Citation: 2014 BCSECCOM 260

IAC – Independent Academies Canada Inc., Micron Systems Inc., Theodore Robert Everett, Leonard George Ralph and Robert H. Duke

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	Audrey T. Ho	Commissioner
	Gordon L. Holloway	Commissioner
Submissions completed	June 2, 2014	
Date of Decision	July 3, 2014	
Submissions filed by		
Brigeeta C. Richdale Anthony S. Abato	For the Executive Director	
Aengus R.M. Fogarty	For IAC – Independent Academies Canada Inc., Micron Systems Inc., Theodore Robert Everett and Robert H. Duke	

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 March 13, 2014 (2014 BCSECCOM 93) are part of this decision.

¶ 2 We found that:

- IAC – Independent Academies Canada Inc., Theodore Robert Everett, and Robert H. Duke distributed securities to 126 investors for proceeds of $5.1 million without filing a prospectus, contrary to section 61(1) of the Act;
- Micron, Everett and Duke contravened a cease-trade order issued by the executive director; and
- all of the respondents perpetrated a fraud, contrary to section 57(b).

¶ 3 Leonard George Ralph reached a settlement with the executive director prior to the liability hearing. Our Findings and this decision deal only with the remaining respondents, and Ralph is not included in our references below to the respondents as a group.

II Position of the Parties

¶ 4 The executive director seeks orders:

- permanently prohibiting the respondents from trading in and purchasing securities, and from engaging in investor relations activities;
- permanently prohibiting Everett and Duke from acting as a director or officer of any issuer or registrant, and from acting in a management or consultative capacity in connection with activities in the securities market;
- requiring the respondents to disgorge $5,433,189, the total amount obtained as a result of their contraventions of the Act, and
- requiring each respondent to pay an administrative penalty of $3 million.

¶ 5 The respondents say that the sanctions sought by the executive director are excessive. They seek:

- prohibitions of no more than five years on capital market activities,
- maximum disgorgement, if any, of $1.645 million, the amount of the fraud, and
- a maximum administrative penalty, if any, of $100,000 against each of IAC and Micron, and no penalty against Everett or Duke.

III Analysis

A. Factors

¶ 6 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

¶ 7 The Commission has often characterized fraud as the most serious misconduct prohibited by the Act. See, for example, *Manna Trading Corp Ltd.* 2009 BCSECCOM 595, where the Commission said (at paragraph 18), "Nothing strikes more viciously at the integrity of our capital markets than fraud."

¶ 8 A contravention of section 61(1) is also inherently serious because that section is a part of the foundation requirements for protecting investors and the integrity of capital markets. That section requires those who wish to distribute securities to file a prospectus with the Commission, so that investors get the information necessary for an informed investment decision.

¶ 9 Here, the respondents raised $5.1 million from investors without filing a prospectus, $1.645 million of that fraudulently. They knew that the property they told investors would be developed with their money was in foreclosure. Indeed, at the time some of the funds were raised the court had already ordered the sale of the property. Meanwhile, the respondents told investors only positive, but false, news about the development.

Harm to investors; damage to markets

¶ 10 Clearly, there is harm to the investors. None has recovered any part of their investment. There is no evidence that IAC or Micron securities have any present or future value. There is no evidence of any credible hope that investors will recover any part of their investments.

¶ 11 The respondents' misconduct damaged the reputation and integrity of our securities market.

Enrichment

¶ 12 The respondents submit that they did not benefit personally or indirectly from investors' funds and all the money raised was used to develop Sage Hills. They say Everett and Duke paid for some of IAC's costs to develop Sage Hills, that those payments were then recorded as shareholder loans, and that any payments to Everett and Duke or their companies from investors' funds were to reduce those shareholder loans.

¶ 13 The amount spent by IAC in repayment of those loans exceeded $300,000 by year-end 2009.

¶ 14 In addition, the individual respondents paid to their own companies $83,900 of the $195,000 raised by Micron, and continued to pay themselves or their companies from investor funds raised after the foreclosure started in 2009.

