

**Robert Waters**

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

**Hearing**

<b>Panel</b>	Judith Downes Gordon L. Holloway	Commissioner Commissioner
<b>Hearing Date</b>	August 15, 2014	
<b>Date of Decision</b>	September 4, 2014	
<b>Appearing</b>		
Veda Kenda	For the Executive Director	
Robert Waters	For Himself	

**Decision**

**I Introduction**

- ¶ 1 This is the sanctions portion of a hearing under sections 161(1), 162 and 174 of the *Securities Act*, RSBC 1996, c. 418. Our Findings on liability made on June 5, 2014 (2014 BCSECCOM 215) are part of this decision.
- ¶ 2 We have found that Waters contravened sections 34(a) and 61(1)(a) of the Act by trading and distributing securities of Berkeley Coffee & Tea, Inc. to 45 investors for proceeds of \$312,977 without being registered and without filing a prospectus.

**II Positions of the Parties**

- ¶ 3 The executive director seeks orders:
1. prohibiting Waters, for a period in excess of five years, from trading in securities, acting as a registrant or promoter, acting in a management or consultative capacity in connection with activities in the securities market, engaging in investor relations activities and acting as a director or officer of any issuer,
  2. requiring Waters to pay an administrative penalty of \$20,000, and
  3. requiring Waters to successfully complete courses concerning capital raising in British Columbia and the duties and responsibilities of directors and officers.
- ¶ 4 Waters did not make any written submissions regarding the appropriate sanctions.

### III Analysis

#### A Factors

¶ 5 Orders under section 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 SCC 37.

¶ 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.”

#### B Application of the Factors

##### *Seriousness of the conduct; damage to integrity of capital markets*

¶ 7 The Commission has consistently held that any contravention of sections 34(1) and 61(1) is inherently serious as those sections are the foundation investor protections of the Act. The requirement in section 34(1) that those who trade in securities must be registered is intended to ensure that purchasers of securities are offered only securities that are suitable. The requirement in section 61(1) that those who wish to distribute securities must file a prospectus with the Commission is intended to ensure that investors and their advisers get the information they need to make an informed investment decision. See *Corporate Express Inc., et al.* 2006 BCSECCOM 153.

¶ 8 In distributing Berkeley shares without complying with the registration and prospectus requirements of the Act, Waters engaged in serious misconduct as described in *Corporate Express* as investors were deprived of protections provided in the Act.

¶ 9 Waters used his status as a former registrant and Canadian Securities Course instructor to promote his services to Berkeley in connection with what turned out to be illegal capital raising activities. This conduct and the already noted failure to comply with the registration and prospectus requirements of the Act damaged the reputation and integrity of the British Columbia capital markets. Investors become hesitant to invest in the market if they cannot trust those who sell securities to do so in compliance with applicable securities laws.

***Market Risk/Fitness to be a Registrant, Director, Officer or Adviser to Issuers***

¶ 10 Despite his background as a registered investment adviser and former Canadian Securities Course instructor, Waters did not understand the prospectus and registration requirements applicable to the Berkeley share distribution.

¶ 11 Waters stated he relied on absolute assurances by Berkeley management that he could distribute Berkeley shares anywhere in North America in reliance on the prospectus Berkeley had filed with the US Securities & Exchange Commission (SEC).

¶ 12 Waters also claimed to have subsequently called Berkeley's Washington state lawyer and the general inquiries lines at the Commission and the SEC with questions regarding the distribution of Berkeley shares in British Columbia. He stated that all of the people he spoke to said they were not in a position to provide him with legal advice.

¶ 13 Although Waters claims to have relied on Berkeley's assurances, these inquiries show that he recognized there were potential securities issues relating to the share distribution. His preliminary inquiries having failed, he concluded that the information was too difficult to access and, as he described it, "esoteric at best". He proceeded with the distribution anyway.

¶ 14 This conduct falls far short of the diligence required by anyone raising funds in the British Columbia capital markets, particularly a former registrant who should have known better.

¶ 15 After completion of the share distribution, Waters provided Berkeley with incorrect information regarding the nature of his relationship with some of his investors as his close friends or close business associates. Waters claimed that he didn't realize that this information was being used to determine the availability of prospectus exemptions. This is hard to believe given Waters' history as a former registrant.

¶ 16 Waters' failure to take the steps necessary to ensure compliance with securities regulatory requirements with respect to his capital raising activities and his indifference to the truthfulness of the information he provided demonstrates that he poses a significant risk to our capital markets were he allowed to continue to participate in them without restriction.

