Citation: 2012 BCSECCOM 492

JV Raleigh Superior Holdings Inc.,
Maisie Smith (aka Maizie Smith) and Ingram Jeffrey Eshun

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	Bradley Doney	Commissioner
	Suzanne K. Wiltshire	Commissioner
Date Submissions Completed	November 30, 2012	
Date of Decision	December 24, 2012	
Submissions filed by		
Ryan J. Carrier	For the Executive Director	
Ronald J. Pelletier	For Maisie Smith and JV Raleigh Superior Holdings Inc.	

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 July 27, 2012 (2012 BCSECCOM 301) are part of this decision.

¶ 2 We found that JV Raleigh Superior Holdings Inc., Maisie Smith and Ingram Jeffrey Eshun traded in securities without being registered to do so, contrary to section 34 of the Act, and distributed those securities without filing a prospectus, contrary to section 61 of the Act, when they distributed JVR securities for proceeds of $5.7 million.

A Positions of the parties

¶ 3 The executive director seeks orders:

1. under sections 161(1)(b), (c), and (d), prohibiting each of Eshun and Smith permanently from:

- trading securities,
- using the exemptions under the Act,
- acting as a director or officer of any issuer or registrant
- 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 JV Raleigh;

3. under section 161(1)(d)(v), permanently prohibiting JV Raleigh from engaging in investor relations activities;

4. under section 161(1)(g), requiring the respondents to pay to the Commission $5.7 million, being the amount obtained as a result of their contraventions of section 34 and 61; and

5. under section 162, requiring each of Eshun and Smith to pay to the Commission an administrative penalty of $250,000.

¶ 4 JVR and Smith say these orders are appropriate:

1. under sections 161(1)(b) and (d), prohibiting Smith for five years from:
   - trading securities or exchange contracts, except that she may trade for her own account through a registrant,
   - acting as a director or officer of any issuer, and
   - acting in a management or consultative capacity in connection with activities in the securities market;

2. under section 161(1)(b), permanently prohibiting JV Raleigh from trading or purchasing securities or exchange contracts;

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

4. under section 162, that Smith pay to the Commission an administrative penalty of $50,000.

B Factors

¶ 5 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

¶ 6 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. . . ."

¶ 7 We found that the respondents distributed securities for proceeds of $5.7 million without complying with the registration and prospectus requirements of the Act. In doing so, they engaged in the serious misconduct described in *Corporate Express*.

¶ 8 In addition to the inherent seriousness of a contravention of sections 34 and 61(1), there is no evidence that JV Raleigh used any of the funds to purchase "consumer secured notes receivables", or to invest in any form of factoring, as JV Raleigh promised in its loan agreements with the investors. To the contrary, it appears that investors' funds were withdrawn from JV Raleigh and given to companies of which Eshun and Smith were directors and officers.

¶ 9 Nor have the respondents produced an accounting for the funds advanced by investors. Smith and JV Raleigh say that just because they have failed to produce an accounting, that does not "inexorably lead to the conclusion" that the funds were not used as promised in the loan agreements. After all, they say, none of an accounting, financial statements, or a general ledger exist.

¶ 10 That is an argument as astonishing as it is devoid of merit. It is in the public interest that those who raise money from investors keep proper books and records. It is a fundamental premise of credible capital markets that those who invest their funds are entitled to know that those funds are put to use as promised. Accounting for funds raised and disbursed would be the minimum expectation for the keeping of books and records.

¶ 11 It is ridiculous to suggest that the failure to keep proper books and records could somehow be fashioned into a defence against misconduct. To the contrary, the failure to do so is an aggravating factor. Those who raise money from investors in our capital markets and who fail to keep proper books and records do so at their peril.

¶ 12 The notice of hearing did not allege fraud, and we made no finding of fraud. However, the respondents' raising of funds on the basis of certain promises, their use of the funds for purposes other than what they promised, and the deprivation that resulted (as described below) raise the seriousness of the misconduct in this case to a similar level as fraud.

Enrichment

¶ 13 The respondents raised $5.7 million and produced no records to show how it was spent. They have no evidence to show that any of it was spent in the manner promised in the loan agreements. In these circumstances, it is reasonable to conclude that the respondents were enriched to the extent of the entire amount they raised from investors.

¶ 14 At a minimum , we know, as we found, that Eshun signed four cheques payable to him totalling about $150,000.

