Citation: 2015 BCSECCOM 69

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

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

**Hearing**

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| **Panel** | Judith Downes | Commissioner |
| | Nigel P. Cave | Vice Chair |
| | Christopher D. Farber | Commissioner |
| | Don Rowlatt | Commissioner |
| **Hearing Dates** | February 3, 2015 | |
| **Submissions Completed** | February 3, 2015 | |
| **Date of Decision** | February 26, 2015 | |

**Appearing**

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| Neil Cave | For the Executive Director |

**Decision**

## I Introduction

¶ 1 This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. Our Findings on liability made on November 18, 2014 (2014 BCSECCOM 405) are part of this decision.

¶ 2 We have found that Roberta McIntosh contravened section 34(b) of the Act by advising a client to purchase securities of affiliates of Walton International Group Inc. without being registered to do so.

## II Positions of the Parties

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

- 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 McIntosh,
- McIntosh be permanently prohibited from trading in or purchasing 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, and

- McIntosh pay an administrative penalty of $60,000 and disgorge $11,700.

¶ 4 McIntosh did not appear nor was she represented at the hearing. She made written submissions in which she argued that a permanent trading and market ban would be redundant as she does not intend to work in the investment industry in the future. She also made submissions regarding mitigating factors which are discussed below.

## 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 In *Re Donas* COR#95/059, the Commission said:

> "As noted by the Supreme Court of Canada in *Gregory* and *Brosseau*, the Act is aimed at regulating the market and protecting the public. A cornerstone of the regulatory structure is the requirement that people advising and trading on behalf of others be registered. This is intended to ensure that the investing public receives expert advice from competent and ethical people."

¶ 8 McIntosh advised her client to purchase Walton securities without being registered as an adviser as required under the Act. In doing so, she engaged in serious misconduct by contravening a foundational provision of the Act.

¶ 9 McIntosh's failure to comply with the registration requirements of the Act also damaged the reputation and integrity of the British Columbia capital markets. The registration of advisers is essential to public confidence in the markets as it ensures that advisers are both competent and ethical.

***Market risk/fitness to be a registrant, director or officer***

¶ 10 Despite McIntosh's prior experience as a registered representative, it is clear, by her own admission, that she did not understand the securities regulatory requirements applicable to her dealings with her client.

¶ 11 In her submissions, she described her unsuccessful attempts to identify and understand these requirements. She acknowledged that she does not have "a good grasp of the responsibilities of a person in the financial services industry". She said that she is afraid she would "cross a line again without knowing or meaning it." She also said that she does not have the desire or capability to learn the applicable rules and regulations.

¶ 12 While McIntosh has stated that she has no current intention of participating in the capital markets, should she change her mind, it is clear, based on the above and her past misconduct, she would pose a risk to investors and our markets. Her misconduct also raises serious concerns about her suitability as a registrant or a director or officer of an issuer in the future.

***Past misconduct***

¶ 13 In 2012, McIntosh was involved in proceedings before the Insurance Council of British Columbia (Decision & Order under Sections 231 &238 of the *Financial Institutions* Act, RSBC 1996, c. 141 *Roberta Merlin McIntosh*, 48688-11149 (June 6, 2012) ) relating to her role in soliciting her former mutual fund clients to invest in securities.

¶ 14 The facts relating to these proceedings have a number of similarities to the case before us. The securities which comprised the investment were high risk exempt market securities. McIntosh failed to disclose the risks to her clients and, in fact, described the investment as safe and liquid. The investment was found to be highly unsuitable for three of her clients based on their age, personal situation and/or risk tolerance. McIntosh denied she

advised her clients on suitability of the investment. She said it was left to the clients to determine suitability and she described her role as administrative. She claimed that she was trained and supervised by the issuer's lawyers and accountants and was compliant with securities law.

¶ 15 The Council did not accept McIntosh's submissions. They found that McIntosh used her role as a trusted financial advisor to promote her own interests to the serious detriment of her clients and concluded she posed a significant risk to the public which could not be mitigated through supervision, education or licence conditions. The Council ordered that McIntosh's insurance licence be cancelled for five years Given the similarities in misconduct to the case before us, this decision is a factor in our current sanctions considerations.

***Mitigating factors***

¶ 16 McIntosh submitted it is a mitigating factor that she is indigent and has no ability to pay any penalties. She did not provide any evidence of her financial circumstances. In any event, the Commission has found in past decisions that the ability to pay is not a mitigating factor in considering sanctions.