¶ 15 All these payments personally enriched Everett and Duke. Even if they were repayments of shareholder loans that funded legitimate IAC business expenses, that does not alter the fact that Everett and Duke were enriched by their misconduct. What is relevant is that they took money from investors fraudulently and used some of it to pay themselves and recover their own money at the expense of investors.

Mitigating or aggravating factors

¶ 16 The respondents submit that their admission at the start of the hearing that they contravened section 61 and the cease trade order is a mitigating factor.

¶ 17 We do not agree. Although admissions by respondents are sometimes relevant to sanction, in this case the overriding factors are the $5.1 million of investor losses and the fraud (to which the respondents did not admit).

¶ 18 The individual respondents argue that their age, health, and financial circumstances are mitigating factors. We disagee; these factors are not relevant to their misconduct.

¶ 19 The respondents say that a mitigating factor is that they were engaged in a real business and used investor funds for that purpose. It clearly is not. To the extent the respondents were engaged in legitimate business, and the funds were spent on that business, that is merely the minimum one would expect from those raising funds in our capital markets. What the respondents overlook is that in raising that capital, they not only contravened section 61(1), but perpetrated a fraud.

Past conduct

¶ 20 There is no evidence that any of the respondents has a regulatory history.

Risk to investors and markets

¶ 21 Counsel for the respondents submits that given the age, health and financial circumstances of Everett and Duke, it is unlikely they will create similar problems in the future.

¶ 22 In fact, the evidence is to the contrary. In 2012, Duke offered to sell IAC shares to an existing investor. Duke told him that the cease trade order was "just nonsense" and that IAC had "taken care of all that".

¶ 23 In late June 2013, Everett solicited an existing investor to invest another $5,000. Everett told him that "everything was looking good", that "there was a substantial amount of money in trust and they were winding things up", and that the $5,000 would help pay legal fees to "complete everything."

¶ 24 This was despite the temporary order and notice of hearing issued by the executive director the previous January, which prohibited Everett from trading or engaging in investor relations activities. Not to mention that the executive director's 2011 cease trade order against IAC was still in force.

¶ 25 The respondents' blatant disregard of orders made against them under the Act demonstrates that they are a serious risk to investors and to our markets.

Specific and general deterrence

¶ 26 The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous orders

¶ 27 In fraud cases, the Commission has consistently imposed permanent orders and imposed significant financial sanctions.

¶ 28 The respondents cited no authorities that would support less than permanent orders in a fraud of this magnitude.

¶ 29 The respondents say that any disgorgement order should be no greater than $1.645 million, on the basis that this was the amount raised in contravention of the Act. That is not correct. That is the amount raised through fraud. The total amount raised in contravention of the Act, including the fraud, the contravention of section 61(1) and the breach of the cease trade order, was $5,433,189.

¶ 30 In the circumstances of this case it is appropriate to order disgorgement against Everett and Duke personally. They were the directors and officers of IAC and Micron, and the individuals who directed the affairs of these two companies. Their deceitful conduct was directly responsible for the harm done to the IAC and Micron investors. They also enriched themselves at investors' expense.

¶ 31 We reviewed the decisions cited by the parties in considering appropriate financial penalties.

¶ 32 In *Luc Castiglioni* 2011 BCSECCOM 62, the panel found a fraud of $1.3 million and imposed permanent orders, disgorgement of $1.3 million, and an administrative penalty of $6 million. Significant aggravating factors were present, including lying to Commission staff and lying to investors about registration under the Act. Castiglioni and his wife were personally enriched by $840,000. The penalty was three times the amount Castiglioni defrauded investors plus another $2 million on account of the aggravating factors.

¶ 33 In *Great White Capital Corp. and Adam Keller* 2011 BCSECCOM 303, the panel found a fraud of $523,100 and imposed permanent orders, disgorgement of $523,100, and an administrative penalty of $1.6 million. Keller used all the money raised for personal purposes. The penalty was three times the amount raised through fraud.

¶ 34 In *Won Sang Shen Cho, also known as Craig Cho, d.b.a. Chosen Media and Groops Media* 2013 BCSECCOM 454, the panel found a fraud of $100,000 and imposed permanent orders, disgorgement of $20,569 (the amount the investors were found to have lost) and a $200,000 administrative penalty. Cho solicited investors over the Internet and had been previously warned by Commission staff for apparent misconduct. There was no finding of personal enrichment. The penalty was two times the amount raised through fraud.

