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

Citation: Re Inverlake, 2016 BCSECCOM 258 Date: 20160803

Inverlake Property Investment Group Inc., Wheatland Business Park Ltd., and Alfredo Miguel "Michael" Yong

Panel	Nigel P. Cave	Vice Chair
	Suzanne K. Wiltshire	Commissioner
Hearing Date	March 2, 2016	
Date of Decision	August 3, 2016	

Appearing

James Torrance	For the Executive Director
Patrick J. Sullivan	For Alfredo Miguel "Michael" Yong
John R. Shewfelt	Wheatland Business Park Ltd.

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 September 14, 2015 (2015 BCSECCOM 348), are part of this decision.

[2] The panel found that:

a) Yong and Inverlake contravened section 61 with respect to distributions to 23 investors for a total of $910,650; and

b) Yong and Wheatland contravened section 61 with respect to distributions to 15 investors for a total of $1,090,479.

II. Position of the Parties

A. Executive Director

[3] In his written submissions the executive director sought the following orders:

Yong

(a) market prohibitions for 10 years;

(b) under section 161(1)(g) of the Act, that Yong pay to the Commission $2,001,129 (the total of the Inverlake and Wheatland illegal distributions); and

(c) under section 162 of the Act, that Yong pay to the Commission an administrative penalty of $65,000.

Inverlake

(d) permanent market prohibitions; and

(e) under section 161(1)(g) of the Act, that Inverlake pay to the Commission $910,650.

Wheatland

(f) market prohibitions for 10 years; and

(g) under section 161(1)(g) of the Act, that Wheatland pay to the Commission $1,090,479.

Regarding disgorgement

(a) Yong and Inverlake should be jointly and severally liable for the total amount of $910,650; and

(b) Yong and Wheatland should be jointly and severally liable for the total amount of $1,090,479.

B. Yong

[4] Yong says that he should be subject to market prohibitions but submits that those prohibitions should not exceed two years. He agrees that he should be ordered to pay an administrative penalty under section 162 but that the quantum of that penalty should not exceed $25,000.

[5] Yong emphasizes that this case involves a significant mitigating factor arising from his admission, early in the investigation, of wrongdoing with respect to contraventions of section 61 of the Act and his formal admissions at the commencement of our hearing.

[6] Yong also submits that significant and stigmatizing allegations were made by the executive director in the notice of hearing in respect of this matter which were not ultimately proven and as such there is less need for specific deterrence than in other cases.

[7] Finally, Yong says that a disgorgement order is not appropriate in this case for a number of reasons, including that specific deterrence is not necessary in this case and that he did not retain any financial benefit from his contraventions of section 61. He says that the funds raised from investors were used as investors intended, to acquire real estate. In the case of Wheatland, this real estate is still owned by that entity and the financial outcomes for that entity and the investors in that entity are still to be determined.

C. Wheatland

[8] Wheatland says that we should not impose any sanctions on it in the circumstances.

[9] Wheatland submits that our sanctions must take into account that it still owns the asset purchased from the funds raised through the illegal distributions.

[10] It submits that Yong is no longer the sole director of the company and that certain of the investors have taken over management of the investment held by Wheatland.

[11] Wheatland submits that any sanctions imposed on it, whether financial or market prohibitions, would not be in the public interest as they are likely to harm the very investors who were the subject of the respondents' misconduct.

[12] Finally, Wheatland says that its contraventions arose from the conduct of Yong and that now that he has been removed as the sole director of the company, it is no longer in the public interest to make sanctions against it.

D. Inverlake

[13] We did not receive any submissions on sanction with respect to Inverlake.

III. Section 161(1)(g) Orders

[14] The panel members agree on all of the orders to be made against each of the respondents except for orders against Yong, Inverlake and Wheatland under section 161(1)(g). The panel members would each make different orders under section 161(1)(g) against each of the respondents. As the panel is comprised of two members and there is no majority decision, the effect is that no orders under section 161(1(g) are made against any of the respondents.

