

BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re McLeary, 2015 BCSECCOM 444

Date: 20151210

Mark Aaron McLeary

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner

Hearing Dates June 9, 10 and September 15, 2015

Submissions Completed September 15, 2015

Date of Findings December 10, 2015

Appearing

Stephen M. Zolnay For the Executive Director

H. Roderick Anderson For Mark Aaron McLeary

Findings

I. Introduction

- [1] This is the liability portion of a hearing under sections 161(1), 162 and 174 of the *Securities Act*, RSBC 1996, c. 418.
- [2] In an amended notice of hearing issued April 27, 2015 (2015 BCSECCOM 153), the executive director alleged that the respondent:
- a) failed to file, in a timely manner, insider reports about his trading activity in the securities of Silver Sun Resource Corp. and Newton Gold Corp., contrary to section 87(2) of the Act and section 3.3 of National Instrument 55-104 *Insider Reporting Requirements and Exemptions*;
 - b) filed insider reports between 2011 and 2013 regarding his trading activity in the securities of Silver Sun and Newton Gold that contained false or misleading information contrary to section 168.1 of the Act; and
 - c) conducted himself in a manner that was contrary to the public interest.
- [3] At the commencement of the hearing, the executive director withdrew his allegations that the respondent had filed insider reports that contained false or misleading information

and that the respondent had conducted himself in a manner that was contrary to the public interest.

- [4] During the hearing, the executive director called one witness, a Commission investigator, and tendered documentary evidence. The respondent did not call any witnesses but provided documentary evidence. Both parties provided written and oral submissions on liability.

II. Background

- [5] At all times relevant to the allegations, the respondent was a resident of British Columbia.
- [6] The respondent was the CEO and a director of Silver Sun and Newton Gold at all times between 2011 and 2013. He was previously registered as a mutual fund salesperson under the Act but was not registered in any capacity between 2011 and 2013. He was an insider of at least one other reporting issuer prior to or during the period in issue. McLeary had multiple trading accounts with Canadian brokerage firms.
- [7] Each of Silver Sun and Newton Gold were reporting issuers and listed on the TSX Venture Exchange at all times between 2011 and 2013. Silver Sun's shares were halted from trading as of June 2013.
- [8] In 2010, the respondent engaged a Panamanian law firm to assist him in creating a corporation and opening a trading account for that corporation with a Panamanian brokerage firm. Although McLeary directed the creation of the company and the account, his name was not attached to the account. The individuals named on the account opening forms were nominees provided by the Panamanian law firm. McLeary confirmed, in a compelled interview with Commission staff, that he had trading authority over this account.
- [9] On May 4, 2011, McLeary deposited 1,666,666 shares of Silver Sun to this Panamanian account.
- [10] The respondent then commenced trading Silver Sun shares through the Panamanian account. By August 26, 2011, the respondent had purchased an additional 30,000 Silver Sun shares and sold a total of 1,696,666 Silver Sun shares. The respondent paid \$12,155 for the 30,000 shares purchased and received \$824,984 for the 1,696,666 shares sold.
- [11] From October 18, 2011 to February 25, 2013, the respondent purchased 135,000 Silver Sun shares at a total cost of \$22,810 and sold those 135,000 shares for total proceeds of \$21,800.
- [12] McLeary used some of the proceeds of the sale of Silver Sun shares to acquire Newton Gold shares.
- [13] Between July 28, 2011 and March 11, 2013, the respondent acquired a total of 2,950,000 Newton Gold shares through the Panamanian account. The total acquisition cost for

those shares was \$359,597. Over half of the shares purchased (1,692,500) were purchased between July 28, 2011 and December 13, 2011.

- [14] It was not disputed that the amount of commissions and fees that the respondent paid to trade these securities through the Panamanian account was substantially in excess of the commissions and fees that the respondent would have paid had these transactions been conducted through certain of his Canadian brokerage accounts.
- [15] At the same time that the respondent was trading Silver Sun and Newton Gold shares through the Panamanian account, he was also trading shares in those companies through his Canadian brokerage accounts.
- [16] The respondent admitted that the trading of Silver Sun and Newton Gold shares through the Panamanian account was not reported in insider reports in a timely manner. The respondent further admitted that some of the Silver Sun and Newton Gold transactions that were conducted in his Canadian accounts were not reported in insider reports in a timely manner.
- [17] In total, the parties agree that the following is a summary of the aggregate of the trades that were not reported in insider reports by the respondent in a timely manner:
- a) the sale of 1,831,666 shares of Silver Sun in the Panamanian account;
 - b) the purchase of 165,000 shares of Silver Sun in the Panamanian account;
 - c) the sale of 129,500 shares of Silver Sun in his Canadian accounts;
 - d) the purchase of 173,500 shares of Silver Sun in his Canadian accounts;
 - e) the purchase of 2,950,000 shares of Newton Gold in the Panamanian account; and
 - f) the purchase of 484,500 shares of Newton Gold in his Canadian accounts.
- [18] In 2014, after the unreported trades were uncovered by Commission staff in another investigation, the respondent filed updated insider reports which included previously unreported trades in the shares of Silver Sun and Newton Gold and paid to the Commission a late filing fee of \$5,250. The respondent says that there were 105 unreported trades in total and the executive director says that there were 125 unreported trades. We cannot reconcile these two figures, although part of the difference appears to result from the aggregation of certain trades on a report. We do not find that the difference in the number of unreported trades materially affects the nature of the respondent's misconduct.
- [19] As can be seen from the summary of unreported trades set out in paragraph 17, the unreported trading activity that was conducted by the respondent in the offshore account was largely sales of Silver Sun shares and purchases of Newton Gold shares.
- [20] During the middle and latter part of 2011, while he was selling Silver Sun shares in the offshore account and failing to report that trading activity, McLeary was causing Silver Sun to release press releases on its business activities.

