2014 BCSECCOM 512

**Colin Robert Hugh McCabe and Erwin Thomas Speckert**

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

**Hearing**

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| **Panel** | Judith Downes | Commissioner |
| | Don Rowlatt | Commissioner |
| **Submissions completed** | November 21, 2014 | |
| **Date of Decision** | December 18, 2014 | |

**Appearing**

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|---|---|
| Derek J. Chapman | For the Executive Director |
| Sean K. Boyle | For Colin Robert Hugh McCabe |
| Patricia A.A. Taylor | For Erwin Thomas Speckert |

**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. The Findings on liability made on July 8, 2014 (2014 BCSECCOM 269) are part of this decision.

¶ 2 The panel found that:

- Colin Robert Hugh McCabe engaged in egregious conduct contrary to the public interest when he took and followed, without question, instructions from third parties to promote Guinness Exploration Inc., Tuffnell Exploration Ltd. and Gunpowder Gold Corp., published grossly promotional and misleading reports about them, and facilitated arrangements designed to conceal payment to him from the beneficiaries of the promotions,

- Erwin Thomas Speckert engaged in conduct contrary to the public interest when he took instructions from a person or persons unknown to arrange for the promotion of Guinness, initiated contact with McCabe to tout Guinness and arranged payment to McCabe by means designed to conceal the transaction.

- McCabe contravened section 50(1)(d) of the Act when he made a gross misrepresentation about Guinness in the February, March and May 2010 editions of *Elite Stock Report*.

The notice of hearing alleged that McCabe made three misrepresentations in the reports he wrote promoting Guinness. The panel found that the gross misrepresentation he made regarding a non-

existent resource estimate for one of Guinness' properties was so egregious that it alone would dominate consideration of the appropriate penalty arising from McCabe's misrepresentation and there was no need to consider the other two alleged misrepresentations.

## II Positions of the parties

### *Executive director's submissions*

¶ 3 The executive director seeks orders under sections 161(1) and 162 of the Act that:

- McCabe and Speckert be permanently prohibited from trading in securities,
- none of the exemptions set out in the Act, the *Securities Regulation*, B.C. Reg. 196/97 or a decision of the Commission apply to McCabe or Speckert,
- McCabe and Speckert be permanently prohibited from becoming or 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 being or acting as a director or officer of any issuer or registrant,
- McCabe "disgorge" US$2.65 million and pay an administrative penalty of $5.5 million to $8 million, and
- McCabe and Speckert be permanently prohibited under section 161(1)(e)(i) from engaging in certain investor relations activities.

¶ 4 The executive director, in his oral submissions, requested that:

- the order issued under section 161(1)(e)(i) against McCabe prohibit him from authoring, issuing or disseminating tout sheets or promotional newsletters about any issuers, including *Elite Stock Reports*, in any format and under any name,
- the prohibition against McCabe engaging in investor relations activities apply regardless of whether or not McCabe is aware on whose behalf the investor relations activities are being carried out, and
- the prohibition against Speckert engaging in investor relations activities include a prohibition on facilitating investor relations activities.

### *McCabe's submissions*

¶ 5 McCabe submitted that:

- he pay an administrative penalty of a maximum of $65,000,
- he undertake not to publish newsletters in the future,
- any other sanctions against him be limited to no more than five to eight years,
- any trading prohibition permit him to hold and trade mutual funds, GICs and stocks in a registered retirement savings account and a tax-free savings account or, in the alternative, to trade through a registered dealer, and
- no disgorgement order be made, but if it is, it be for $501,741.38.

¶ 6 In his oral submissions, McCabe agreed to the variation to the section 161(1)(e)(i) order proposed by the executive director if it was determined that such an order was appropriate.

### *Speckert's submissions*

¶ 7 Speckert submitted:

- any sanctions against him be limited to one year,

- any trading prohibition permit him to trade through a registered dealer,
- any order prohibiting him from acting as an officer or director be limited to reporting issuers, and
- under section 161(1)(e)(i), he be prohibited from disseminating to the public, or authorizing the dissemination to the public, of any information of any kind relating to any reporting issuer.

