Citation: 2014 BCSECCOM 405

Roberta Merlin McIntosh
(aka Bert McIntosh, Roberta Sims
Roberta Butcher, and Roberta Mayer)

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

Hearing

Panel	Judith Downes	Commissioner
	Nigel P. Cave	Vice Chair
	Christopher D. Farber	Commissioner
	Don Rowlatt	Commissioner
Dates of Hearing	June 18 and August 14, 2014	
Submissions Completed	August 21, 2014	
Date of Findings	November 18, 2014	
Appearing		
Neil Cave	For the Executive Director	

Findings

I Introduction

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

¶ 2 On December 20, 2013, the executive director issued a notice of hearing (2013 BCSECCOM 405) alleging that:

- by advising a client to purchase specific securities without being registered as an adviser, McIntosh contravened section 34 of the Act,
- by describing certain securities as a prudent investment when she knew or ought to have known they were a highly speculative and risky investment, McIntosh contravened section 50(1)(d) of the Act,
- by advising the client to purchase securities that were unsuitable for her, McIntosh contravened section 13.3 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, and
- McIntosh's conduct described in the notice of hearing was contrary to the public interest.

¶ 3 At the hearing, the executive director called two witnesses, a Commission investigator and the client, and tendered documentary evidence.

¶ 4 McIntosh was given notice of the proceedings and attended the hearing management meeting. She did not make any formal written submissions with respect to the allegations. She sent to the executive director a written statement dated June 11, 2014, signed but not sworn, which was included as evidence. She did not appear at the hearing nor was she represented by counsel.

II Background

¶ 5 McIntosh is a British Columbia resident.

¶ 6 She is a former registrant who resigned in 2003. At the time of the events described in the notice of hearing, she was not registered in any capacity under the Act.

¶ 7 McIntosh is also a former insurance licensee. In 2012, her license was cancelled for five years because she recommended high-risk illiquid securities unsuitable for her clients.

¶ 8 In this case, McIntosh's client had suffered a mild traumatic brain injury as a result of a car accident. In 2011, she received a lump sum settlement with respect to her injury.

¶ 9 On the recommendation of an acquaintance, the client first contacted McIntosh in 2011 to discuss investment of $440,000 in net settlement proceeds. She told McIntosh about the brain injury and said that, as she was unable to work, she planned to live on income from the investment for the rest of her life. The client had minimal investment experience.

¶ 10 On April 19, 2011, McIntosh sent a letter to the client outlining what she described as "a plan for investment" of the settlement monies. In the letter, she recommended amounts to be invested in specific securities including a recommendation that:

> "$147,000 would be invested in "land banking" with Walton International. …Owning land as part of a diversified portfolio is prudent, sets aside money to grow for 3 – 6 years and provide [sic] superior rates of return without access to capital."

¶ 11 The concluding paragraph of the April 19 letter reads:

> "You will find the plan easy to understand, leaves you lots of liquidity and flexibility, meets your monthly obligation with a cushion and hopefully will provide you with more money in 5 years than you start out with. You will be able to find money to help your kids like you want to do."

¶ 12 The Walton securities were exempt market securities. The offering memorandum for these securities described them as "a risky investment" and "highly speculative". The April 19 letter made no reference to the risks associated with investment in these securities.

¶ 13 McIntosh set up a meeting on April 24, 2011 with the client and a representative of Walton, who was a registrant. At the meeting, McIntosh was asked by the Walton representative to leave while he presented the Walton securities to the client.

¶ 14 At the meeting, the client invested $156,000 in Walton securities.

¶ 15 McIntosh received referral fees of $11,730 with respect to the Walton investment.

¶ 16 The client subsequently ended her relationship with McIntosh after McIntosh suggested to the client that she forge the client's signature on a document.

III Analysis and Findings

A Advising without being registered

1 Law relating to advising

¶ 17 Section 34(b) of the Act says "a person must not…(b) act as an adviser…unless the person is registered in accordance with the regulations and in the category prescribed for the purpose of the activity."

