orders we made against Walker:

“61 While the panel said at para. 27 of its Sanctions Decision that it found no mitigating factors and rejected the contention that the appellant’s civil settlement with Panterra should be considered, it did in fact recognize at para. 44 of that decision that the appellant understood that his conduct had been wrong, and expressed remorse for it, stated that it would not be repeated, and had experienced ruinous results in his life and career. The panel did not refer to the fact that the appellant cooperated with the respondent, a factor that is generally considered to be mitigating one, but I am not satisfied that in this case, by itself, it would have been of any significance to the sanctions imposed.

...

80 The appellant contended that his conduct was far less egregious than any of these four examples, [*a reference to cases cited to the Court*], that his ten-year prohibition, at age 57 was in effect, a lifetime prohibition . . . , and that the sanctions imposed upon him were not in keeping with the orders of the Commission

....

83 While the conduct of others whose sanctions were considered by the hearing panel could reasonably be said to be more egregious than that of the appellant, with one exception, I am unable to identify any incorrect legal principle or palpable and overriding error in the imposition of the sanctions imposed on the appellant.

84 The one exception that the appellant, in my view, has established that warrants intervention by this Court is the commencement of the period of the prohibitions on various activities. The panel ordered that the prohibitions commence on October 7, 2010. The panel were aware that he had previously been prohibited from engaging in those activities as a result of an interim order of the TSX. The TSX order was made on November 1, 2006.

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85 At para. 46 of its Sanctions Decision, the hearing panel concluded that the appellant's conduct warranted a prohibition of these activities until October 7, 2020, a period of ten years from the commencement of the hearing panel's prohibition. The hearing panel does not appear to have taken the almost four years of prohibition by the TSX into account. While the TSX prohibition did not prevent the appellant from trading on other markets, nor does that of the Commission. We were advised that similar bodies in other jurisdictions may engage in reciprocal enforcement of such prohibitions by the Commission, however, the only exchange that was material to the appellant between November of 2006 and October 2010 was the TSX.

86 As it is not apparent that the Commission considered the effects of the existing suspension when it imposed its prohibitions, and given my comments in paragraph 61, I have concluded that this Court should not uphold the prohibitions that were imposed. The issue then becomes whether the matter of the sanctions should be remitted back to the respondent, or whether this Court should substitute a different period of prohibition for the appellant.

...

88 In recognition of the expertise and statutory role of the Securities Commission, it is my view that the Court should allow it the opportunity to reconsider the length of the prohibitions it has imposed. In such reconsideration, it would be incumbent upon the Commission to take into account the fact that Mr. Walker was subject to a suspension prior to the imposition of the Commission's sanctions.

...

89 I would, accordingly, allow the appeal, only to the extent of making an order that the Commission reconsider the expiry date that applies to the prohibitions imposed on Mr. Walker."

### **C Reconsideration of the orders**

#### ***Scope of the reconsideration***

- ¶ 7 Our decision contained six sanction orders against Walker:
- a prohibition against his trading and purchasing securities,
  - a prohibition against his acting as a director or officer of any issuer,
  - a prohibition against his acting in a management or consultative capacity in connection with activities in the securities market,
  - a prohibition against his engaging in investor relations activities,

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- a requirement to resign any position he held as a director and officer of any issuer, and
- the imposition on him of an administrative penalty.

¶ 8 The Court's order that we reconsider the expiry date of the prohibitions in our orders affects only the first four of these. The order that Walker resign any position he held as a director or officer applied immediately, and by its nature has no expiry date. The Court did not allow the appeal of the order imposing the administrative penalty and that order remains in force.

¶ 9 The Court ordered us to reconsider the expiry date of the prohibitions because it was not apparent to the Court whether we took into account that the Exchange decision had been in force for almost four years when we made our orders. In essence, the Court considered this a mitigating factor and thought it appropriate that we reconsider whether the expiry date of the prohibitions should be changed as a result.

### ***The nature of orders made under section 161(1)***

¶ 10 The Court recognizes in its judgement that the purpose of the Commission's public interest jurisdiction under section 161(1) is "neither remedial nor punitive; it is protective and preventative, intended to be exercised to prevent future harm" to British Columbia's capital markets (*Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)* 2001 SCC 37. The Court cited this passage from *Thow v. British Columbia (Securities Commission)* 2009 BCCA 46:

"[38] *Asbestos* and *Cartaway* establish that securities commissions, not being criminal courts, may not impose penalties that are "punitive" in the sense of being designed to punish an offender for past transgressions. They may, however, impose penalties that place burdens (even very heavy burdens) on offenders, as long as the penalties are designed to encourage compliance with regulations in the future. In essence, penalties may be directed at general or specific deterrence and at protection of the public; penalties that are purely retributive or denunciatory, however, are not appropriately imposed by administrative tribunals.