¶ 35 In *Canada Pacific Consulting, Inc. and Michael Robert Shantz* 2012 BCSECCOM 195, the panel found a fraud of $1.5 million and imposed permanent orders, disgorgement of $1.5 million, and a $630,000 administrative penalty against Shantz. The panel found that Canada Pacific had no legitimate business, that it stole from investors and took elaborate steps to make the whole scam appear legitimate. Of the amount raised, Shantz sent $1.2 million to bank accounts in the names of other persons in Spain and kept $210,000 for himself. Shantz' penalty was three times the amount he personally received.

¶ 36 The executive director submits that the administrative penalty should fall between those in *Keller* and *Castiglioni*, because the amount defrauded here is more than in *Keller* and the aggravating factors and misconduct are less egregious than in *Castiglioni*.

¶ 37 The respondents say that the Commission has imposed much lower sanctions in cases with more serious breaches and without mitigating factors, such as *Canada Pacific* and *Cho*.

¶ 38 In the cited cases, the entirety of the investor funds at issue was obtained through fraud. That is not the case here; $5.1 million was raised through illegal distributions of which $1.645 million (about 30%) was obtained fraudulently. We considered both amounts in determining the appropriate penalty.

¶ 39 Our disgorgement order includes the $5,078,189 raised under the IAC illegal distribution, of which $1.45 million was fraudulent. The order also includes the $195,000 raised fraudulently by Micron and another $160,000 for trades that were made during the period that we found the respondents were acting fraudulently. Of those, trades representing $75,000 were exempt from the prospectus requirement and therefore not included in the illegal distribution.

¶ 40 Assessing the circumstances of this case in light of the cases described above, we consider an appropriate administrative penalty to be the sum of the amount raised in contravention of the Act exclusive of the fraud (about $3.8 million), and an amount approximately two times the $1.645 million raised through the fraud.

¶ 41 The respondents also submit that any administrative penalties we order should be imposed only on IAC and Micron, not on Everett or Duke.

¶ 42 In our opinion, the respondents have it backwards. IAC's and Micron's conduct was entirely controlled by Everett and Duke. They were the directing minds of IAC and Micron, and the authors of the misconduct. We are ordering administrative penalties against them. Ordering administrative penalties against IAC and Micron would only risk reducing funds that may become available to investors through those companies.

¶ 43 Everett and Duke acted jointly in the misconduct and we view them as equally responsible. For that reason, we hold them jointly and severally liable for the administrative penalty and, with IAC and Micron, jointly and severally liable for the disgorgement order.

IV Orders

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

IAC and Micron

1. under section 161(1)(b)(i) of the Act, that all persons cease trading in, and are prohibited from purchasing, securities of IAC and Micron, permanently;

2. under section 161(1)(b)(ii), that IAC and Micron permanently cease trading in, and are permanently prohibited from purchasing, securities and exchange contracts;

3. under section 161(1)(d)(v), that IAC and Micron are permanently prohibited from engaging in investor relations activities;

4. under section 161(1)(g), and subject to paragraph 11, that IAC and Micron 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 $5,433,189;

Everett and Duke

5. under section 161(1)(b)(ii), that Everett and Duke permanently cease trading in, and are permanently prohibited from purchasing, securities and exchange contracts;

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

7. under section 161(1)(d)(iv), that Everett and Duke are permanently 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 Everett and Duke are permanently prohibited from engaging in investor relations activities;

9. under section 161(1)(g), and subject to paragraph 11, that each of Everett and Duke 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 $5,433,189;

10. under section 162, that Everett and Duke are jointly and severally liable to pay an administrative penalty of $7 million;

Maximum amounts

11. IAC, Micron, Everett and Duke are jointly and severally liable to pay the amounts in paragraphs 4 and 9.

¶ 45 July 3, 2014

¶ 46 **For the Commission**

Brent W. Aitken
Vice Chair

Audrey T. Ho
Commissioner

Gordon L. Holloway
Commissioner