¶ 17 McIntosh also said it is a mitigating factor that she made admissions during settlement discussions with the executive director. An admission in the course of settlement negotiations is not, in and of itself, a mitigating factor. It may be a mitigating factor if an admission forms part of a settlement agreement or an agreed statement of facts. However, in this case, no agreement was reached and McIntosh repeatedly denied her misconduct in the ensuing liability and sanctions proceedings.

¶ 18 McIntosh made a number of other submissions relating to mitigating factors which we did not find to be relevant to sanctions.

***Aggravating factors***

¶ 19 The executive director submitted that there are a number of aggravating factors:

1. as a previous registrant, McIntosh should have known better than to engage in unregistered advising,
2. McIntosh has admitted she did not understand the regulatory requirements applicable to her dealings with her client and, as a market participant, it was her responsibility to do so, and
3. McIntosh has failed to take responsibility for her actions.

¶ 20 It is an aggravating factor that McIntosh was a former registered representative. Although she resigned in 2003, as a former registrant, she should have been aware of the fundamental prohibition against unregistered advising.

¶ 21 McIntosh's failure to understand the applicable regulatory requirements is not an aggravating factor but a part of the risk she poses to investors and the capital markets.

¶ 22 McIntosh's failure to take responsibility for her actions is not an aggravating factor. As noted above, it may have been a mitigating factor had she admitted responsibility in connection with a settlement agreement. However, her decision to mount a defence to the allegations against her is not an aggravating factor. To find otherwise would be inconsistent with a respondent's right of appeal.

¶ 23 In our Findings, we said we would consider McIntosh's failure to comply with the suitability provisions of section 13.3 of National Instrument 31-103 in setting the appropriate sanctions. It is clear that McIntosh failed to take any steps to determine whether an investment in Walton securities was suitable for her client before making her purchase recommendation. She said she had not read the offering memorandum for the Walton securities nor did she ever have any information regarding the investment. Her client ended up making a sizable purchase of speculative, risky securities that were highly unsuitable for her. We find McIntosh's failure to comply with the suitability requirements of section 13.3 of NI 31-103 is an aggravating factor.

¶ 24 We also find McIntosh's past misconduct is an aggravating factor.

***Harm suffered by investor***

¶ 25 McIntosh's client did not suffer any actual loss with respect to her investment in Walton securities. Walton repaid her investment in full after the client contacted them. However, it is clear that the client's recovery of her investment was not attributable to any action of McIntosh. McIntosh put her client's assets at significant risk of loss when she advised her client to invest one third of her available capital in highly speculative and risky exempt market securities.

***Enrichment***

¶ 26 McIntosh received a fee of $11,700 with respect to her client's investment in Walton securities.

¶ 27 McIntosh stated that she did not receive the full amount of the fee as 20% was paid to her client's brother. The evidence before us does not support her submission.

***Specific and general deterrence***

¶ 28 The sanctions we impose must be sufficiently severe to ensure that McIntosh and others will be deterred from engaging in similar conduct.

***Previous orders***

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

¶ 30 In *Eric Wayne Nelson* 2005 BCSECCOM 195, it was alleged that Eric Nelson illegally distributed securities, acted as an unregistered adviser, made misrepresentations and, together with his wife, perpetrated a fraud against investors. Nelson solicited approximately 10 investors, including a retiree and a disabled worker, to invest funds on their behalf in exchange contract trading. Nelson misled the investors as to his track record and their potential and actual returns on their investments. He made payments from investor funds to his own account, to a family member and to other investors. Together the investors lost more than $550,000 which represented almost all of the funds invested. The panel found that there was a significant body of evidence supporting the allegation of fraud. However, the fraud allegation set out in the notice of hearing referred to trading in securities, not exchange contracts. As a result, the panel was unable to make a finding in respect of the fraud allegation. There were similar issues with respect to the allegations relating to illegal distribution and misrepresentation. In the circumstances, the panel made a single finding against Nelson of unregistered advising. The panel imposed a 10-year trading and market ban against Nelson and ordered him to pay an administrative penalty of $50,000 and the costs of the hearing.

¶ 31 The executive director also cited a settlement agreement, *Basil Roy Botha* 2010 BCSECCOM 313. We have not considered this settlement in our reasoning as settlements occur in a completely different context than the proceedings before us.

### C. Appropriate Orders

***Market and trading bans***

¶ 32 The executive director submitted that a permanent trading and market ban against McIntosh is appropriate based on the significant risk her continued participation in the capital markets poses to investors. He said that a longer ban than that imposed in *Nelson* is warranted due to the pattern of McIntosh's previous misconduct.