## III Analysis

### A Factors

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

¶ 9 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***

*McCabe*

¶ 10 There is no issue regarding the seriousness of McCabe's misconduct. The panel found it to be egregious and contrary to the public interest because it exposed investors to improper practices and eroded confidence in our markets.

¶ 11 In his submissions, McCabe characterized himself as a young man in the newsletter writing business who thought what he was doing was lawful. He said that he did not intend his actions

to be deceptive or to result in misrepresentations. He said that, although he was not a child, he also was not a sophisticated, mature businessman.

¶ 12 We do not accept this benign characterization. McCabe authored three publications in which he made stock purchase recommendations, one under his own name in *Elite Stock Report* and the other two under aliases. In the *Elite Stock Report*, he wrote and distributed grossly promotional and misleading information about Guinness, Tuffnell and Gunpowder.

¶ 13 McCabe took instructions to publish these reports from persons with no apparent relationship with the companies. He made no inquiries about these persons, who they represented or the purposes of the promotion. He was paid exorbitant fees in advance for preparation of the reports and facilitated payment of his fees through offshore corporations and accounts.

¶ 14 McCabe was not simply in the business of writing newsletters. As stated in the Findings, he was in the business of creating and publishing grossly promotional and misleading reports about public companies, no questions asked. All he needed was payment in advance and a name for the disclaimer. His reports were designed to significantly increase trading volumes in the shares of Guinness, Tuffnell and Gunpowder in order to inflate their stock price. There was nothing about this conduct that was consistent with any benign market activity.

*Speckert*

¶ 15 We found that Speckert's facilitation of secret payments to McCabe from whomever it was that wanted Guinness promoted made him an active participant in the process that resulted in the blatant touting of Guinness. His conduct was an essential part of McCabe's Guinness promotion.

¶ 16 By facilitating secret funding of egregious touting which damaged the reputation of our markets, Speckert engaged in serious misconduct.

***Harm to investors***

¶ 17 We found that the potential investors who received the *Elite Stock Reports* containing grossly misleading information reports on Guinness, Tuffnell and Gunpowder were exposed to an improper practice. As McCabe wrote and distributed these reports and Speckert arranged, and facilitated secret payment, for McCabe's services, their misconduct clearly harmed potential investors.

***Specific and general deterrence***

¶ 18 The sanctions we impose must be sufficiently severe to ensure that the respondents and others will be deterred from engaging in similar misconduct in the future.

***Past misconduct; mitigating factors***

*McCabe*

¶ 19 McCabe said that he regrets any errors he has made and accepts responsibility for his actions. He did not appear or testify at the sanctions hearing so we cannot gauge the depth of his contrition.

¶ 20 McCabe said he stopped publishing newsletters when contacted by the executive director and undertakes not to do so in the future. He also said at no time did he purchase shares of the issuers that were the subject of his promotions.

¶ 22 McCabe has no history of regulatory misconduct.

¶ 23 None of these points is a mitigating factor in considering sanctions when balanced against the seriousness of McCabe's misconduct.

¶ 21 It is an aggravating factor that McCabe's conduct related to companies in the junior markets as those markets are particularly vulnerable to reputational damage.

*Speckert*

¶ 22 Speckert submitted it is a mitigating factor that he cooperated with the Commission staff, answering all questions put to him. He subsequently said we should attach no weight to any statements in the interview with Commission staff that conflict with other evidence he provided.

¶ 23 Speckert has no history of regulatory misconduct.

¶ 24 Neither of these points is a mitigating factor in considering sanctions when balanced against the seriousness of Speckert's misconduct.

***Enrichment***

*McCabe*

¶ 25 McCabe was paid US$2.65 million in advance for the Guinness promotions in the *Elite Stock Reports*. He was also paid $1.2 million for each of the Gunpowder and Tuffnell promotions.

¶ 26 Speckert's company received a "spread or commission" of US$200,000 with respect to the Guinness promotion.

***Risk to investors and markets***

¶ 27 McCabe said he thought what he was doing was lawful and he did not intend to be deceptive or make a misrepresentation. His failure to understand that his actions constituted serious misconduct shows a fundamental lack of judgment which, when combined with the nature of his misconduct, poses a serious risk to investors and our markets.