[15] As there are no orders made under section 161(1)(g) against the respondents, our respective reasons would have no precedential or other effect. Therefore, we are not issuing any reasons in respect thereof.

[16] The following are the panel's decision and reasons with respect to the remaining requested sanctions against all of the respondents.

IV. Analysis

A. Factors

[17] 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.

[18] 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

[19] Breaches of section 61 are inherently serious. The requirement to provide prospectus disclosure to purchasers of securities is one of the fundamental tenets of the Act. The provision is critical to ensuring that those who purchase securities have material information about the issuer and those most closely associated with it.

Harm to investors

[20] There is no doubt that the investors in Inverlake have suffered harm. The real estate acquired by Inverlake with the investors' funds has been lost due to foreclosure and there is no evidence that these investors will recover any of their investments.

[21] The outcome for the investors in Wheatland is still to be determined. However, the real estate acquired by Wheatland with the investors' funds is subject to a foreclosure proceeding and the evidence suggests at least the possibility of significant loss for these investors.

[22] While Yong acknowledges that the Inverlake investors have suffered harm and that the Wheatland investors may potentially suffer harm, he submits the harm is merely that suffered by any investor in an unsuccessful investment.

[23] We do not agree that that is the only harm that investors in Inverlake and Wheatland have suffered. These investors were denied one of the basic protections offered under the Act for those who would purchase securities. Without Yong's contraventions of the Act, these investors could not have purchased securities under an exemption from the prospectus requirements and therefore would not have lost their investments in Inverlake and have their investments in Wheatland at risk of significant loss.

Enrichment

[24] There is no evidence that Yong was directly enriched by his contraventions of section 61. The executive director does not allege that Yong personally received any of the funds that Wheatland and Inverlake obtained from contraventions of section 61.

[25] However, the executive director submits that Yong was indirectly enriched by his misconduct. He submits that the investment schemes in Inverlake and Wheatland were structured in such a way that Yong (and family members) acquired shares in the real estate for considerably less than the other investors. In other words, the investments were structured in an extremely favourable manner to Yong. The executive director says that the benefit of these favourable investment structures could only be realized by the illegal distributions carried out by the respondents and that, in this manner, Yong was enriched by his contraventions.

[26] Yong submits that, in fact, he lost money as a result of the investments and the fact that the investments were structured in a manner that would allow Yong to make money on the ventures is not the same as enrichment.

[27] The evidence of Yong's cash contributions to Inverlake for his and his wife's shares is not clear. However, there was evidence they made some cash contributions for their shares. The evidence was also clear that Yong was to assume the mortgage payments on the Inverlake property. Yong paid approximately $130,000 in mortgage payments before ceasing to make these payments.

[28] We agree with Yong's submissions that his misconduct was the illegal distributions not the structure of the two investments and what Yong would receive under those investments. But we also recognize that because these were illegal distributions made without prospectus disclosure, the result of Yong's contravention of section 61 was that the investment structures favourable to Yong were not fully disclosed to investors.

Aggravating and mitigating factors

[29] None of the respondents has a history of securities regulatory misconduct.

[30] The executive director says that there are no mitigating factors in this case. He says that it is an aggravating factor that Yong took advantage of unsophisticated investors in his misconduct.

[31] We do not agree with the executive director that it is an aggravating factor that the respondents took advantage of unsophisticated investors. That will often be the case where there are contraventions of section 61. Further, there was no evidence to suggest that the respondents were predatory in the nature of the investors who participated in the investments.

[32] Yong says that it is a significant mitigating factor that he admitted his contraventions of section 61 early in the process. He points to a "with prejudice" letter, written by his counsel and addressed to the executive director, in which he submits that the allegations of fraud against him will not be successful and that he will admit to contraventions of section 61 and, as a consequence, the parties should proceed directly to the sanctions phase of the hearing.