[39] *Asbestos* and *Cartaway*, then, are cases about the proper role of administrative tribunals in administering regulatory regimes. They concern the limits of proper administrative sanctions. In defining those limits, the Supreme Court of Canada

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distinguished between penal orders that function to punish an offender and those that attempt to protect society. The former are the exclusive purview of the courts administering in punishing offences; the latter may be imposed, as well, by administrative bodies.”

### *The orders we made*

- ¶ 11 In making the orders in our decision, we applied the factors in *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, as set out in the decision at paragraph 17.
- ¶ 12 In terms of Walker’s conduct, the most significant of the *Eron* factors were these:
- the seriousness of his conduct and the resultant damage done to British Columbia’s capital markets,
  - the risk to investors and British Columbia’s capital markets posed by Walker’s continued participation in them, and
  - specific and general deterrence.
- ¶ 13 In making our orders, we considered the length of the prohibitions necessary to protect the public interest. In considering the public interest, we considered Walker’s conduct as a whole. Walker:
- failed to act with integrity as a director and officer of Panterra, a public company, and put Panterra’s interest ahead of his own
  - took funds from Panterra and lied about it to Panterra’s management, the Exchange, and the public
  - did all of these things when he knew they were wrongful, as would anyone with his experience with the securities markets and public companies
- ¶ 14 In paragraph 28 of our decision, we stated that the Exchange decision was not a mitigating factor, but “a foreseeable consequence of [the respondents’] misconduct.” As directed by the Court, we are reconsidering this aspect of our decision.

### *Effect of the Exchange decision*

- ¶ 15 On November 1, 2006 the Exchange sent a letter to Walker’s then counsel that records a decision the Exchange communicated to Walker in a meeting on August 31, 2006. The parties argued before the Court the effect that the Exchange decision ought to have had on the orders we made (the Exchange decision itself was not part of the record before the Court).
- ¶ 16 The Exchange decision:

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- determined that Walker was not acceptable as a director or officer (nor to act in those capacities) of any Exchange-listed issuer,
- required Walker to resign any positions of director or officer that he held in Exchange-listed issuers, and
- imposed conditions on Walker's ability to act as a filing solicitor for Exchange-listed issuers.

¶ 17 The Exchange decision also said,

“should any Exchange listed issuer wish to retain Mr. Walker's services as a Director and/or Officer in the future, the issuer will be required to provide a written submission to and obtain the approval from the Compliance and Disclosure Department of the Exchange.” [*emphasis in the original*]

¶ 18 Our orders under section 161(1) of the Act prohibited Walker, for a period of 10 years, from:

- trading and purchasing securities (with a limited exception)
- acting as a director or officer of any issuer (with a limited exception)
- acting in a management or consultative capacity in connection with activities in the securities market, and
- engaging in investor relations activities

¶ 19 Walker says we should consider the Exchange decision as a significant mitigating factor because once the Exchange made its decision in August 2006, his livelihood was essentially terminated. His livelihood, he says, depended on acting for Exchange-listed issuers, and the Exchange decision brought that to an end. He says he was effectively removed from the market in August 2006.

¶ 20 This argument does not determine the matter. If the issue were restricted to Walker's loss of his livelihood, we would have considered his resignation from the Law Society as a mitigating factor in our decision. We did not, for the reasons we explained in our decision.

¶ 21 There are significant differences between the effect of the Exchange decision and our orders, and those differences have implications for the public interest.

¶ 22 The Exchange decision is not an outright prohibition. (We grant that we used the word “prohibition” as a term of convenience to describe it in our decision.) It provides for reconsideration of Walker's status if an issuer asks the Exchange to do so. The prohibition under our order is absolute (subject only to appeal and to Walker's right to seek a variation of the order under section 171).