¶ 28 Speckert's actions in arranging for, and facilitating the funding of, egregious touting has no place in our capital markets and poses a risk to investors and our markets.

***Previous orders***

¶ 29 We considered past decisions of the Commission cited by the parties.

*Brookmount*

¶ 30 In *Brookmount Explorations Inc., Peter John Flueck and Zafer Erick Sungur* 2012 BCSECCOM 445, Brookmount Explorations Inc. made misrepresentations and contravened National Instrument 43-101 *Standards of Disclosure for Mineral Projects* when it omitted material facts

from its new releases. Peter Flueck and Zafer Sungur authorized or acquiesced in those contraventions and breached a cease trade order issued against Brookmount.

¶ 31 In the news releases at issue, Flueck exaggerated the prospects of Brookmount's primary mining property by cherry-picking favorable statements from available reports and failing to disclose qualifying information that would have shown his statements to be false. He also made up information. Sungur approved the news releases even though he knew they were false.

¶ 32 The panel found that Brookmount's blatant misrepresentations about the value of its key property was at the highest end of the range of misconduct because of the damage it could cause to the integrity of our markets. There was no evidence that Flueck or Sungur was enriched as a result of his misconduct. The panel found Fleuck's and Sungur's sale of Brookmount shares in breach of the cease trade order to be an aggravating factor. The respondents cooperated with the investigation and did not contest some key elements of the allegations.

¶ 33 The Commission issued a permanent cease trade order against Brookmount. They imposed eight-year trading and market bans (with certain exceptions) against Flueck and an administrative penalty of $65,000. The same bans (without exceptions) were imposed on Sungur for a term of five years. He was required to pay an administrative penalty of $45,000**.** Both individual respondents also were required to complete a course on financing and governance for public companies.

¶ 34 McCabe cited *Brookmount* as an authority in determining the appropriate amount of his administrative penalty. He said that the characterization of Flueck's conduct as "the highest end of the range of misconduct" was similar to the characterization of his conduct made in the Findings. He argued that, accordingly, the amount of the penalty imposed on him should be no more than the $65,000 imposed on Flueck.

¶ 35 We do not find the penalty imposed in *Brookmount* to be determinative of the appropriate penalty in the case before us. There was no evidence of enrichment in *Brookmount.* Additionally, the scale of the misconduct and the related potential harm to the capital markets in *Brookmount* was materially different than the case before us. The individual respondents in *Brookmount* were directors and officers of a junior mining issuer and their misconduct was confined to that single issuer. McCabe was in the business of creating and publishing grossly promotional and misleading reports about public companies. In this case, he participated in a secret promotion of three public issuers, published grossly promotional and misleading reports about them, received significant fees in advance for his services and facilitated arrangements designed to conceal the source of the payment of those fees.

¶ 36 McCabe also argued that, unlike *Brookmount,* his misrepresentation was not deliberate. The panel found that McCabe's misrepresentation was not technical and not accidental. To argue that it might not have been deliberate is not a meaningful distinction.

¶ 37 McCabe also said that, unlike *Brookmount*, there was no evidence that his misrepresentation was intended to influence the market. As the panel found that McCabe's reports were designed to

significantly increase trading volumes in shares in order to inflate the stock price, we do not find this submission to be compelling.

*Manna*

¶ 38 *Manna Trading Corp Ltd. et al* 2009 BCSECCOM 595 involved a Ponzi scheme into which more than 800 investors deposited about US$16 million. The respondents were found to have perpetrated a fraud on investors and, in doing so, illegally distributed securities and made misrepresentations to investors. A permanent cease trade order was issued against Manna Trading Corp. Ltd. and associated entities. Permanent market bans were issued against all of the individual respondents. Disgorgement orders of $16 million were made against all of the respondents. An administrative penalty of $6 million or $8 million was imposed against each of the individual respondents.