[33] The executive director says that an early admission of wrongdoing may be a mitigating factor in some cases in that it may be suggestive of a respondent's remorse. In this case, he says that Yong's lack of candor in an interview with Commission staff rebut this suggestion of remorse. In particular, he says that Yong was not forthcoming on certain particulars that relate to the acquisition details of the purchase of land by Inverlake. These questions were not relevant to the respondents' contraventions of section 61 but may have been relevant to further allegations in the notice of hearing against Yong of contraventions of section 57(b) that were not proven during the hearing.

[34] We agree that an early admission of wrongdoing may be a mitigating factor. It may reflect a respondent's remorse; it may also result in a less costly and more efficient proceeding for all parties. On the whole, we find that an early admission of wrongdoing is suggestive of someone who is in less need of deterrence – early admission connotes an acceptance of responsibility and, at least, the possibility of remorse. In this case, the respondents were clear and unequivocal in their admissions of contraventions of section 61 throughout the investigation and hearing process. We find their early admissions to be a mitigating factor in this case.

[35] We do not agree with the executive director that any credit that the respondents should receive for their early admissions should be offset by Yong's lack of candor with respect to answering certain questions that may have been relevant to other allegations (ultimately unproven).

[36] Yong also says that it is a mitigating factor that he has made several attempts to compensate some of the investors who have lost money in Inverlake.

[37] The executive director says that: a) the evidence of these efforts to compensate investors lacks any specificity in order to be able to properly assess the legitimacy of these efforts; and b) these efforts involved swaps of land with an investor having to pay more money to Yong as part of the exchange. The executive director says that the respondents' efforts in this respect should not be viewed as a mitigating factor.

[38] We agree with the executive director's submissions in this respect. Certain of the investor witnesses did testify about approaches to and from Yong regarding exchanges of their interests in Inverlake. That evidence lacked any specificity but the tenor of that evidence was that those exchanges would require the investors to make further cash injections with Yong.

[39] Yong testified about a settlement agreement that he had a law firm prepare and circulate to certain investors which contained cash payment terms. He said that there were negotiations with certain investors over that agreement's terms. However, the draft settlement agreement contains covenants of Inverlake, not Yong, to make cash payments to the investors.

[40] First, this settlement agreement was only a draft and was never realized. We also find it unlikely that the agreement ever could have been realized as the evidence was clear that Inverlake had no money in order to make cash payments. Second, if this could be viewed as a compensation mechanism it would be a credit to Inverlake only and not Yong; having Inverlake make cash payments to investors would, in effect, have the investors repaid from their own funds, not repaid by Yong. As a consequence, it is difficult to view the draft settlement agreement as a legitimate effort at compensating the investors.

Risk to our Capital Markets/Fitness to be a director or officer of an issuer

[41] The executive director submits that Yong represents a substantial risk to our capital markets and is not fit to be a director or officer of an issuer. He makes these submissions for the following reasons

a) Yong made no efforts to comply with securities laws and was either reckless or careless in his capital raising activities;

b) Yong testified that in 2014 he had used assets owned by Wheatland for his personal benefit by registering a mortgage against the real estate owned by Wheatland without obtaining any approval from any of the other investors in Wheatland – the executive director acknowledges that this conduct is unrelated to the matters set out in the notice of hearing but he says it is demonstrative of Yong's attitude to the interests of arm's length investors;

c) Yong agreed to the foreclosure proceedings against the Inverlake land without the approval of the investors in Inverlake and Yong thereby avoided having to personally make further mortgage payments on the mortgage registered against the Inverlake land – again, the executive director says this is demonstrative of Yong's attitude to the interests of arm's length investors; and

d) Yong's record keeping was deficient for a director and/or officer of an issuer who raises funds from the public.

