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

Citation: Re McLeary, 2016 BCSECCOM 191 Date: 20160606

Mark Aaron McLeary

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner
Hearing date	September 15, 2015	
Submissions Completed	May 20, 2016	
Decision date	June 6, 2016	

Appearing

Stephen M. Zolnay	For the Executive Director
H. Roderick Anderson	For Mark Aaron McLeary

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 of this panel on liability made on December 10, 2015 (2015 BCSECCOM 444), are part of this decision.

[2] The panel found that the respondent contravened section 87.2 of the Act and section 3.3 of National Instrument 55-104 *Insider Reporting Requirements and Exemptions* with respect to at least 105 trades in securities of Silver Sun Resource Corp. and Newton Gold Corp. that were not reported by the respondent in a timely manner.

[3] The sanction portion of this hearing proceeded solely in writing. We received written submissions from both the executive director and the respondent.

II. Position of the Parties

[4] The executive director seeks:

a) an order under sections 161(1)(b), 161(1)(c) and 161(1)(d)(i) to (v) of the Act that:

i) McLeary cease trading in, and be prohibited from purchasing, any securities;

ii) the exemptions set out in the Act, the regulations or any decision do not apply to McLeary;

iii) McLeary is prohibited from becoming or acting as a director or officer of any issuer or registrant;

iv) McLeary is prohibited from becoming or acting as a registrant or promoter;

v) McLeary is prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and

vi) McLeary is prohibited from engaging in investor relations activities,

for a period of at least five years from the date of the order, except that he may:

vii) trade or purchase securities for his own account through one RRSP account and one cash account at a registered dealer provided he first provides a copy of the decision in this case to the registered dealer; and

viii) act as a director of one issuer all of the securities of which are owned by him.

b) an order under section 162 of the Act that McLeary pay an administrative penalty of at least $35,000.

[5] The respondent is in agreement with the extent and term of the market prohibitions suggested by the executive director but says that any order under section 162 of the Act should be made in the amount of $20,000.

III. Analysis

A. Factors

[6] Orders under sections 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.

[7] In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified 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 conduct

[8] Several decisions of this Commission have highlighted the significance of the insider reporting regime under the Act, including *Re Lloyd*, [1996] 8 BCSC Weekly Summary 76, wherein the panel noted

> The Commission has noted in several decisions, including *In the Matter of Robert Theodore Slavik*, [1990] 90 BCSC Weekly Summary 28, and *In the Matter of Seven Mile High Group Inc.* [1991] 47 BCSC Weekly Summary 7, that disclosure of trading by insiders is a key element in the continuous disclosure regime for reporting issuers. As the Commission stated in the *Seven Mile High* decision at page 36:
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> > The information provided by insider reports is important market information, as it discloses to market participants the trading activities of the persons most closely connected to, and therefore in a position to be most knowledgeable about, a reporting issuer. Timely reporting is particularly important where, as in this case, the insider is an active trader.

[9] In this case, the respondent's misconduct was extensive, both in terms of the number of unreported trades and the dollar values (over $1.2 million) associated with those transactions. The unreported trading was also carried out through an offshore account that was designed to provide secrecy.

[10] During the liability phase of this hearing, the executive director submitted that the respondent's misconduct was intentional. We agree with that submission. We reach that conclusion on the evidence of the respondent's significant historical experience with reporting issuers and his contemporaneous compliance with his insider reporting requirements in connection with his trading through his Canadian accounts.

[11] That the respondent's misconduct was intentional and carried out in secret, make his misconduct more serious.

Harm to investors

[12] There is no evidence of any direct harm caused by the respondent's misconduct to any specific person. Any harm to investors would be indirect in the sense that the respondent's misconduct resulted in the market lacking full knowledge of his trading activities as required under the Act.

Enrichment

[13] There is no direct evidence of enrichment arising from the misconduct by the respondent.

Aggravating and mitigating factors

[14] It is an aggravating factor that the respondent's misconduct was intentional.

[15] It is a factor to consider when assessing any financial sanctions in this matter, that the respondent has already paid a late filing fee of $5,250 associated with his late filing of the required insider reports in 2014.

[16] The respondent was served a summons with respect to another, unrelated, investigation by this Commission in August 2009. He attended a compelled interview in that matter in September 2009. He was named as a respondent therein in August 2011. The executive director says that it is an aggravating factor that the respondent's misconduct in this case commenced after McLeary knew he was under investigation by this Commission in another matter and that his misconduct continued after he was named a respondent in that matter.