III. Analysis and Findings

A. Applicable Law

a) *Standard of Proof*

[21] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held:

49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[22] The Court also held (at paragraph 46) that the evidence must be “sufficiently clear, convincing and cogent” to satisfy the balance of probabilities test.

[23] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

b) *Insider reporting requirements*

[24] Section 87(2) of the Act requires that insiders report their transactions “in accordance with the regulations”. Section 87(2) provides as follows:

- 87 (2)** An insider of a reporting issuer must, in accordance with the regulations,
- (a) file reports disclosing the insider's
 - (i) beneficial ownership of, or control or direction over, directly or indirectly, securities of the issuer, and
 - (ii) interest in, or right or obligation associated with, a related financial instrument of a security of the issuer, and
 - (b) make other prescribed disclosure.

[25] The relevant regulations include National Instrument 55-104 *Insider Reporting Requirements and Exemptions* and National Instrument 55-102 *System for Electronic Disclosure by Insiders*.

[26] Sections 3.1 to 3.3 of National Instrument 55-104 provide as follows:

- 3.1 Reporting requirement** – An insider must file insider reports under this Part and Part 4 in respect of a reporting issuer if the insider is a reporting insider of the reporting issuer.
- 3.2 Initial report** – A reporting insider must file an insider report in respect of a reporting issuer, within 10 days of becoming a reporting insider, disclosing the reporting insider’s
- (a) beneficial ownership of, or control or direction over, whether direct or indirect, securities of the reporting issuer, and
 - (b) interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer.

- 3.3 **Subsequent report** – A reporting insider must within five days of any of the following changes file an insider report in respect of a reporting issuer disclosing a change in the reporting insider’s
- (a) beneficial ownership of, or control or direction over, whether direct or indirect, securities of the reporting issuer, or
 - (b) interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer.

[27] The insider reporting obligation applies to a “reporting insider”. Section 1.1 of National Instrument 55-104 defines “reporting insider” to include (among others) the CEO, CFO or COO of a reporting issuer, the director of a reporting issuer, and any person “responsible for a principal business unit, division or function of the reporting issuer”.

B. Positions of the parties

[28] The executive director submits that the respondent had an obligation to file insider reports which disclosed the transactions set out in paragraph 17 above.

[29] In addition, the executive director suggests that there is a context to the failure to file insider reports that must be considered by the panel. In particular, he says that

- with the respondent’s history of registration under the Act and involvement, over a period of years, with reporting issuers and his, largely, timely filing of insider reports on his trading in his Canadian accounts, he was aware of his obligation to file insider reports and that, in this case, he intentionally failed to file the reports on his off-shore transactions in a timely manner;
- the respondent set up an offshore trading account in Panama with a view to concealing his trading activity; and
- the respondent set up the Panamanian account at a time when he knew that he was under investigation in another securities regulatory matter.

[30] The respondent admits that he had an obligation to file insider reports which disclosed the transactions set out in paragraph 17 above.

[31] The respondent submits that we should not make any findings with respect to the other matters that are set out in paragraph 29 above.

C. Analysis

[32] The respondent admitted to contraventions of the Act as set out in paragraph 17 above. The respondent says that there were a total in 105 transactions that were not reported in an insider report in a timely manner. That admission is consistent with his having filed updated insider reports in 2014 and paying a late filing fee to the Commission with those updated reports.

[33] We find that the respondent contravened section 87.2 of the Act and NI 55-104 with respect to at least 105 unreported trades in the securities of Silver Sun and Newton Gold and in the manner set out in paragraph 17.

[34] Having found that the executive director has proven the remaining allegations in the notice of hearing, it is unnecessary for the purposes of liability to make further findings relating to the submissions in paragraph 29. However, we leave it to the parties to argue how those submissions may be relevant in the context of the appropriate sanction for the proven allegations.

[35] We direct the parties to make their submissions on sanction as follows:

By January 6, 2016 The executive director delivers submissions to the respondent and to the secretary to the Commission.

By January 20, 2016 The respondent delivers response submissions to each other, 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. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).

By January 27, 2016 The executive director delivers reply submissions (if any) to the respondent.

December 10, 2015

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Audrey T. Ho
Commissioner