

Citation: 2014 BCSECCOM 209

**Independence Energy Corp., and
Bruce Thomson**

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken Gordon L. Holloway Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
Hearing dates	January 14, 2014	
Submissions completed	February 3, 2014	
Date of Decision	June 3, 2014	
Appearing		
Anthony Abato	For the Executive Director	
Bruce Thomson	For himself	

Decision

I Introduction

- ¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- ¶ 2 On June 21, 2013 the executive director issued a notice of hearing alleging that Bruce Thomson and Independence Energy Corp. provided false or misleading information to the Commission, contrary to section 168.1(1) of the Act, and failed to file periodic disclosure required under section 85(a).
- ¶ 3 Thomson appeared at the hearing. He was not represented by counsel. Independence did not appear and was not represented.
- ¶ 4 At the hearing:
- Thomson admitted under oath all of the allegations in the notice of hearing.
 - We entered the executive director's documentary evidence relevant to liability.

- The executive director called a staff witness who gave evidence ostensibly relevant to sanction.
- Thomson testified further and was cross-examined by counsel for the executive director.

¶ 5 We found Thomson to be a credible witness. His testimony was straightforward, direct and consistent with the objective facts. In cross-examination he was responsive and candid. He did not dissemble. We accept his evidence as truthful.

¶ 6 Commission staff issued a cease-trade order under section 164 against Independence on June 20, 2012. That order is still in effect, and the executive director seeks no further orders against Independence. This hearing is therefore about what sanctions, if any, are appropriate against Thomson.

II The Allegations

¶ 7 The factual misconduct alleged in the notice of hearing is set out in paragraphs 5 and 6 of the notice of hearing:

“5. On September 15, 2008, Independence responded to Staff’s letter claiming:

- its head office has been recently relocated to Calgary, Alberta;
- Thomson is resident of Calgary; and
- the rules governing OTC Reporting Issuers do not apply to Independence.”

[the Staff letter referred to is described below]

6. Independence’s representations were false, as Thompson [*sic*] had structured his affairs to create the false appearance that he and Independence were conducting business from Calgary. In particular, Thomson:

- Arranged to sublease a Calgary office that he never used and did not pay for;
- Arranged for Independence’s mail that was delivered to a Calgary address to be forwarded to his residence in Vancouver, BC;
- Arranged for someone to take phone calls for Independence in Calgary, and then relay messages to him in Vancouver; and
- Starting in 2008, gave false Calgary business and residential addresses to U.S. securities regulators.”

¶ 8 The remaining allegations are that Thomson, by “structuring his affairs to evade BC regulations . . . harmed the reputation and credibility of the province’s

securities markets”, and that he and Independence contravened sections 84(a) and 168.1(1).

III Facts

A Thomson’s Admissions Compared to his Testimony

- ¶ 9 We find the facts set out below. Our findings are based on the allegations in the notice of hearing that Thomson admitted, and on his other testimony. On some points, his testimony conflicts with the language of the allegations he admitted.
- ¶ 10 These conflicts arise because the allegations to which Thomson admitted include statements of his intentions – “to create a false appearance” and “structuring his affairs to evade BC regulations”. His admitted allegations also include those alleging the contraventions of the Act as well as the one alleging harm to the reputation and credibility of BC’s securities market.
- ¶ 11 Thomson was not represented and cannot be taken to have understood the legal implications of the language in the allegations that impute intention. In addition, his testimony clearly conflicts with his admission of these allegations, yet that conflict in the evidence was not put to him on cross-examination.
- ¶ 12 Neither can it be taken that Thomson, in admitting contraventions of the Act, had the ability to determine whether, as a matter of law, there was a contravention, or that his conduct resulted in harm to the market.
- ¶ 13 In making our findings, we relied on Thomson’s admissions as proof of the allegations in the notice of hearing, other than those that allege his intentions, that allege a contravention of the Act, and that characterize his conduct as harmful to the market, or that conflict with his other testimony.