¶ 39 The aspect of the decision discussed in the submissions in the matter before us was the administrative penalties ordered under section 162 of the Act. In *Manna*, each of the respondents was found to have contravened four sections of the Act. They were also found to have contravened all of those sections in their dealing with hundreds of clients and multiple times in their dealings with many clients. The panel concluded there were, therefore, hundreds if not thousands, of contraventions for which it could order an administrative penalty. Rather than deal with each of the respondent's contraventions separately, the panel considered their conduct globally and imposed an administrative penalty for all of their contraventions.

¶ 40 The executive director argued that the reasoning in *Manna* applied in the case before us. He said that McCabe authored and disseminated *Elite Stock Reports* for three different months to a total of three million households and that technically McCabe's misrepresentation was made to each of those three million households. The executive director said that while we should not determine the administrative penalty on a crude calculation of how many actual contraventions there were, based on the analysis in *Manna,* McCabe's misrepresentation should not be characterized as a single contravention of the Act.

¶ 41 McCabe argued that, as the Commission did not make any findings with respect to the other two alleged misrepresentations, any order for sanctions must be limited to a single finding of a misrepresentation. He submitted that any repetition of the misrepresentation in subsequent issues of *Elite Stock Report* constitute a linked series of acts within a single endeavor. He made a general reference to cases at criminal law, such as kidnapping, where a series of acts within a single endeavor are found to be a single contravention of the law. He did not provide any detailed analysis or cite any authorities for his submission.

¶ 42 McCabe also submitted that the analysis regarding multiple contraventions in *Manna* is wrong. He argued that the panel's interpretation of the statutory provisions was flawed and did not reflect the legislature's intent. McCabe did not provide any analysis or cite any authorities to support his argument.

¶ 43 McCabe also sought to distinguish *Manna* on a factual basis. He said that *Manna* involved misrepresentations made in the course of conversations and other dealings with 800 investors unlike the case at hand where there is the equivalent of one misrepresentation in a press release

disseminated to many people. This point was not discussed by the panel in *Manna* and any inference as to its effect on the panel's decision is speculation.

¶ 44 We agree with the executive director that McCabe's misrepresentation should not be characterized as a single contravention of the Act for the purposes of determining the administrative penalty. The misrepresentation was repeated in three separate editions of *Elite Stock Report* which, while identical in content, each bore a separate date. The reports were distributed on three different dates to a total of approximately three million households with at least a month elapsing between each distribution. McCabe was paid separately for each report. Adopting the analysis in *Manna*, there were multiple contraventions of the Act.

*Cartaway*

¶ 45 In *Cartaway Resources Corp. et al.*, 2001 BCSECCOM 594, Robert Hartvikson and Blayne Johnson were found to have engaged in an illegal distribution of securities of Cartaway Resources Corp. when they relied on a prospectus exemption to which they were not entitled. Hartvikson and Johnson were brokers with First Marathon Securities Limited who, along with other First Marathon brokers, acquired a controlling interest in Cartaway. The respondents arranged for the purchase by Cartaway of certain mining claims and, with the control group, for two brokered private placements of Cartaway securities to finance acquisition and exploration of the claims. Disclosure of the respondents' role in acquiring the mining claims, the extent of the control group's holdings and any related conflicts of interest was not made until closing of the second financing. Hartvikson and Johnson ultimately realized $5.1 million in profits from trading in their Cartaway shares.

¶ 46 The Commission found that the respondents had placed themselves in a position where their personal interests conflicted with those of Cartaway's and that they had consistently placed those interests above those of their clients, including Cartaway. The panel said that the respondents' conduct constituted a breach of their duties as gatekeepers of the securities industry and that such conduct was highly prejudicial to the public interest. In the sanctions decision, the Commission focussed primarily on these findings in determining what orders should be made in the public interest.

¶ 47 The Commission said the sanctions imposed must make clear to those who enjoy the benefits of access to the capital markets that there are consequences to them if they take unfair advantage of those benefits. The panel said that unless there was effective deterrence, inappropriate conduct would continue and public confidence in the fairness of our markets would be eroded further.