¶ 33 A comparison to the ban ordered in *Nelson* is unhelpful. The misconduct in *Nelson* was far different and more egregious than in this case. However, in determining the appropriate length of the trading and market ban, the panel in *Nelson* was limited to consideration of a single finding of unregistered advising due to drafting deficiencies in the allegations.

¶ 34 We agree with the executive director that McIntosh poses a material risk to investors and our capital markets and, given the aggravating factors, that a significant trading and market ban is warranted. However, we do not agree that a permanent ban is called for. Considering the circumstances of this case, we find a 10-year trading and market ban is appropriate.

¶ 35 McIntosh submitted that a trading and market ban is redundant as she does not intend to work in the investment industry in the future. While she may have no current intention

of participating in the capital markets, in the absence of such a ban, there is nothing to prevent her from re-entering the markets in the future.

¶ 36 McIntosh did not ask for an exception to the trading prohibition to permit her to trade through a registered dealer. However, given that her misconduct did not involve any trades conducted on her own behalf, we have determined that such an exception is appropriate.

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

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

¶ 38 The executive director seeks an order under section 161(1)(g) requiring McIntosh to pay to the Commission the $11,700 fee she received in connection with her unregistered advising activities. He said this will deter both McIntosh and others from engaging in unregistered advising by removing the incentive of profit from illegal misconduct.

¶ 39 In *David Michael Michaels et al.*, 2014 BCSECCOM 457, the panel discussed the principles relevant to section 161(1)(g) orders. The panel said that the focus of the sanction should be on compelling the respondent to pay any amounts obtained from a contravention of the Act. In that case, the respondent was ordered to disgorge the fees he derived from illegal advising.

¶ 40 We find the $11,700 fee received by McIntosh to be the amount obtained by her as a result of her contravention of section 34(b) of the Act. We agree with the executive director that a section 161(1)(g) order in the amount of $11,700 is appropriate.

***Administrative penalty***

¶ 41 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.

¶ 42 The executive director submitted that an administrative penalty of $60,000 is appropriate. He said that a greater administrative penalty is warranted than that imposed in *Nelson* based on McIntosh's past misconduct and the fact that she put at risk a substantial portion of the assets of a particularly vulnerable investor.

¶ 43 We do not agree. As stated above, comparisons to *Nelson* are unhelpful. However, we note that in *Nelson* two of the 10 investors were as vulnerable as McIntosh's client and, unlike this case, all of the investors' funds were put at risk and almost all of the funds were lost.

¶ 44 Considering the circumstances of this case, we find an administrative penalty of $30,000 is appropriate. It significantly exceeds McIntosh's enrichment and reflects the seriousness of her misconduct and the other factors relevant to sanctions, making it appropriate for McIntosh personally. It also serves as a meaningful general deterrent to others who would engage in similar misconduct.

***Other***

¶ 45 As noted above, McIntosh made admissions regarding her lack of understanding of the responsibilities of a person in the financial services industry and her inability to identify and learn the applicable securities regulatory requirements.

¶ 46 In light of these admissions, we find that, in this case, in addition to the ten year trading and market ban and other orders made below, it is appropriate to order that McIntosh be required to successfully complete a course of studies satisfactory to the executive director concerning the obligations of registrants and participants in the capital markets in the event she decides to participate in the capital markets again.

## IV Orders

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

1. under section 161(1)(d)(i), McIntosh resign any position she holds as a director or officer of any issuer,
2. until the latest of February 26, 2025 and the date the payments ordered under paragraphs 4 and 5 have been made, McIntosh is prohibited, under section 161(1)(b)(ii,) from trading in or purchasing securities except that McIntosh may trade or purchase securities for her own account through a registrant if she gives the registrant a copy of this order,
3. until the latest of February 26, 2025, the date the payments ordered under paragraphs 4 and 5 have been made and the date on which she successfully completes a course of studies satisfactory to the executive director concerning the obligations of registrants and participants in the capital markets, McIntosh is prohibited:

    (a) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant,
    (b) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter,
    (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,

4. under section 161(1)(g), McIntosh pay to the Commission $11,700, and

5. under section 162, McIntosh pay to the Commission an administrative penalty of $30,000.

¶ 48 February 26, 2015

¶ 49 **For the Commission**

Judith Downes
Commissioner

Nigel P. Cave
Vice Chair

Christopher D. Farber
Commissioner

Don Rowlatt
Commissioner