¶ 15 We also know that money was transferred out of JV Raleigh's accounts to entities associated with Smith and Eshun:

- $1.9 million to Trem DY Group Inc., of which Eshun is president and a director
- $1.5 million to DSC Lifestyle Services, of which Eshun is president and a director
- $370,000 to 0747940 BC Ltd., of which Smith is sole director (the payments included those related to shareholder loans and management fees)
- $234,426 to Siboco Marketing Inc., of which Eshun and Smith are sole directors.

¶ 16 The executive director says that we should infer that Eshun and Smith were enriched because of the amounts JV Raleigh paid to Trem DY Group, DSC Lifestyle Services, 0747940 BC Ltd., and Siboco Marketing Inc.

¶ 17 We agree. Although the evidence does not trace these funds completely into the hands of Eshun and Smith, it is inconceivable that these payments (totalling $4 million) did not significantly benefit them.

¶ 18 Smith and JV Raleigh say that the executive director did not lead evidence showing that the funds raised from investors were the only funds available to JV Raleigh and therefore we ought not to conclude that the $4 million in impugned payments were made from the proceeds of the illegal distribution.

¶ 19 We disagree. The evidence shows that the payments to Trem DY Group, DSC Lifestyle Services, 0747940 BC Ltd., and Siboco Marketing Inc. all began after JV Raleigh started its illegal distribution of securities. It is reasonable to conclude that those payments were made using the proceeds of the illegal distribution.

¶ 20 More importantly, if there is evidence that JV Raleigh, before raising funds from its illegal distribution, had funds in its account sufficient to have made all these payments, that evidence would be in JV Raleigh's own banking records. That JV Raleigh has not produced that evidence in its defence is telling.

¶ 21 In our liability decision, we stated in the Background section that Smith, in closing a JVR credit union account, received a bank draft in the amount of $2.7 million. In doing so, we relied on the testimony of the Commission staff investigator.

¶ 22 As Smith points out, this was incorrect. In fact, when JV Raleigh's credit union account was closed, the remaining balance of $3.7 million was disbursed by a draft payable to the order of JV Raleigh.

¶ 23 About a month before the credit union account was closed, another bank draft in the amount of $2.6 million was made payable to the order of a BC numbered company. This, says the executive director, suggests that when the staff investigator testified, he confused the two payments. The fact remains, however, that neither of the two drafts was payable to Smith.

Harm to investors

¶ 24 There is evidence of significant harm to investors. The respondents raised over $5.7 million from 81 investors, 49 of whom were residents of British Columbia who invested $3.2 million. There is no market for the securities the investors purchased, nor is there any evidence that their investments have any present or future value.

¶ 25 The executive director entered affidavits of investors from British Columbia. They suffered significant harm:

- a nurse lost over $75,000 and now works two jobs to pay the mortgage on her home she used to raise the funds to invest
- a hospital technician lost over $100,000, funded by mortgaging her home
- a hotel room attendant lost $50,000, funded by mortgaging her home
- a forklift operator lost $40,000, funded by mortgaging his home, and has since as a result been forced to sell his home
- a homecare worker lost nearly $160,000, funded by mortgaging her home

- a couple (the wife a dietary aid worker and the husband a shipper/receiver) lost $196,000, using a home equity loan and their daughter's education fund; they are now unable to fund their daughter's education and expect to have to sell their home to pay off the loan
- a retiree lost $49,000 from her RRSP savings
- a nurse lost $218,000, funded by mortgaging her home; her retirement plans are significantly curtailed
- a grocery store cashier lost over $275,000, funded by mortgaging her home and using the funds in her RRSP; she has no retirement savings left.

Mitigating or aggravating factors

¶ 26 There are no mitigating factors. Although Smith and JV Raleigh made admissions, they did so only in respect of three investors. This did not shorten the hearing – we considered and relied on all of the evidence to find that they engaged in an illegal distribution of the entire $5.7 million to all 81 investors.

¶ 27 The respondents' use of funds for purposes other than those promised in the loan agreements, and JV Raleigh's failure to keep proper books and records are aggravating factors.

Past conduct

¶ 28 Eshun has a regulatory history. He admitted to the Manitoba Securities Commission in 2004 that he illegally traded securities without being registered and without filing a prospectus and was sanctioned.