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- ¶ 23 The Exchange decision applies to Walker’s acting as a director or officer only of Exchange-listed issuers. The order we made is significantly broader. It prohibits Walker from acting as a director or officer of any issuer. This extends the prohibition to issuers listed on any exchange or alternative trading system recognized or exempted in British Columbia (for example, the Toronto Stock Exchange), issuers in British Columbia listed on foreign exchanges, and issuers not listed on any exchange but who raise capital in British Columbia through the private placement markets.
- ¶ 24 The Exchange decision is also significantly narrower than the prohibitions in our decision taken as a whole. In addition to the prohibition against acting as a director or officer, our orders prohibited Walker from trading, from acting in a management or consultative capacity in connection with activities in the securities market, and from engaging in investor relations activities.
- ¶ 25 These additional prohibitions are essential to ensure that the public interest is protected in the circumstances of this case, and the Exchange decision imposed no such prohibitions.
- ¶ 26 That the scope of the Exchange decision is narrower than the orders we made is not surprising – the Exchange is a subordinate regulatory body and does not have the jurisdiction to make the orders we did. The Exchange concerns itself with matters affecting trading on the Exchange. The Commission’s concern is broader – the protection of the public interest generally.
- ¶ 27 It therefore cannot be said that Walker, at the time we made our orders, had been under a prohibition substantially the same as our orders for four years as a result of the Exchange decision.
- ¶ 28 As far as the prohibition against Walker’s trading or purchasing securities is concerned, it is possible that the Court misunderstood the scope of our order. In paragraph 85 of its judgement, the Court said, “While the TSX prohibition did not prevent the appellant from trading on other markets, nor does that of the Commission.”
- ¶ 29 In fact, the order against Walker prohibits him from buying or selling securities in British Columbia’s public markets, in its private placement markets, and in any other market, or with any person, worldwide, if the trade originates or terminates in British Columbia.



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### *Appropriate orders*

- ¶ 30 As ordered by the Court, we have reconsidered the duration of the prohibitions in our orders to take into account the Exchange decision.
- ¶ 31 Walker says the prohibition against his acting as a director or officer should end now, and the remaining prohibitions should be shortened to six years. He also made submissions about the administrative penalty, but the Court did not allow the appeal as to that order. It is not under reconsideration and remains in force.
- ¶ 32 Walker's submissions focus on the impact of our orders on him. They undeniably have a significant impact on him, but they are founded on broader considerations – the need for preventative orders to protect the public interest.
- ¶ 33 Walker, an experienced securities law practitioner, while a director and officer of a public company, defrauded the company, attempted to conceal the fraud, lied about it, and misled the company, the Exchange, and the public. In our opinion, considering Walker's conduct and the need to protect the public interest, the 10-year prohibitions we imposed are appropriate.
- ¶ 34 As we have explained, the effect of the Exchange decision was less severe than our prohibition against Walker's acting as a director or officer, and the scope of the Exchange decision was far narrower than the prohibitions we ordered. For those reasons, the fact that the Exchange decision was in place for about four years before we made our orders does not, in our opinion, warrant changing the expiry date of the orders we made.

### **III Orders**

- ¶ 35 The orders in paragraphs 2 and 6 below we made on October 7, 2010 and were not affected by the appeal. However, we repeat them here for convenience of reference. Considering it to be in the public interest, we order:
1. under section 161(1)(b) of the Act, that Walker cease trading, and is prohibited from purchasing, securities or exchange contracts, except that Walker, or an issuer all the securities of which are owned by him or members of his immediate family may trade or purchase securities for his or its own account (other than in consideration for services rendered, finders fees, or for vending assets to public issuers) through not more than two accounts with a registrant, if he gives the registrant a copy of this decision;
  2. under section 161(1)(d)(i), that Walker resign any position he holds as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;

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3. under section 161(1)(d)(ii), that Walker is prohibited from acting as a director or officer of any issuer, other than an issuer all the securities of which are owned by him or members of his immediate family;
4. under section 161(1)(d)(iv), that Walker is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
5. under section 161(d)(v), that Walker is prohibited from engaging in investor relations activities;
6. under section 162, that Walker pay an administrative penalty of \$60,000; and
7. that the orders in paragraphs 1 and 3 through 5 of these orders remain in force until the later of October 7, 2020 and the date Walker pays the amount in paragraph 6 of these orders.

¶ 36 February 14, 2012

¶ 37 **For the Commission**

Brent W. Aitken  
Vice Chair

Bradley Doney  
Commissioner

Suzanne K. Wiltshire  
Commissioner