[17] The respondent denies knowing that he was under investigation in that other matter until he was named a respondent therein.

[18] We do not agree with the executive director that it is an aggravating factor that the misconduct in this case occurred after the respondent had been summoned in another investigation and then named in that other matter. As of those earlier dates, the respondent had not been found to have contravened the Act. We do not view the respondent's actions or non-actions in the context of an investigation on an unrelated matter as an aggravating factor.

[19] However, although the executive director did not raise this in his submissions, we must take into account that McLeary has been found, in that other matter, to have contravened the Act through a significant market manipulation and is now subject to lifetime market prohibitions as a consequence. The respondent has a clear disregard for securities laws. We discuss this in further detail below.

Risk to investors and the capital markets

[20] We find that the respondent, as a result of the misconduct found in this case along with his other securities related misconduct, as noted above, represents a very serious risk to investors and our capital markets.

Previous orders

[21] In addition to *Lloyd*, the executive director referred in his submissions to two other previous decisions of this Commission where the misconduct at issue was similar to that of the respondent in this matter: *Re Giesbrecht*, [1996] 8 BCSC Weekly Summary 67 and *Re McLean*, 2003 BCSECCOM 301.

[22] In each of *Lloyd*, *Giesbrecht* and *McLean*, the respondents were given five year market prohibitions for extensive contraventions of the insider trading requirements. The extent of the misconduct in those cases is similar to that of McLeary in this case. Two of the respondents in those cases were ordered to pay an administrative penalty of $20,000 (in addition to the payment of late filing fees) and the remaining respondent was ordered to pay $10,000 where the panel took into account the respondent's financial circumstances.

IV. Appropriate Orders

A. Market prohibitions

[23] We agree with the submissions of both parties that the facts and circumstances of this case are similar to the three decisions noted above. As a consequence, we agree that the five year term of the market prohibitions, suggested by both parties, is reasonable for this misconduct.

[24] However, our orders are to be protective and preventative. In this case, the respondent has been found by this Commission, in another matter, to represent a very grave risk to our capital markets and has had lifetime market prohibitions imposed as a consequence. We have now found that the respondent has committed yet another significant contravention of the Act. We conclude that our findings further confirm the earlier decision of this Commission that the respondent represents a grave risk to investors and our capital markets. In the circumstances, we cannot see that imposing anything less than permanent market prohibitions on the respondent is appropriate given this affirmation of his risk to our capital markets.

B. Administrative penalty

[25] The executive director submits that owing to the length of time between the *Giesbrecht* and *Lloyd* decisions and today and to changes in the maximum allowable penalty under section 162 since the date of those decisions, a higher administrative penalty of $35,000 is warranted. The respondent submits that the $20,000 figure remains appropriate in all of the circumstances.

[26] We agree that an administrative penalty greater than what was ordered in *Giesbrecht* and *Lloyd* is appropriate. Those cases were decided a significant number of years ago. Due to inflation, the deterrent effect of a $20,000 administrative penalty is different and lesser today than when those previous cases were decided. Secondly, since those cases were decided the maximum allowable penalty has been increased under the Act. By increasing the maximum, the legislature clearly intended that the Commission have the power to impose higher administrative penalties where appropriate.

[27] We have been given no evidence of the respondent's ability to pay, nor are there any mitigating factors.

[28] In light of all of the circumstances and the need for both specific and general deterrence, we find $25,000 to be an appropriate order under section 162 of the Act.

V. Appropriate orders

[29] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the act, we order that:

1. under sections 161(1)(b), (c) and (d)(i) to (v),

    a) McLeary cease trading in, and be prohibited from purchasing, any securities or exchange contracts, except that he may trade or purchase securities for his own account through one RRSP and one cash account at a registered dealer provided he first provides that dealer with a copy of this decision;

    b) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to McLeary;

    c) McLeary resign any position that he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant, other than one issuer all the securities of which are owned by him;

    d) McLeary is prohibited from becoming or acting as a registrant or promoter;

    e) McLeary is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

    f) McLeary is prohibited from engaging in investor relations activities;

g) that the orders in paragraphs (a), (b), (d) through (f) remain in place permanently; and

h) under section 162 of the Act, that McLeary pay to the Commission an administrative penalty of $25,000.

June 6, 2016

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Audrey T. Ho
Commissioner