2012 BCSECCOM 59

David Charles Greenway and Kjeld Werbes

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	Kenneth G. Hanna	Commissioner
	David J. Smith	Commissioner

Hearing date January 23, 2012

Date of Decision February 22, 2012

Appearing

Joyce Johner For the Executive Director

Gary Snarch For David Charles Greenway

Decision
(David Charles Greenway)

I Introduction

¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 On July 13, 2011 the executive director issued a notice of hearing, amended January 23, 2012 (see 2011 BCSECCOM 335 and 2012 BCSECCOM 21), alleging that David Charles Greenway and Kjeld Werbes contravened the Act. This decision relates to the allegations against Greenway. A decision is pending relating to the allegations against Werbes.

¶ 3 The notice of hearing alleges that Greenway contravened section 57.2(2) of the Act by purchasing 68,500 shares of Global Uranium Corp. while being in a special relationship with Global and with knowledge of a material fact relating to Global that had not been generally disclosed. The purchases took place between March 31 and April 16, 2010, which we refer to as the acquisition period.

¶ 4 The executive director seeks an order prohibiting Greenway from purchasing or trading in securities of any issuer with whom he is in a special relationship for a period of three years and an order that Greenway pay an administrative penalty of $22,785.

¶ 5 Greenway says the trading prohibition should be for a period of between six months and a year, and should allow Greenway to acquire securities of issuers with whom he is in a special relationship in consideration for services rendered (including finders' fees) or for assets he transfers or assigns to the issuer. He says the administrative penalty should be between $12,750 and $19,125.

II Background

¶ 6 In November 2009 Greenway introduced a property known as the Anderson property to Global, a reporting issuer listed on the TSX Venture Exchange.

¶ 7 On April 15, 2010 Global finalized an agreement with the owner of the Anderson property to acquire an interest in it. On April 16 Global issued a news release disclosing the acquisition agreement.

¶ 8 During the acquisition period Greenway purchased 68,500 common shares of Global at a total cost of $18,040. The closing price of the Global common shares on April 16 was $0.45.

¶ 9 Greenway admits that:

- during the acquisition period he was a person in a special relationship with Global,
- the acquisition agreement for the Anderson property was a material fact or material change in relation to Global,
- when Greenway purchased Global shares during the acquisition period he had knowledge of the acquisition agreement that had not been generally disclosed,
- the acquisition agreement was generally disclosed by the close of the trading on April 16, 2010, and
- his share purchases during the acquisition period contravened section 57.2(2) of the Act.

¶ 10 Greenway is 35 years old and says that during 2010 his livelihood was the earning of finders' fees and consultancy fees from Exchange-listed issuers and from acting as a director or officer of those issuers.

¶ 11 Greenway was not a director or officer of Global at the time he made the impugned purchases of Global shares. He says he did not realize that, even though he was not then a director or officer of Global, he was prohibited from purchasing Global shares during the acquisition period.

¶ 12 In February 2010 Greenway purchased 563,334 units of Global (one share and one warrant per unit) at $0.12 per unit. He also purchased Global shares after the Anderson property acquisition agreement was generally disclosed.

¶ 13 Greenway did all his trading through an account in his own name at a Vancouver investment dealer.

¶ 14 On August 13, 2010 the Exchange wrote Greenway, inquiring about his trades. On September 4, 2010 Greenway replied. He admitted to inadvertent illegal insider trading and said he did not realize he was prohibited from trading during the acquisition period. He said he bought the shares because he thought they were a good investment and because he wanted to show support for the company.

¶ 15 Greenway says that as a result of the Exchange's letter he realized that he did not fully understand his obligations when trading shares of public companies of which he was not a director or officer. In October 2010 he completed the course "Public Companies: Financing, Governance and Compliance" at Simon Fraser University.

¶ 16 When the Exchange sent its letter, Greenway was a director of three Exchange-listed issuers. He resigned those directorships in November and December 2010. Greenway was also the CEO and a director of a fourth company. He resigned as CEO on July 14, 2011, the day after the notice of hearing was issued in this matter. He resigned as a director of that company on July 19, upon receiving that day a request to do so from the Exchange.

¶ 17 Greenway also ceased providing services to another Exchange-listed issuer. On July 20, 2011, at the Exchange's request, he undertook to the Exchange not to act as a director or officer of any Exchange-listed issuer, nor to be an employee, consultant or agent, nor to perform work for any Exchange-listed issuer until the allegations in the notice of hearing are resolved. He says he has complied with this undertaking. That evidence is not controverted.

¶ 18 The evidence includes a letter dated November 15, 2011 to Greenway's counsel from Dean Holley, a consultant who does business through Capital Markets Consulting Corp. Although Holley cautions that his letter "should not be considered a comprehensive evaluation" of Greenway's trading, he says that Greenway's trading in Global shares between March 31 and April 16, 2010 is characterized by factors "that would distinguish Mr. Greenway's trading from an aggressive attempt to take advantage of undisclosed information."