B Background

- ¶ 14 Independence is a Nevada corporation whose securities are quoted on the United States Over-The-Counter market.
- ¶ 15 Thomson was a director of Independence and its sole executive officer from September 15, 2008 until February 2012, when he resigned. The executive director alleges that this is the relevant period but, as explained below, in our opinion the relevant period actually ended in November 2011: after that, Thomson had no management role with Independence.
- ¶ 16 In a letter dated July 14, 2008, Commission staff informed Independence that, based on “a preliminary review of the Company’s affairs”, staff’s opinion was that BC Instrument 51-509 *Issuers Quoted in the US Over-the-Counter Markets* (since superseded) applied to Independence, based on the criteria in section 3 (set out below) of that instrument. The letter stated “If the Company is of the view that

the Rule does not apply to it, please include reasons for this position in the response.” We refer to this letter as the Staff letter.

- ¶ 17 Independence responded in a letter dated September 15, 2008 from its counsel. We refer to this letter as the Independence response. The response included these statements:

“We have reviewed BC Instrument 51-509 and the related 51-509CP. Given the standards and guidance contained in those documents, it does not appear that the Instrument would apply to the Company, given that:

- The Company’s head office, where the Company’s executive functions take place, has recently been relocated to Calgary, Alberta.
- Bruce Thomson, President, Treasurer, Chief Financial Officer, Chief Executive Officer and a sole member of the Board of Directors is a resident of Calgary, Alberta.
- The Company has confirmed that the Company does not conduct (and no parties on its behalf conduct) investor relations activities from British Columbia.
- The Company has already obtained its ticker symbol.”

- ¶ 18 Thomson admits arranging office space in Calgary for Independence and setting up forwarding arrangements for mail and calls, as described in paragraph 6 of the notice of hearing.

- ¶ 19 Thomson testified that, starting in 2005, he started travelling to Calgary on a weekly basis to manage an oil and gas company. His routine was to travel to Calgary on Tuesday mornings and return to Vancouver Friday nights.

- ¶ 20 While in Calgary, Thomson stayed in an apartment hotel close to the company’s office. He used his nephew’s address as his residential address, rather than the apartment hotel, as he thought that was a safer address for personal mail.

- ¶ 21 This pattern abated some time before September 2008.

- ¶ 22 Meanwhile, Thomson and others had acquired control of Independence in 2005. It had been a mining company. They decided to change the company’s business to oil and gas, and changed its name. Thomson says the intention was to turn Independence into an operating company, located in Calgary, and managed by him. (Thomson explained why it is advantageous for junior oil and gas companies to be located in Calgary; in the case of Independence, his existing contacts in that city were among the reasons.)

- ¶ 23 When it appeared that financing might become available, Thomson expected his previous Calgary travel routine would resume, in order to manage Independence. He thought it was possible that he might ultimately have to become a full-time resident of Calgary.
- ¶ 24 On receipt of the Staff letter, Thomson consulted Independence's counsel, a firm in Calgary. He told counsel of the plans to move the Independence head office to Calgary. He told counsel that his primary residence was in Vancouver. He described his earlier Calgary travel routine and his expectation that a similar routine would resume when Independence started operations.
- ¶ 25 Whether Independence's business was administered or directed from British Columbia was relevant to whether it was required to comply with BCI 51-509. Thomson was the sole director and officer of Independence. His residency would have been relevant to the issue of whether Independence was administered or directed from British Columbia. Counsel told Thomson that a person could be resident in more than one place and so Thomson could claim to be a resident of Alberta for the purposes of BCI 51-509.
- ¶ 26 Thomson asked what the downside would be if that interpretation was incorrect. Counsel's advice was that the only downside was that Commission staff would require compliance with BCI 51-509, and the company would then have to do so.
- ¶ 27 It was the summer and fall of 2008. The full impact of the global financial crisis was rapidly becoming apparent, and was manifest nowhere more so than in financing for the junior resource sector. The availability of financing simply disappeared. The financing Thomson had anticipated for Independence vanished.
- ¶ 28 Independence sought alternative financing, unsuccessfully, until November 2011, when another group took over the company. Although he did not formally resign his offices until February 2012, he had no management role with Independence after November 2011.
- ¶ 29 During the relevant period, Independence was dormant. It had no business activities and its shares did not trade.
- ¶ 30 Thomson testified that he was paid no compensation during the six years he ran the company.
- ¶ 31 Independence never made any filings, including those under section 89(a), that would have been required if it were an OTC reporting issuer under BCI 51-509. As a consequence, on June 20, 2012, the executive director issued a cease trade order under section 164 against Independence. That order is still in effect.