¶ 18 An adviser is defined in section 1(1) of the Act as "a person engaging in, or holding…herself out as engaging in, the business of advising another with respect to investment in or the purchase or sale of securities…".

¶ 19 Section 3.3(a) of BC Policy 31-601 *Registration Requirements* says "advising is offering an opinion about the investment merits of, or recommending the purchase or sale of, securities…".

¶ 20 In *Donas (Re)*, 1995 LNBCSC 18, the Commission considered the definition of advice:

> "As indicated by the definition of "advice", the nature of the information given or offered by a person is the key factor in determining whether that person is advising with respect to investment in or the purchase or sale of securities. A person who does nothing more than provide factual information about an issuer and its business activities is not advising in securities. A person who recommends an investment in an issuer or the purchase or sale of an issuer's securities, or who distributes or offers an opinion on the investment merits of an issuer or an issuer's securities, is advising in securities."

¶ 21 Companion Policy 31-103CP to National Instrument 31-103 under the heading "Business Trigger for Trading and Advising" lists factors to be considered in determining whether a person is advising in securities for a business purpose. These factors include engaging in activities similar to a registrant and receiving any form of compensation for carrying on the activity.

¶ 22 National Policy 31-103 sets out available exemptions from the adviser registration requirements. The only one potentially applicable to McIntosh's activities is section 8.25(2), which provides for an exemption where the advice given does not purport to be tailored to the needs of the person receiving the advice.

2 Issues and Findings relating to advising

¶ 23 McIntosh was not registered as an adviser under the Act. The issue is whether in her dealings with the client she engaged in the business of advising another with respect to investment in securities.

¶ 24 Her April 19, 2011 letter outlined what she described as a "plan for the investment" of the $440,000 net settlement proceeds. It went far beyond providing factual information about issuers and their business activities. It contained clear recommendations for the investment of specific amounts in specific securities including the purchase of Walton securities. It also included a statement about the merits of an investment in the Walton securities in the comment that it offered "superior rates of return". We find that the April 19 letter constituted advice to the client with respect to investment in securities.

¶ 25 McIntosh received compensation relating to her investment advice in the form of the $11,730 in referral fees paid to her for the client's purchase of the Walton securities. She also carried out activities similar to a registrant by recommending securities for purchase to the client. Considering these facts, we find McIntosh was engaged in the business of advising.

¶ 26 In the concluding paragraph of her April 19 letter, McIntosh says "…the plan…leaves you with lots of liquidity and flexibility, meets your monthly obligation with a cushion and hopefully will provide you more money in 5 years than you start out with. You will be able to find money to help your kids like you want to do." We find that in making these statements, McIntosh purported to tailor her investment advice to the client's needs and that the exemption from the adviser registration requirement set out in section 8.25(2) of National Policy 31-103 is not available.

¶ 27 We find that McIntosh contravened section 34(b) of the Act by advising the client to purchase Walton securities without being registered to do so.

B Misrepresentation

1 Law relating to misrepresentation

¶ 28 Section 50(1)(d) of the Act says: "A person, while engaging in investor relations activities or with the intention of effecting a trade in a security must not…(d)

make a statement that the person knows, or ought reasonably to know, is a misrepresentation."

¶ 29 "Misrepresentation" is defined in section 1(1) of the Act as "an untrue statement of a material fact, or… an omission to state a material fact that is (i) required to be stated, or (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made;".

¶ 30 "Material fact" is defined in section 1(1) as "a fact that would reasonably be expected to have a significant effect on the market price or value of securities."

2 Issues and Findings with respect to misrepresentation

¶ 31 The notice of hearing alleges that McIntosh made a misrepresentation when she described certain exempt market securities as a prudent investment when she knew or ought to have known they were a highly speculative and risky investment.