III Analysis

A Factors to Consider

¶ 19 There are only two recent precedents from this Commission that involve insider trading: *Torudag* (2009 BCSECCOM 145; 2009 BCSECCOM 439, aff'd. 2011 BCCA 458) and *Hu* (2011 BCSECCOM 355; 2011 BCSECCOM 514).

¶ 20 In *Torudag*, the amounts involved were not great, and the panel did not find intentional wrongdoing. To that extent, it is close to the facts here, although, for the reasons we explain below, it is not of great assistance. *Hu* is clearly inapplicable – the amounts were much larger and the panel found that Hu acted intentionally.

¶ 21 In *Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22 the Commission discussed the factors relevant to sanction for contraventions of the Act. In *Torudag* and *Hu*, the Commission grouped the *Eron* factors under these headings:

- the seriousness of the respondent's conduct and the damage done to British Columbia's capital markets
- the harm suffered by investors as a result of the respondent's conduct and the extent to which the respondent was enriched
- factors that mitigate or aggravate the respondent's conduct
- the respondent's past conduct
- the risk to investors and capital markets posed by the respondent's continued participation in the capital markets
- specific and general deterrence
- orders made by the Commission in similar circumstances in the past

Seriousness of conduct; damage done to British Columbia's capital markets

¶ 22 Illegal insider trading is serious, even when small amounts are involved, and the conduct is not intentional or done in ignorance of the rules. Market participants expect that all those trading in a market with integrity have available to them the same material information about the securities traded in that market. When people in a special relationship with an issuer trade while in possession of material information about the issuer that has not been generally disclosed, the public's perception of the fairness of our markets is damaged.

¶ 23 This is especially so when it comes to the conduct of those who seek to earn a living by earning finder's fees from, and vending assets to, public companies, and by acting as a director or officer of those companies. These individuals are in a position to do great harm to the integrity of our markets if they act

inappropriately. They are therefore expected to know the rules and to follow them. The integrity of our markets demands nothing less.

Harm to investors; enrichment

¶ 24 In *Torudag*, the Commission held that investors are harmed by illegal insider trading in direct proportion to the degree to which the trader is enriched. The Commission stated the measurement of enrichment as follows:

> "21 In our opinion, the benefit a trader has derived from illegal insider trading is measured by the difference between the price at which the illegal trade takes place and the price of the securities after the material information has been generally disclosed. This compares the price at which the trader bought or sold to the price at which the trader could have bought or sold after general disclosure of the material information. The result is the trader's profit earned or loss avoided through the illegal trading."

¶ 25 Applying that method, we have subtracted Greenway's acquisition cost of the 68,500 Global shares he purchased during the acquisition period ($18,040) from the value of those shares ($30,825) at the Global share price ($0.45) after the Anderson property acquisition agreement had been generally disclosed. The result is $12,785.

Mitigating and aggravating factors; past conduct

¶ 26 Greenway's trading was not intentional. He traded in ignorance of the rules. We accept Holley's evidence that his trading showed no pattern of intentionally seeking to profit from trading on insider information.

¶ 27 Greenway appears to have recognized right away that he was in trouble. He admitted his wrongdoing to the Exchange and to the Commission, and removed himself from all of his relationships with Exchange-listed companies. He also took steps to educate himself about the obligations of those who do business with public companies.

¶ 28 We have also considered that Greenway has, for seven months, been bound by his undertaking to the Exchange not to earn finders' fees and consultancy fees from Exchange-listed issuers and not to act as a director or officer of those issuers.

¶ 29 Greenway cooperated with the investigation and admitted to the allegations in the notice of hearing, thereby shortening the hearing.

¶ 30 Greenway has no regulatory history.

Risk to investors and markets

¶ 31 Greenway's response to the regulatory action taken to his misconduct suggests that this experience has taught him something about his obligations should he wish to continue in this field in future. He has taken this episode seriously and has sought to educate himself so that it does not reoccur.

Specific and general deterrence

¶ 32 Sanctions must serve as a deterrent both to Greenway and to others against future misconduct. Misconduct of this type, even in comparatively benign circumstances, warrants a time-out from trading securities of issuers with whom the respondent has a special relationship, as well as a significant administrative penalty.

Previous orders

¶ 33 In *Torudag*, the panel imposed a one-year prohibition against purchasing or trading securities generally, with some exceptions. One of the exceptions was that the panel allowed Torudag to continue to acquire securities of issuers listed on the Toronto Stock Exchange or the TSX Venture Exchange in consideration for services rendered (including finder's fees) or for assets he transferred or assigned to the listed issuer.

¶ 34 The *Torudag* panel determined the administrative penalty under section 162 by multiplying his enrichment (determined as described above) by 1.5, a multiplier Torudag and the executive director agreed was appropriate.