¶ 29 Eshun is president and a director of GDC Investments Inc. GDC was cease-traded by the executive director in 2010 for attempting to distribute securities under an offering memorandum that did not comply with the Act.

Risk to investors and markets

¶ 30 The respondents took $5.7 million from 81 investors on false pretences. There is no evidence that the investors have any hope of recovering any part of their investment.

¶ 31 The respondents have shown no contrition. Smith and JV Raleigh have acknowledged, through their counsel's submissions, that their contraventions are serious, but there is no evidence before us that would give us any comfort that they intend to alter their behaviour so as to remove any concern about the risk of their future misconduct in our capital markets. In our opinion, the respondents pose a serious risk to our capital market were they to be allowed to participate in them in any meaningful way.

Specific and general deterrence

¶ 32 The sanctions we impose must be sufficiently severe to ensure that the respondents and others will be deterred from the misconduct we found in this case.

Previous orders

¶ 33 The parties cited four commission decisions (*Corporate Express Inc.* 2006 BCSECCOM 153; *Pacific Ocean Resources Corporation* 2012 BCSECCOM 104; *Solara Technologies Inc.* 2010 BCSECCOM 357; and *VerifySmart* 2012 BCSECCOM 176) and three settlements (*Fine Water Inc.* 2010 BCSECCOM 179; *Microline Veneer & Forest Products Corp.* 2011 BCSECCOM 87; and *Stojak* 2004 BCSECCOM 375).

¶ 34 In *Corporate Express*, the illegal distribution raised $175,000 from British Columbia investors, and there was no evidence of investor harm or enrichment of the respondents.

¶ 35 In *Solara*, the panel found that Solara appeared to be a legitimate business.

¶ 36 In *Pacific Ocean* the panel declined to make disgorgement orders. There was no evidence of enrichment and or that any of the illegal proceeds had gone to the respondents. However, in *VerifySmart*, the Commission said:

> "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."

¶ 37 *Stojak*, *Microline*, and *Fine Water* were settlements where there was no evidence of enrichment and the amounts raised were significantly smaller.

C Sanctions

¶ 38 The executive director applied for orders against Smith and Eshun denying them the use of the registration and prospectus exemptions under the Act. Because we are prohibiting them from trading and purchasing securities, those orders are not necessary.

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

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

¶ 41 The executive director applied for an order under section 161(1)(g) that the respondents 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.

¶ 42 In our opinion, an administrative penalty against each of Smith and Eshun is appropriate having regard to all of the factors relevant to sanction. The executive director asked for administrative penalties of $250,000 for both Eshun and Smith. Smith argues that any administrative penalty made against her should be lower than one made against Eshun.

¶ 43 In our opinion, an administrative penalty at the level proposed by the executive director is not proportionate to the seriousness of the respondents' misconduct. As we found above, the seriousness of that misconduct is on a par with fraud.

¶ 44 We agree with Smith that her penalty should not be as high as Eshun's. We note that of the $4 million of investor funds that were withdrawn from JV Raleigh's account, $3.4 million was given to companies of which Eshun was president and a director. Not only was his potential enrichment greater, it appears that he was the one deciding where JV Raleigh's funds were to go.

III Orders

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

Eshun

1. under section 161(1)(b) of the Act, that Eshun permanently cease trading in, and be permanently prohibited from purchasing, securities and exchange contracts;

2. under sections 161(1)(d)(i) and (ii), that Eshun resign any position he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

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

4. under section 161(1)(d)(iv), that Eshun is permanently 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 Eshun is permanently prohibited from engaging in investor relations activities;

6. under section 161(1)(g), that Eshun 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 $5.7 million;

7. under section 162, that Eshun pay an administrative penalty of $750,000;

Smith

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

9. under sections 161(1)(d)(i) and (ii), that Smith resign any position she holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

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

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

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

13. under section 161(1)(g), that Smith 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 $5.7 million;

14. under section 162, that Smith pay an administrative penalty of $500,000;

JV Raleigh

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

16. under section 161(1)(g), that JV Raleigh 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 $5.7 million; and

Maximum disgorgement

17. the aggregate amount paid to the Commission under paragraphs 6, 13, and 16 not exceed the greater of $5.7 million and the actual amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the Act.

¶ 46 December 24, 2012

¶ 47 **For the Commission**

Brent W. Aitken
Vice Chair

Bradley Doney
Commissioner

Suzanne K. Wiltshire
Commissioner