IV Findings

- ¶ 32 The allegation that Thomson contravened sections 85(a) and 168.1(1) is based on his liability under section 168.2. That section says that that “If a person, other than an individual, contravenes a provision of this Act . . . an . . . officer [or] director . . . of the person who authorizes, permits or acquiesces in the contravention . . . also contravenes the provision.”
- ¶ 33 There is no dispute that during the relevant period Thomson was the sole director and officer of Independence. Accordingly he would have had to authorize, permit and acquiesce in everything Independence did. The findings we have made against Independence are therefore also findings against Thomson under section 168.2.

A Contravention of section 85(a)

- ¶ 34 An “OTC issuer”, as defined in BCI 51-509, was one whose shares were OTC-quoted securities and were not listed on any of the stock exchanges and marketplaces specified in the instrument. Independence was an OTC issuer because it met that definition.
- ¶ 35 The Independence response appears to have been framed to address section 3 of BCI 51-509, which set out the criteria for determining whether an OTC issuer was also a reporting issuer in British Columbia. Section 3 said:
- “3 An OTC issuer is a reporting issuer under securities legislation if one or more of the following apply:
- (a) on or after September 15, 2008, its business has been directed or administered in or from British Columbia;
- (b) on or after September 15, 2008, investor relations activities have been carried on in or from British Columbia by or on behalf of the OTC issuer;
- (c) the ticker-symbol date is on or after September 15, 2008, and, on or before the ticker-symbol date, the issuer distributed a security to a person resident in British Columbia and that security is of the class of securities that became the issuer's OTC-quoted securities.”
- ¶ 36 We find that Independence was an OTC reporting issuer under section 3(a) of the instrument, because Thomson, its sole director and officer, administered and directed its business, at least part of the time, from Vancouver. There is no evidence proving that Independence would have been an OTC reporting issuer under sections 3(b) or (c).

- ¶ 37 As such, Independence was required to file periodic disclosure under section 85(a) of the Act. It did not do so. We find that Independence contravened that section.
- ¶ 38 That said, during the relevant period, Independence was essentially dormant. Whatever there was to be done in connection with the direction and administration of its business was minimal. There is no evidence that anything of significance happened that would have been required to be disclosed. Nor, given that its shares were not trading, would there have been anyone with an interest in the disclosure, even had Independence made it.

B Contravention of section 168.1(1)

- ¶ 39 Sections 168.1(1) says:

168.1 (1) A person must not

(a) make a statement . . . or submit or give information under this Act to the . . . executive director or any person appointed under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading, or

(b) make a statement or provide information in any record required to be filed, provided, delivered or sent under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading.

- ¶ 40 If Independence contravened section 168.1(1), it can be based only on the Independence response, which would invoke a consideration of section 168.1(1)(a), which deals with information submitted or given.
- ¶ 41 Section 168.1(1)(b) does not apply because it deals with information “in any record required” to be given. The evidence is, and we have found, that Independence did not make any required filings.
- ¶ 42 There is a discrepancy between the Independence response and its description in paragraph 5 of the notice of hearing. The third and fourth statements in the Independence response were that there were no investor relations activities conducted on behalf of Independence from British Columbia, and that Independence had already obtained its OTC ticker symbol. These clearly address sections 3(b) and (c) of BCI 51-509.