¶ 32 The first issue to consider is whether the statement made by McIntosh in the April 19 letter regarding the prudence of the Walton investment was a misrepresentation.

¶ 33 For a statement to meet the definition of misrepresentation, it must be an untrue statement of a material fact. The relevant section of the letter is set out above. The key sentence is "Owning land as part of a diversified portfolio is prudent, sets aside money to grow for 3 – 6 years and provide [sic] superior rates of return without access to capital."

¶ 34 The executive director did not provide any analysis or reference to authorities to support a finding that this statement was an untrue statement of a material fact.

¶ 35 Contrary to the allegation in the notice of hearing, McIntosh did not state that the Walton securities were a prudent investment. Her actual statement was a general one relating to the prudence of holding land as part of a diversified portfolio. Even if this statement is taken in the context of the paragraph as a whole to read more specifically that holding Walton securities as part of a diversified portfolio is prudent, it remains a statement about her view of the appropriate composition of a diversified portfolio.

¶ 36 Fundamentally, McIntosh's statement was a statement of opinion, not a statement of fact, material or otherwise. It was not a misrepresentation under the Act.

¶ 37 We find that McIntosh did not make a misrepresentation by describing the Walton securities as a prudent investment and, accordingly, did not contravene section 50(1)(d) of the Act.

¶ 38 The executive director also submitted that McIntosh made a misrepresentation by omitting to describe the risks associated with the Walton investment.

¶ 39 The executive director conceded at the hearing that this allegation of misrepresentation by omission is not set out in the notice of hearing. The relevant allegation is very specific. At para 17 it reads:

> "By describing certain exempt securities as a prudent investment, when she knew or ought to have known they were a highly speculative and risky investment, McIntosh contravened section 50(1)(d) of the Act."

¶ 40 The executive director argued that the notice of hearing does not require a statement that McIntosh breached section 50(1)(d) by omission. Rather, the executive director submitted that simply alleging a breach of section 50(1)(d) of the Act is sufficient in a notice of hearing to support an allegation of a misrepresentation, either by omission or commission. We disagree.

¶ 41 In *Blackmont Capital Inc*., 2011 BCSECCOM 490, at para 24 the Commission said:

> "A notice of hearing is the foundation of hearings before...this Commission. It identifies the alleged misconduct that the respondent has to meet. It establishes the issues to be determined at the hearing. It follows that a panel does not have jurisdiction to determine matters not alleged in the notice of hearing. (Particulars need not be in the notice of hearing, but must relate to an allegation that is in the notice)".

¶ 42 As this allegation is not set out in the notice of hearing, we cannot make the finding requested by the executive director.

C Suitability

1 Law relating to suitability

¶ 43 Section 13.3 of National Instrument 31-103 says:

> "13.3 Suitability – (1) A registrant must take reasonable steps to ensure that, before it makes a recommendation to or accepts an instruction from a client to buy or sell or a security, or makes a purchase or sale of a security for a client's managed account, the purchase or sale is suitable for the client;"

¶ 44 Part 13 of Companion Policy 31-103CP also addresses the suitability requirement and states in part:

> "Subsection 13.3(1) requires registrants to take reasonable steps to ensure that a proposed trade is suitable for a client before making a

> recommendation or accepting instructions from the client. To meet this suitability obligation, registrants should have in-depth knowledge of all securities that they buy and sell for, or recommend to, their clients. This is often referred to as the "know your product" or KYP obligation.
>
> Registrants should know each security well enough to understand and explain to their clients the security's risks, key features, and initial and ongoing costs and fees."

2 Issues and Findings with respect to suitability

¶ 45 The obligation imposed on registrants under Section 13.3 is to take reasonable steps before giving advice to ensure that the purchase or sale of a security is suitable. Unfortunately, the description of the misconduct alleged in the notice of hearing does not reflect that obligation. Instead, the notice of hearing alleges that McIntosh contravened section 13.3 of National Instrument 31-103 "by advising her client to purchase securities that were unsuitable for her". This allegation incorrectly focuses on the advice McIntosh gave to the client, rather than the steps she took prior to giving the advice to ensure it was suitable.