¶ 48 The Commission ordered a one-year ban against the respondents relying on certain exemptions (except that each could trade through a registered dealer on his own account). The respondents were also prohibited from acting as directors or officers of any reporting issuer until the later of one year and the date they successfully completed a course concerning the duties and responsibilities of directors and officers. Each of the respondents was also ordered to pay an administrative penalty of $100,000, which was the maximum administrative penalty available at the time. The Commission's decision was ultimately appealed to the Supreme Court of Canada which upheld the decision.

¶ 49 Speckert submitted that *Cartaway* was the most relevant decision of the Commission as it focused on the relationship between conduct that was not a breach of the Act, the public interest and appropriate sanctions. He argued that any sanctions imposed should be consistent with *Cartaway*.

¶ 50 While *Cartaway* sanctions focused on consideration of conduct that was found to be contrary to the public interest, the circumstances were very different from the case before us. The case involved an illegal distribution. Additionally, among other things, the respondents were found to have previously had an extensive and commendable track record regarding their participation in and contribution to the capital markets. The panel also found that the respondents would continue to make a positive contribution to the British Columbia capital markets if permitted to do so. Neither of these considerations apply to Speckert.

*Independent Academies*

¶ 51 The executive director argued in his written submissions that McCabe's conduct was comparable to the dishonest deprivation involved in fraud. In his oral submissions he said he was not equating McCabe's conduct to fraud but suggesting that the sanctions in fraud cases be considered in determining sanctions in this case. He cited *Independent Academies Inc. (Re),*2014 BCSECCOM 260 as an authority for a general description of the orders typically imposed by the Commission in fraud cases. McCabe argued that to equate his misconduct to fraud is simply wrong and we agree. We do not consider the sanctions imposed in fraud cases to be relevant to determination of sanctions in this case.

¶ 52 McCabe also cited a settlement agreement, *Re Jardine*, 2007 BCSECCOM 602. We have not considered this settlement in our reasoning as settlements occur in a completely different context than that before us.

## C Appropriate Orders

***Market and trading bans***

¶ 53 To issue an order under section 161 or 162 of the Act, the Commission must determine that it is in the public interest to do so. Guidance on how to apply the public interest in the context of making enforcement orders is found in two Supreme Court of Canada cases. The first is *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* [2001] 2 SCR 132 and the second is the appeal from the Commission's decision in *Cartaway* ( *Cartaway Resources Corp. (Re)*, 2004 SCC 26).

¶ 54 These cases establish that when considering the appropriateness of a sanction in the public interest:

(a) the Commission should broadly assess the proposed sanction in the context of the purposes of the Act which are to:
    (i) provide protection to investors from unfair, improper or fraudulent practices,
    (ii) foster fair and efficient capital markets, and
    (iii) promote confidence in the capital markets.

(b) the purpose of sanctions in the public interest is neither remedial or punitive, it is protective and preventative, intended to be exercised to prevent likely future harm to the capital markets. In *Asbestos*, the Court said at paragraph 43 "The role of the OSC under s. 127 [the legislative equivalent to section 161] is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets", and

(c) it is reasonable and appropriate to consider general deterrence when imposing a sanction.

*McCabe*

¶ 55 McCabe argued that a market ban against him under section 161 would have little remedial value as he received no benefit related to the performance in the capital markets of the issuers featured in his reports. Similarly, he submitted that with respect to the trading ban requested, no wrongdoing was alleged in relation to his trading.

¶ 56 However, McCabe's egregious misconduct struck at the heart of the fairness and reputation of our capital markets. It exposed investors to improper practices and eroded confidence in our markets. When compounded with his lack of judgment in failing to recognize the potential adverse consequences of his actions, it is clear that his continued presence in our markets poses a serious risk to investors and the integrity of our capital markets.

¶ 57 Orders under section 161 of the Act are protective and preventative, and are meant to prevent likely future harm. McCabe's past conduct is sufficiently abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets. We have determined that it is appropriate to use the powers that are available to us under section 161 to protect our capital markets from future harm by removing McCabe from them.

¶ 58 In the circumstances, we consider it appropriate to issue permanent market and trading prohibitions against McCabe under section 161(1)(b)(ii) and (d) with an exception to the trading prohibition to permit him to trade through a registered dealer.