[42] In response, Yong says that he is no longer engaged in raising money from the public. He says that he was unsophisticated with respect to the requirements of the Act and that now he has been made aware of those requirements he is less of a risk to the capital markets. Yong says that his early admission of his contraventions of section 61 is consistent with someone who is less of a risk to the capital markets. He says that the conduct described in paragraph 41 b) above is not conduct related to securities. Finally, he says that no adverse inference should be drawn from the conduct described in paragraph 41 c), as that was the substance of one of the fraud allegations against Yong that was ultimately dismissed.

[43] We agree with the executive director that one of the troubling aspects of this case is Yong's record keeping. Yong testified that his records of the use of proceeds of investor funds was lost in a move of his household possessions. However, records from law firms Yong hired were also not produced. What evidence there was at the hearing was that his record keeping was sloppy and almost impossible to discern. This does raise questions for us about Yong's fitness to be a director or officer of a registrant.

[44] We agree with the executive director that ignorance of the requirements of the Act and a reckless or careless attitude towards learning of those requirements is neither a defence to contraventions of those regulatory requirements nor does it give us any comfort that Yong is less of a risk to our capital markets.

[45] We agree with the executive director that Yong's admission to having used Wheatland's assets for his personal benefit is troubling. However, that conduct was not the subject of the proceedings before us in any manner and whether that conduct was inappropriate or not has not been fully canvassed by the parties before us. We do not consider this a factor.

[46] We agree with Yong that his conduct with respect to the Inverlake foreclosure is not relevant for our sanctions purposes.

Specific and general deterrence

[47] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

[48] Yong says that because he has been improperly accused of committing fraud, with all of the negative ramifications to his life and career that go with such allegations, that there is less of a need for specific deterrence in this case. In effect, he says that having gone through this traumatic experience with the Commission, he is less likely to be involved in any securities related misconduct. He points to his lack of current involvement in raising funds from the public as further evidence of this.

[49] There are several conflicting public interest issues at stake in this submission. On the one hand, we do not wish to place a chill on the enforcement activities of the Commission by suggesting that unproven allegations should substantially impact sanctions in cases where that same respondent is found to have committed misconduct. On the other hand, we must assess the need for specific deterrence with respect to each respondent and their unique circumstances. One of the unique circumstances of this case is the combination of a very early admission of contraventions of section 61 by the respondents combined with unproven fraud allegations against Yong.

[50] We do not agree with Yong's submissions with respect to the unproven fraud allegations. We do not think that this lessens the need for us to consider specific deterrence with respect to Yong.

Previous orders

[51] The executive director cites two previous decisions of this Commission in support of his submissions on sanctions: *VerifySmart Corp (Re)*, 2012 BCSECCOM 66 and *Pacific Ocean Resources Corporation (Re)*, 2012 BCSECCOM 104.

[52] Yong's submission is that while previous decisions of this Commission can provide guidance on our sanctions, they should be of limited value and that we should focus on the specific circumstances of the respondents before us. He says that the *VerifySmart* and *Pacific Ocean* decisions are distinguishable from the case before us now. Finally, he points to the decisions in *Aviawest Resorts Inc.*, 2013 BCSECCOM 219 and *Zarr (Re)*, 2014 BCSECCOM 454 as cases more appropriate as guidance to the panel in the circumstances.

[53] In *VerifySmart*, the Commission found that the respondents had raised over $1.2 million from 99 investors through illegal distributions. The individual respondents raised roughly half of the $1.2 million each. The Commission banned the individual respondents from the capital markets for five years and ordered each of them to pay an administrative penalty of $50,000.

[54] In *Pacific Ocean*, the Commission found that the respondents had raised US$836,658 from 93 investors through illegal distributions. The Commission found, as an aggravating factor, that the transactions were specifically structured with a view to avoiding the prospectus and registration requirements of the Act. The Commission imposed a $60,000 administrative penalty and a 10-year market prohibition against the individual respondent.