¶ 46 More importantly, the notice of hearing already contains an allegation that McIntosh breached the requirement to be registered under section 34(b) of the Act. This allegation relates to one of the most serious contraventions of the Act. Such an allegation subsumes the potential breach of many secondary obligations imposed on registrants under National Instrument 31-103, including the breach of section 13.3 alleged in this case. Having found that McIntosh breached the requirement to be registered, it is not appropriate or in the public interest to also find that she was in breach of the further requirement of a registrant alleged under National Instrument 31-103. We dismiss this allegation.

¶ 47 While we question why this allegation was included in the notice of hearing, evidence and arguments relating to suitability and investor harm are not irrelevant to these proceedings. These considerations are more appropriate, however, in the context of what sanctions are warranted in light of our findings of a contravention of section 34(b).

D Public Interest

¶ 48 The notice of hearing alleges that McIntosh's conduct described in the notice of hearing is contrary to the public interest. As far as that conduct relates to her dealings with the client relating to investments in securities, we have already found that McIntosh committed one of the most serious breaches of the Act by contravening section 34(b). As such, we do not find it necessary to make a separate finding regarding the public interest allegation with respect to this conduct.

¶ 49 The notice of hearing outlines in paragraphs 14 and 15 particulars of an offer by McIntosh to forge the client's signature to facilitate a transfer of monies from one investment fund to another. The client testified that McIntosh contacted her to ask

if she could forge her signature on a transfer form. The client said she couldn't recall the details but the purpose of the transfer was either to switch her investment between funds or to provide her with cash. When the client did not give her consent, McIntosh did not proceed.

¶ 50 In his oral submissions, the executive director argued that the offer to forge the client's signature was conduct contrary to the public interest. He did not provide any analysis or reference to authorities to support a finding that McIntosh's conduct rose to the level of conduct contrary to the public interest.

¶ 51 We do not condone an offer by an adviser to forge a client's signature, whether or not the adviser proceeds with the forgery. However, the single instance testified to by the client is not necessarily conduct contrary to the public interest. The circumstances must be considered. There was no prejudice to the client. McIntosh was seeking authorization from her client to sign a document on her behalf to facilitate the flow of funds for her client's benefit. McIntosh did not proceed when the client refused authorization.

¶ 52 In these circumstances, we do not find McIntosh's conduct to be sufficiently serious to constitute conduct contrary to the public interest.

IV Summary of Findings

¶ 53 We have found that:

- McIntosh contravened section 34(b) of the Act by advising the client to purchase Walton securities without being registered to do so;
- McIntosh did not make a misrepresentation by describing certain securities as a prudent investment and, accordingly, did not contravene section 50(1)(d) of the Act;
- Having already found that McIntosh contravened section 34(b), it is not appropriate or in the public interest to also find that she was in breach of 13.3 of National Instrument 31-103 and this allegation is dismissed;
- As far as McIntosh's conduct relates to her dealings with the client relating to investments in securities, it is not necessary to make a separate finding regarding the public interest allegation as we have already found that she contravened section 34(b) of the Act; and
- McIntosh's conduct in offering to forge her client's signature is not conduct contrary to the public interest in the circumstances.

V Submissions on Sanctions

¶ 54 We direct the parties to make their submissions on sanctions as follows:

By December 2, 2014	The executive director delivers submissions to McIntosh and to the secretary to the Commission
By December 16, 2014	McIntosh delivers response submissions to the executive director and to the secretary to the Commission. Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission
By December 23, 2014	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

¶ 55 November 18, 2014

For the Commission

Judith Downes
Commissioner

Nigel P. Cave
Vice Chair

Christopher Farber
Commissioner

Don Rowlatt
Commissioner