*Speckert*

¶ 59 Speckert made a number of submissions regarding the appropriateness and remedial value of the trading and market bans requested against him given the nature of his misconduct. He also said that permanent bans have been imposed only for the most egregious misconduct and this is not a case where such a ban is appropriate.

¶ 60 Speckert poses a risk to investors and the integrity of our capital markets. He profited by facilitating secret funding of egregious touting that damaged the fairness and reputation of our capital markets. Tolerance of this outcome would be contrary to our mandate to foster a securities market that is fair and warrants public confidence.

¶ 61 Like McCabe, Speckert's past conduct is sufficiently abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets. In the circumstances, we consider it appropriate to issue a five-year market and trading prohibition against Speckert with the same exception to the trading prohibition described above for McCabe.

***Investor relations bans***

¶ 62 The executive director cited section 172 of the Act as giving the Commission the authority to include the specific wording he requested in the investor relations bans against McCabe and Speckert under section 161(1)(d)(v) outlined in paragraph 4 above. He said this section authorizes the Commission to customize its orders as the circumstances require.

¶ 63 The authority granted to the Commission under section 172 is not as broad as suggested by the executive director. Section 172 says:

> "**172** The commission or the executive director may impose any conditions, restrictions or requirements the commission or executive director considers necessary in respect of any decision made by the commission or executive director."

¶ 64 In our view, neither of the executive director's proposed orders, on a plain reading, can be considered a "condition, restriction, or requirement" as outlined in section 172. We dismiss the executive director's request on this ground.

¶ 65 The executive director further argued that the definition of "investor relations activities" is broad enough to include "facilitation" of investor relations activities, to allow for the variation relating to Speckert.

¶ 66 Section 161(1)(d)(v) permits the Commission to order that "a person…is prohibited from engaging in investor relations activities". "Investor relations activities" is defined in section 1 of the Act as:

> "…any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer,…."

¶ 67 We do not agree that this definition is broad enough to include the facilitation of investor relations activities. Facilitating an activity is something quite different from the activity itself. For facilitation to be considered an activity falling within the definition, express language to that effect would be required, similar to the language in the definition of "trade" in section 1 of the Act:

> "(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraph (a) to (e)."

¶ 68 As facilitating does not fall within the definition of investor relations activities, we dismiss the executive director's request that we customize the investor relations ban against Speckert to include it.

***Section 161(1)(e)(i) orders***

¶ 69 Section 161(1)(e)(i) permits the Commission to order that a person engaged in investor relations activities be prohibited from disseminating to the public, or authorizing the dissemination to the public, any information or record described in the order. As we have already determined to issue an order under section 161(1)(d)(v) prohibiting McCabe and Speckert from engaging in investor relations activities entirely, an order under section 161(1)(e)(i) imposing limitations on activities we have prohibited is not necessary.

***Section 161(1)(g) order***

¶ 70 Under section 161(1)(g), if a person has not complied with a provision of the Act the Commission may order that a person pay to the Commission "any amount obtained, …directly or indirectly, as a result of the failure to comply or the contravention".

¶ 71 In a recent decision, *David Michael Michaels et al* 2014 BCSECCOM 457 the Commission discussed the principles relevant to section 161(1)(g) orders at paragraphs 42 and 43:

> "To summarize, these are the principles that are relevant under section 161(1)(g):
> a) the focus of the sanction should be on compelling the respondent to pay any amounts obtained from the contravention(s) of the Act;
> b) the sanction does not focus on compensation or restitution or act as a punitive or deterrent measure over and above compelling the respondent to pay any amounts obtained from the contravention(s) of the Act;
> c) the section should be read broadly to achieve the purposes set out above and should not be read narrowly to either limit orders:
> (i) to amounts obtained, directly or indirectly, *by that respondent*; or
> (ii) to a narrower concept of "benefits" or "profits",
> although that may be the nature of the order in individual circumstances.
>
> Principles that apply to all sanction orders are applicable to section 161(1)(g) orders, including:
> a) a sanction is discretionary and may be applied where the panel determines it to be in the public interest; and
> b) a sanction is an equitable remedy and must be applied in the individual circumstances of each case."