¶ 17 Waters assisted in the Berkeley share distribution in anticipation of becoming a director or officer of Berkeley. He also disclosed that he had lost three directorship opportunities as a result of these proceedings. His conduct also raises serious concerns about his suitability as a director or officer of an issuer in the future.

### ***Past Misconduct***

- ¶ 18 Waters disclosed that in 1992 he was the subject of disciplinary proceedings involving allegations of financial dealings with clients with respect to an initial public offering. He said he was required to rewrite the registered representative exam and was fined \$2,000 plus \$1,500 in costs.
- ¶ 19 In 2005, Waters received a caution letter from the Commission in connection with activities relating to his solicitation of friends and business acquaintances to invest in an unrelated OTC company to which Waters' company provided investor relation services.

### ***Mitigating Factors***

- ¶ 20 Waters submitted that there are mitigating factors we should consider. As already noted, he said that he relied on Berkeley's advice that its shares could be distributed anywhere in North America and he attempted, through the inquiries described above, to determine whether a British Columbia prospectus was required.
- ¶ 21 The executive director argued that Waters cannot rely on any advice received as a mitigating factor as there is no proof that the advice was given. We agree that there is no corroborating evidence. However, as Waters' actions fall far short of the diligence required by anyone raising funds in the capital markets, we would not consider them as mitigating factors even if proof had been provided.
- ¶ 22 Waters also submitted we should consider that throughout his career in the securities industry he had always considered his clients' interests as paramount. He stated "...even if my conduct was within the regulations, but were [sic] against client interests and to my detriment, I would go with the client interests."
- ¶ 23 Not only is this submission irrelevant to sanctions, it shows a troubling failure to recognize that what is paramount is not clients' interests but conducting capital raising activities in accordance with applicable securities laws.
- ¶ 24 We do not find there to be any mitigating factors.

### ***Aggravating Factors***

- ¶ 25 Waters failed to take responsibility for his actions or express any remorse for his conduct. He blamed Berkeley's management for his contravention of the Act and said that he relied on them in deciding he could sell the Berkeley shares.
- ¶ 26 Waters sent a number of threatening and abusive emails to the Commission in connection with the sanctions hearing. This conduct falls far short of the standards of behavior required of participants in the capital markets.
- ¶ 27 We find the above-described conduct and Waters' past misconduct to be aggravating factors.

### ***Harm suffered by investors/enrichment***

- ¶ 28 The executive director submitted documents showing that Berkeley (now DTS8 Coffee Company) is in operation, making securities regulatory filings in the United States and that its shares are trading on the OTC markets in the United States at approximately the same price as the investors paid for their shares. We note that the value of the Berkeley shares is not attributable in any way to Waters as he had no role in Berkeley's management.
- ¶ 29 We do not find evidence of any direct harm to investors from Waters' breach of the Act or that Waters was enriched from his activities relating to the Berkeley share distribution.
- ¶ 30 The executive director is not seeking a disgorgement order and, in the circumstances of this case, we agree that a disgorgement order is not required.

### ***Specific and general deterrence***

- ¶ 31 The sanctions we impose must be sufficiently severe to ensure that the respondents and others will be deterred from engaging in similar conduct.

### ***Previous orders***

- ¶ 32 We considered past decisions of the Commission cited by the parties.
- ¶ 33 In *Cinnabar Explorations Inc. et al* 2014 BCSECCOM 26, Christopher Bass and Dale Zucchet illegally distributed Cinnabar shares to seven investors for proceeds of \$21,500 and Dale Zucchet made misrepresentations. The Commission permanently cease traded Cinnabar, imposed five-year market bans against each of Bass and Zucchet, ordered Cinnabar and Bass to disgorge \$21,500, and imposed administrative penalties of \$10,000 against Bass and \$15,000 against Zucchet. The Commission found that Bass' and Zucchet's carelessness and indifference to learning about and ensuring regulatory compliance when raising capital presented a risk to capital markets. Unlike the present case, the Commission found there was harm to the investors.
- ¶ 34 In *John Arthur Roche McLoughlin, MCL Ventures Inc., Blue Lighthouse Ltd. and Robert Douglas Collins* 2011 BCSECCOM 299, the respondents illegally distributed securities to 22 investors for proceeds of \$317,636, purporting to rely on exemptions that were not available. In doing so, McLoughlin breached a prior order of the Commission arising from a previous illegal distribution. He also continued the misconduct in the face of warnings from Commission staff. Collins was a director of Blue Lighthouse. The Commission permanently ceased traded the corporate respondents, imposed on McLoughlin a 15-year market ban and a \$50,000 administrative penalty and imposed on Collins a five-year market ban, disgorgement of \$14,607 (commission received) and a \$20,000 administrative penalty.
- ¶ 35 In *Saafnet Canada Inc., Nizam Dean and Vikash Sami* 2014 BCSECCOM 96 the respondents illegally distributed securities to 14 investors for proceeds of C\$9,100 and US\$604,479. The Commission permanently cease traded Saafnet and imposed disgorgement of \$686,562 against Saafnet. It imposed on each of Dean and Sami a one-year market ban and a \$10,000 administrative penalty. No disgorgement was ordered against the individual respondents.