¶ 35 The circumstances in *Torudag* were different from those here. The panel found that Torudag was an experienced and sophisticated trader, and was fully aware of the prohibition against persons in a special relationship trading on undisclosed material information. The panel found he understood how information is disseminated to the market, and that it could take some time after the issuance of a news release for general disclosure to occur. Not only did Torudag know the rules, he turned his mind to them when he decided whether it was appropriate to trade. *Torudag* is a case about someone who knew the rules but got into trouble because he failed to apply them properly.

¶ 36 Greenway considered none of these things because he did not know he was supposed to do so. This case is about someone who got into trouble because he did not know the rules.

¶ 37 However, the distinction between *Torudag* and this case loses its significance because the executive director asks us to consider a different approach. Instead of prohibiting trading generally (as in *Torudag*), the executive director proposes we prohibit only trading in securities of issuers with whom Greenway is in a special

relationship, with no exception to allow him to continue business activities with exchange-listed issuers (as in *Torudag*).

¶ 38 In our opinion, this is a more elegant response to cases of this type, because the prohibition aligns more precisely with the wrongdoing. Eliminating the *Torudag*-type exception also reflects the seriousness of the misconduct.

¶ 39 We have noted that both specific and general deterrence warrants a time-out from trading securities of issuers with whom Greenway has a special relationship. In our opinion, a prohibition against trading in securities of issuers with whom the respondent has a special relationship, combined with a complete time-out from engaging in activities for which the respondent receives shares of Exchange-listed issues as compensation, sends the appropriate message of deterrence to both the respondent and to others who engage in these activities.

¶ 40 In *Torudag*, the administrative penalty was determined by multiplying Torudag's enrichment by 1.5. The executive director says applying the multiplier approach in *Torudag* does not yield an appropriately severe financial sanction here, and in these types of cases, would amount to free pass for misconduct. The executive director proposes that we impose an administrative penalty consisting of Greenway's enrichment (determined under the *Torudag* methodology) plus an additional $10,000.

¶ 41 It is not clear whether the executive director is proposing a "minimum fine" concept, in which the administrative penalty would consist of enrichment plus $10,000 in all of these types of illegal insider trading cases. To the extent that is so, we do not think that is the correct approach. The Commission has an obligation to consider an appropriate sanction in the public interest in the circumstances of each case.

¶ 42 In this case, the multiplier approach yields a significant penalty in the circumstances. We see no need to depart from *Torudag* on this aspect of the sanctions. That said, as noted in *Torudag*, there is no formula for determining an administrative penalty. It remains open to the executive director to seek a penalty determined on another basis in circumstances where the multiplier approach would not yield an appropriate outcome.

B Appropriate Orders

¶ 43 Greenway's misconduct, although serious, is at the low end of the range of misconduct for illegal insider trading. The number of shares he purchased and the dollar amounts involved were low. His contravention was inadvertent due to his ignorance of the rules (not to mention an apparent failure to exercise common sense). The evidence is that he did not intend to profit by trading on inside

information. When it became apparent to him that his trading was improper, he acted reasonably promptly to remove his associations with Exchange-listed issuers and took education about his responsibilities.

¶ 44 It appears that Greenway, despite earning a living from finders' fees and consultancy fees from Exchange-listed issuers, and from acting as a director or officer of those issuers, lacked the knowledge and sophistication necessary to do that without getting into trouble.

Trading ban

¶ 45 Considering the *Eron* factors as described above, we agree with the executive director and Greenway that it is not necessary to prohibit him from trading and purchasing shares generally. Our orders prohibit him only from trading or purchasing securities or exchange contracts of any issuer with whom he is in a special relationship. For the reasons stated above, that prohibition does not contain an exception to allow him to acquire shares as finder's fees, or for vending in assets.

¶ 46 In the circumstances of this case, where there are significant mitigating factors, we consider a one-year prohibition to be appropriate. Greenway also made undertakings to the Exchange in July last year that have put him in essentially the same position as he will be under our orders. Greenway has therefore, as a practical matter, been under sanction for seven months, and that is reflected in our orders.

Administrative penalty

¶ 47 Here, the difference in administrative penalty proposed by the executive director ($22,785) and the high end of the range proposed by Greenway ($19,125) arises more from theory than substance.

¶ 48 In this case we have applied a multiplier of 1.5 times the amount we have found he was enriched. This results in an administrative penalty that significantly exceeds Greenway's enrichment and reflects the seriousness of the misconduct and the other factors relevant to sanction.

IV Orders

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

1. under section 161(1)(b) of the Act, that Greenway cease trading in, and is prohibited from purchasing, any securities or exchange contracts of any issuer with whom he is a person in a special relationship until the later of July 22, 2012 and the date Greenway pays the amount described in paragraph 2; and

2. under section 162, that Greenway pay an administrative penalty of $19,177.

¶ 50 February 22, 2012

¶ 51 For the Commission

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner

David J. Smith
Commissioner