¶ 72 The executive director and McCabe made a number of submissions regarding the application of section 161(1)(g) both before and after the issuance of the *Michaels* decision.

¶ 73 McCabe initially argued that the purpose of a section 161(1)(g) order was to compensate aggrieved investors and it was not available in this case as there was no evidence of aggrieved investors. We agree with the panel in *Michaels* that compensation or restitution is not the purpose of a section 161(1)(g) order. Accordingly, this submission fails.

¶ 74 He also argued that there are no monies properly subject to an order under section 161(1)(g) as the monies McCabe received were payment in advance for services rendered, not as a result of the misrepresentation he was found to have authored. In the Findings the panel said that there was only one reasonable explanation for why McCabe was paid in advance for his services. His clients clearly understood that he was in the business of creating and publishing grossly promotional and misleading reports about public companies, no questions asked. In the

circumstances, we find the timing of the payment is not determinative and the fees for services were monies obtained as a result of McCabe's misrepresentation.

¶ 75 McCabe also said that the circumstances of this case are very different from *Michaels* and necessitate that an order for disgorgement, if any, be limited to net rather than gross proceeds. He sought to distinguish the two cases on a number of grounds including the seriousness of the misconduct, the nature of the deductions sought, the source of the monies subject to disgorgement and the evidence of loss by the investors.

¶ 76 None of the factors identified by McCabe support limiting a section 161(1)(g) order to net, rather than gross, proceeds. It is clear from *Michaels* that neither the source of the monies subject to the order nor the nature of the deductions sought are determinative.

¶ 77 The panel in *Michaels* stated that the focus of the sanction should be on compelling the respondent to pay any [emphasis added] amounts obtained from the contravention of the Act. We have already found that the fees paid to McCabe were monies obtained as a result of his misrepresentation. The fact that the monies received by McCabe were paid by a third party for his services rather than commissions paid by aggrieved investors is not relevant.

¶ 78 The panel in *Michaels* acknowledged that there may be circumstances in which it may be inappropriate to make a section 161(1)(g) order for the total amount obtained. The panel cited examples of past Commission decisions where the party did not control the issuer of the securities or had not been equally culpable with another respondent or where the funds obtained clearly went to a third party. The latter instance was the case in *Michaels* where monies were retained by third parties in accordance with the investors' intentions. None of these circumstances apply in the case at hand. The monies McCabe seeks to deduct are the out-of-pocket costs incurred in creating and publishing the very newsletters which contained his misrepresentation. We find it is not appropriate to deduct these expenses from the total amount obtained.

¶ 79 The seriousness of the misconduct and evidence of loss are factors to be considered in determining the overall sanction. We agree that the misconduct in *Michaels* was more egregious than the case at hand. However, McCabe's benign characterization of his misconduct ignores the Findings regarding the seriousness of his misconduct and the basis for the advance payment of his fee for services.

¶ 80 In the circumstances, we consider it appropriate to make an order under section 161(1)(g). For the purposes of the order, we converted the US dollar amount of the transfers related to the promotion (US$2.65 million) to Canadian dollars using the Bank of Canada noon exchange rate on the date the money was transferred to McCabe. Using that conversion, the US dollar amount transferred to McCabe equalled CAN$2,776,993.00. We will make an order under section 161(1)(g) in that amount. Our calculations are summarized in the table in Schedule A to this decision.

***Administrative penalty***

¶ 81 Under section 162 of the Act, the panel may, if it finds the respondent has contravened the Act and considers it to be in the public interest, make an order for an administrative penalty of not more than $1 million for each contravention of the Act.

¶ 82 The executive director said that we should impose an administrative penalty of between $5.5 and $8 million dollars. He calculated this amount as being two to three times what McCabe was paid for the gross misrepresentations about Guinness in the *Elite Stock Reports.* He argued that the sanctions in fraud cases should be considered in determining sanctions in this case and that in fraud cases the Commission has consistently imposed an administrative penalty of two to three times the amount raised.

¶ 83 We have already stated that we do not agree with the executive director that the sanctions imposed in fraud cases are relevant to determination of sanctions in this case.