- ¶ 43 Paragraph 5 of the notice of hearing ignores the third and fourth statements in the Independence response. Instead, to show that Independence was misleading Commission staff, it alleges that Independence stated that BCI 51-509 did not apply.
- ¶ 44 In our opinion, that is a misinterpretation of the Independence response. On a plain reading of the response, Independence was first stating its position that BCI 51-509 did not apply. That was a perfectly reasonable statement for the company to make, especially given that the Staff letter invited the company, “if it was of the view that the Rule did not apply to it”, to provide reasons. In the circumstances, we find it surprising staff would rely on the statement to support an allegation of filing misleading information.
- ¶ 45 That said, the company then made the four statements it was relying on to support its position. It is therefore those statements that are relevant to whether Independence contravened section 168.1(1)(a). The notice of hearing cites only two of them.
- ¶ 46 The first statement is that Independence’s head office had recently been relocated to Calgary. We find that statement was false. The evidence is that the head office was never located in Calgary.
- ¶ 47 The second statement is that Thomson was a resident of Calgary. We find that statement was misleading. Whether or not, as a legal matter, he could have been resident in more than one place for the purposes of BCI 51-509 (about which we express no opinion), what was relevant was whether one of those places was British Columbia. By making the bald statement that Thomson was a resident of Calgary, Independence implied that he was not a resident anywhere else, including British Columbia.
- ¶ 48 Paragraph 6 of the notice of hearing alleges Thomson had structured his affairs to create the false appearance that he and Independence were conducting business from Calgary by arranging for office space for Independence, arranging for mail and phone calls to be forwarded to his residence in Vancouver, and giving false addresses to US securities regulators.
- ¶ 49 Thomson admitted arranging office space and setting up mail and call forwarding arrangements, but he denies doing so to create a false appearance or to evade BC regulations. He explained how and why he did so during his previous period of commuting to Calgary. He also explained that he was anticipating a resumption of those arrangements with the re-financing of Independence.
- ¶ 50 In our opinion, his making of these arrangements was consistent with what he would do if he was going find himself back in Calgary on a regular and continuous basis to manage Independence.

- ¶ 51 It appears that the Independence response was prepared on the expectation that Independence was about to be Alberta-based and managed from Calgary.
- ¶ 52 We find that Independence contravened section 168.1(1)(a) when it stated that its head office had relocated to Calgary and that Thomson was a resident of Calgary.
- ¶ 53 We do not find that Independence structured its affairs with the intention of creating a false appearance or to evade BC regulations.
- ¶ 54 We have not considered the allegation that Independence provided misleading statements to US securities regulators because it has no relevance as to whether Independence contravened section 168.1(1)(a).

V Sanctions

- ¶ 55 The executive director seeks orders prohibiting Thomson from acting as a director and officer for five years, and requiring him to pay an administrative penalty of \$20,000. In making these submissions, we note that the executive director was assessing sanction on the basis that the findings would include all of Thomson's admissions. That our findings do not do so accounts, at least in part, for the difference between the orders the executive director sought and those that we are making.
- ¶ 56 The factors relevant to sanction are set forth in *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 (see page 24).
- ¶ 57 Thomson's conduct was not serious.
- ¶ 58 Independence did not make its required filings under section 85(a), but it was a dormant company. It had nothing to disclose and there was no one interested in reading it.
- ¶ 59 Independence made the false statement that its head office had relocated to Calgary and the misleading statement that Thomson was a resident of Calgary. However, it made those statements in anticipation of them both being true. In the end, the financing did not happen, but the result of that was not just that those statements were false or misleading, but that Independence was dormant during the entire relevant period.
- ¶ 60 The executive director argued that the conduct was serious because it interfered with Commission staff's ability to monitor for non-compliance. Although true in principle, the argument hardly carries force in this case.
- ¶ 61 There was no harm suffered by investors. Thomson was not enriched nor did he benefit in any way. There was no risk to investors or capital markets. There is no

evidence that Thomson has engaged in misconduct in the past, nor any evidence that he poses any risk to investors or the capital markets in the future.

¶ 62 Thomson is 66 years old and is unable financially to retire. He testified that over the past two years he was “financially wiped out”. He has no current income. He depends on the ability to work in the public company arena, as he has done for 30 years as a director and officer of public companies, in investor relations, and in financing and project development.

¶ 63 In our opinion, considering these factors, our Findings do not support the orders sought by the executive director.

VI Orders

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

1. under section 161(1)(j) of the Act, that Thomson is reprimanded; and
2. under section 162, that Thomson pay an administrative penalty of \$1,000.

¶ 65 June 3, 2014

¶ 66 **For the Commission**

Brent W. Aitken
Vice Chair

Gordon L. Holloway
Commissioner

Suzanne K. Wiltshire
Commissioner