- ¶ 36 The Commission found that the individual respondents endeavored to comply with regulatory requirements, were diligent in obtaining legal advice, were remorseful and fully understood and took responsibility for their conduct.
- ¶ 37 In *Aviawest Resorts Inc., Rob DiCastrì, Andrew Pearson, James Pearson, Lawrence Pearson, Susan Pearson, Zulak Financial Group Ltd., Melvin Zulak and Karla Ann Davis* 2013 BCSECCOM 319, although there was an illegal distribution of promissory notes to at least 150 investors, the facts were very different from the matter before us. The Commission permanently cease traded Aviawest but made no order against the individual respondents.
- ¶ 38 The Commission found that the individual respondents were honest, ethical and capable people who demonstrated a high degree of competence and experience in the management of their business and they treated regulatory compliance matters seriously and with respect. They had hired legal counsel to ensure their operations would comply with all legal requirements.
- ¶ 39 The executive director also cited two settlement agreements: *Berkeley Coffee & Tea, Inc. and Sean Tan* 2012 BCSECCOM 424 and *David Malcolm Ruthven* 2010 BCSECCOM 79. We have not considered those settlements in our reasoning as settlements occur in a completely different context than those before us.
- ¶ 40 Waters referred us to *Carolann Steinhoff, Investment Industry Regulatory Organization of Canada* 2014 BCSECCOM 23. We do not find that case helpful as it dealt with very different facts. It involved a review of a decision of a hearing panel of IROC. There was no illegal distribution of securities.
- ¶ 41 The most significant issues in this case are damage to integrity of the markets and market risk. For the reasons already stated, Waters poses a significant risk to our markets and a market ban is warranted. We find Waters' conduct in these respects to be more egregious than the conduct of the individual respondents in cited cases with the exception of *McLoughlin* (15-year ban). Having regard to the circumstances and, in particular the aggravating factors, we find a six year market ban is appropriate.
- ¶ 42 The executive director proposes an administrative penalty of \$20,000. This is the same penalty imposed on Collins in *McLoughlin*. Of the cited cases, the amount of the illegal distribution here is most similar to *McLoughlin*. As we have already addressed the most significant issues posed by Waters' conduct by imposing the market ban, we agree with the executive director and find an administrative penalty of \$20,000 to be appropriate.
- ¶ 43 Further, we agree with the executive director's proposal that Waters be required to successfully complete courses concerning capital raising in British Columbia and the duties and responsibilities of directors and officers.

#### **IV Orders**

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

1. under section 161(1)(d)(i), Waters resign any position he holds as a director or officer of any issuer;
2. until the latest of September 4, 2020, and the date on which the payment ordered in paragraph 4 has been made and the date on which he successfully completes a course of studies satisfactory to the executive director concerning capital raising in British Columbia, Waters is prohibited:
  - (a) under section 161(1)(b), from trading in securities, except that he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;
  - (b) under section 161(1)(d)(iii), from becoming or acting as a promoter or a registrant;
  - (c) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
  - (d) under section 161(1)(d)(v), from engaging in investor relations activities;
3. under section 161(1)(d)(ii), until the latest of September 4, 2020, and the date on which the payment ordered in paragraph 4 has been made and the date on which he successfully completes a course of studies satisfactory to the executive director concerning the duties and responsibilities of directors and officers, Waters is prohibited from becoming or acting as a director or officer of any issuer or registrant; and
4. under section 162, Waters pay an administrative penalty of \$20,000.

¶ 45 September 4, 2014

¶ 46 **For the Commission**

Judith Downes  
Commissioner

Gordon L. Holloway  
Commissioner