¶ 84 The executive director also submitted that the penalty we impose should take into account the entire context of McCabe's gross misrepresentations as well as preservation of the public interest.

¶ 85 McCabe said he should pay an administrative penalty of $65,000. He said he was found to have engaged in a single contravention of the Act involving a single misrepresentation about a single issuer. He argued that, therefore, the maximum allowable penalty under section 162 was $1 million. He submitted that, based on *Brookmount*, a penalty significantly less than the maximum was warranted in this case.

¶ 86 We have already found that the penalty imposed in *Brookmount* is not determinative of the appropriate penalty in this case. We have also found that, based on *Manna,* McCabe contravened section 50(1)(d) of the Act multiple times. Rather than considering each contravention individually, we have viewed the conduct globally to determine a penalty appropriate for all of the contraventions.

¶ 87 The amount of McCabe's enrichment and the egregiousness of his misconduct justifies a significant administrative penalty. A significant penalty is warranted both as a specific deterrent to McCabe and as a general deterrent to others who would engage in creating and distributing "tout sheets" that would expose investors to unfair practices and erode confidence in our public markets.

¶ 88 We have determined a penalty of $1.5 million is appropriate. It reflects the seriousness of McCabe's misconduct and the other factors relevant to sanctions making it appropriate for him personally. Further, it serves as a meaningful and substantial general deterrent to others who would engage in similar misconduct.

## IV Orders

¶ 89 Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

*McCabe*

1. under section 161(1)(b)(ii), McCabe be permanently prohibited from purchasing securities except McCabe may trade or purchase securities for his own account through a registrant if he gives the registrant a copy of this decision,

2. under section 161(1)(d)(i), McCabe resign any position he holds as a director or officer of an issuer or registrant,

3. under section 161(1)(d)(ii), McCabe is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant,

4. under section 161(1)(d)(iii), McCabe is permanently prohibited from becoming or acting as a registrant or promoter,

5. under section 161(1)(d)(iv), McCabe is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market,

6. under section 161(1)(d)(v), McCabe is permanently prohibited from engaging in investor relations activities,

7. under section 161(1)(g), McCabe pay to the Commission $2,776,993.00, and

8. under section 162, McCabe pay an administrative penalty of $1.5 million.

*Speckert*

9. until December 18, 2019,

    (a) under section 161(1)(b)(ii), Speckert is prohibited from purchasing securities except Speckert may trade or 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)(ii), Speckert is prohibited from becoming or acting as a director or officer of any issuer or registrant,

    (c) under section 161(1)(d)(iii), Speckert is prohibited from becoming or acting as a registrant or promoter,

    (d) under section 161(1)(d)(iv), Speckert is prohibited from acting in a management or consultative capacity in connection with activities in the securities market,

    (e) under section 161(1)(d)(v), Speckert is prohibited from engaging in investor relations activities, and

10. under section 161(1)(d)(i), Speckert resign any position he holds as a director or officer of a issuer or registrant.

¶ 90 December 18, 2014

¶ 91 **For the Commission**

Judith Downes
Commissioner

Don Rowlatt
Commissioner

# Schedule A

| **Date of Transfer** | **Amount Transferred (US$)** | **Bank of Canada (noon) Exchange Rate** | **Amount Transferred (CAN$)** |
|---|---|---|---|
| January 27, 2010 | $399,967.50 | $1.0657 | $426,245.36 |
| January 29, 2010 | $349,967.50 | $1.0650 | $372,715.38 |
| February 1, 2010 | $399,967.50 | $1.0653 | $426,085.37 |
| February 4, 2010 | $349,967.50 | $1.0734 | $375,655.11 |
| March 17, 2010 | $349,967.50 | $1.0113 | $353,922.13 |
| March 18, 2010 | $299,967.50 | $1.0139 | $304,137.04 |
| June 1, 2010 | $249,967.50 | $1.0479 | $261,940.94 |
| June 14, 2010 | $249,967.50 | $1.0253 | $256,291.67 |
| **Total** | | | |
| | $2,649,740.00 | | $2,776,993.00 |