[55] In *Aviawest*, the Commission found that certain of the respondents distributed several million dollars of securities to at least 150 investors in contravention of section 61. The Commission permanently cease traded the securities of the issuer but did not impose any sanctions against the individual respondents nor did it impose financial sanctions against the issuer. The panel found that there was no evidence of substantial harm to the investors, that there was no evidence of unjust enrichment by the respondents related to the misconduct and that the respondents had taken appropriate due diligence measures by hiring an experienced lawyer who purported to have the requisite securities law expertise.

[56] In *Zarr*, the Commission found that the respondent contravened sections 34, 61 and 50(1)(d) by carrying out acts in furtherance of trades in securities without a prospectus and without being properly registered. The respondent also made misrepresentations about his experience in the capital markets and the returns he could make for investors. The respondent did not actually receive any money from any investor. The respondent received 4 year market prohibitions and was ordered to pay an administrative penalty of $20,000. The panel found that the respondent's repeated misrepresentations and blatant disregard for securities laws made him a serious risk to our capital markets. The facts and circumstances of the *Zarr* case are fundamentally different from those before us and do not consider this case relevant for the purposes of our sanctions decision.

V. Appropriate Orders

A. Market prohibitions

Inverlake

[57] The real property owned by Inverlake has been foreclosed on. All of the investors have lost their investments in Inverlake. It is in the public interest to impose permanent market prohibitions on Inverlake.

Wheatland

[58] Wheatland says that we should not impose any market prohibitions against it. It says that its misconduct was really the misconduct of Yong and that now that Yong is no longer a director, there is no need for specific deterrence with respect to Wheatland. Secondly, it says that it is working on salvaging its investment in real estate. It says that it does not know what this entails but that it would not be in the public interest to limit its financing options and thereby potentially harm the existing Wheatland investors.

[59] The executive director says that the market prohibitions we make against Yong should also apply against Wheatland. His reasons for this were not wholly clear but were founded on Yong's ownership of shares in Wheatland. He has proposed a ten year period of market prohibitions for both. He also volunteered that should Yong no longer have any involvement (as a director, officer or shareholder) in Wheatland then a section 171 application to vary our orders against Wheatland may be appropriate.

[60] The executive director's requested sanction structure (i.e. that Yong's and Wheatland's market prohibitions should match) also suggests his belief that specific deterrence is only required to the extent of Yong's involvement (as a director, officer or shareholder) in Wheatland. This view is consistent, to some extent, with the submissions from Wheatland itself.

[61] Wheatland says that we should impose no market prohibitions on it as Yong is now no longer a director of the company. However, we are troubled by the lack of clarity before us with respect to the exact status of Wheatland. The only evidence that we have, provided by Wheatland itself, is that Yong is the sole shareholder of Wheatland. We do not have an understanding of what Yong's share ownership entails, what the economic interests of all parties are (including Wheatland itself, given the bare trust nature of the investment structure) and whether future issuances of securities by Wheatland are in any way in the public interest. As a consequence, we consider it is in the public interest to impose permanent market prohibitions on Wheatland. We do this cognizant that Wheatland may apply under section 171 of the Act for a revocation or variance of this order in the future if it believes that such revocation or variance is not prejudicial to the public interest.

Yong

[62] Yong suggests that any market prohibitions that we impose be no longer than 2 years. The executive director suggests that the market prohibitions be 10 years. That is a significant difference of opinion as to what is appropriate in the circumstances. This arises from a clear difference between the parties on what are or are not aggravating or mitigating factors and what risk Yong represents to our capital markets.

[63] We have canvassed those issues above.

[64] The decisions cited by the parties range in length of market prohibitions from ten years to zero. In this case, it is clear that neither end of that spectrum is appropriate.

[65] This case is not similar to *Aviawest* where there was no serious damage done to investors and the panel found that the respondents had clearly undertaken appropriate due diligence measures to comply with securities laws. Here Yong did not undertake any due diligence measures and many investors have been significantly harmed.

[66] Nor is this case similar to *Pacific Ocean* where the panel felt that there was a clear attempt to intentionally circumvent securities laws. There is no such evidence in this case.

[67] The current case is closest to *VerifySmart* on its facts, although the size of the illegal distributions by the respondents in this case is significantly larger. The size of the illegal distribution can be viewed as a risk factor that might suggest a longer period of market prohibitions is appropriate in the circumstances. We have also found that Yong's record keeping practices raise concerns about his fitness to participate in the capital markets. Offsetting those issues is the clear mitigating factor of Yong's early admissions. In this case, these admissions would have obviated the need for a hearing with a corresponding savings of time and cost to the parties.

[68] Balancing all of these factors we would make market prohibition orders against Yong lasting until the later of the date that he pays his administrative penalty and 5 years from the date hereof.

B. Administrative penalties

[69] The executive director has not asked for orders for administrative penalties against the corporate respondents. Given the status of Inverlake we agree that there is no need for such an order against it. Given that Wheatland still has an asset that may lead to recovery for its investors, we do not think that an administrative penalty against it, that might lessen the recovery for investors, is appropriate in the circumstances.

[70] The executive director has asked for an order under section 162 in the amount of $65,000 against Yong. Yong suggests that the order under section 162 not exceed $25,000.

[71] The decisions cited to us for guidance range from $60,000 in *Pacific Ocean* to zero in *Aviawest.* As noted above, this case is not similar to *Aviawest* or *Pacific Ocean*. In *VerifySmart*, the individual respondents were ordered to pay $50,000 to the Commission pursuant to section 162. As noted above, there are some aggravating and mitigating factors with respect to Yong.

[72] When we balance all of the factors set out above we find that an order under section 162 in the amount of $60,000 is appropriate in all of the circumstances.

VI. Appropriate Orders

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

Yong

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

    a) Yong cease trading in, and is prohibited from purchasing, any securities or exchange contracts, except that he may trade for his own account through a registrant, provided that a copy of this order is provided to that registrant,

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

c) Yong resign any positions he holds as, and is prohibited from becoming or acting as, a director or officer of any issuer or registrant, except that he may act as a director or officer of any issuer all of the securities of which are beneficially owned by Yong or members of his immediate family,

d) Yong is prohibited from becoming or acting as a registrant or promoter,

e) Yong is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, and

f) Yong is prohibited from engaging in investor relations activities,

for a period that ends on the later of the date that Yong pays to the Commission the amount in paragraph 2 and August 3, 2021; and

2. under section 162 of the Act, that Yong pay to the Commission an administrative penalty of $60,000;

Inverlake

3. under sections 161(1)(b),(c) and (d)(iii) through (v)

a) all persons permanently cease trading in and are permanently prohibited from purchasing any securities of Inverlake,

b) Inverlake cease trading in, and is permanently prohibited from purchasing, any securities or exchange contracts,

c) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Inverlake,

d) Inverlake is permanently prohibited from becoming or acting as a registrant or promoter,

e) Inverlake is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market, and

f) Inverlake is permanently prohibited from engaging in investor relations activities;

Wheatland

4. under sections 161(1)(b),(c) and (d)(iii) through (v)

    a) all persons permanently cease trading in and are permanently prohibited from purchasing any securities of Wheatland,

    b) Wheatland cease trading in, and is permanently prohibited from purchasing, any securities or exchange contracts,

    c) the exemptions set out in the Act, the regulations or any decision as defined in the Act, do not apply to Wheatland,

    d) Wheatland is permanently prohibited from becoming or acting as a registrant or promoter,

    e) Wheatland is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market, and

    f) Wheatland is permanently prohibited from engaging in investor relations activities.

August 3, 2016

For the Commission

Nigel P. Cave
Vice Chair

Suzanne K. Wiltshire
Commissioner