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

Citation: Re Malone, 2016 BCSECCOM 334 Date: 20161003

William Raymond Malone

Panel	Nigel P. Cave	Vice Chair
	George C. Glover, Jr.	Commissioner
	Gordon L. Holloway	Commissioner
Submissions completed	September 16, 2016	
Date of Decision	October 3, 2016	
Appearing		
Jennifer Whately	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. The Findings of this panel on liability made on August 3, 2016 (2016 BCSECCOM 257), are part of this decision.

[2] We found that Malone:

a) conducted investor relations activities within the province with respect to the sale of shares of Lion King Resources Inc.; and

b) acted as a *de facto* director and/or officer of Lion King,

both of which were in contravention of the terms of a previous order (Order) of this Commission made on January 29, 2009.

[3] The parties were given an opportunity to make written and oral submissions with respect to the appropriate sanctions for the respondent's misconduct. The sanctions phase of this hearing proceeded in writing, with the executive director providing written submissions only. The respondent did not make any written or oral submissions to the panel.

II. Position of the Parties

[4] The executive director sought the following orders:

(a) under sections 161(1)(d)(i) through (v) of the Act, Malone

i) resign any position that he holds as a director or officer of any issuer,

ii) be prohibited from becoming or acting as a director or officer of any issuer,

iii) be prohibited from becoming or acting as a registrant or promoter,

iv) be prohibited from acting in a management or consultative capacity in connection with activities in the securities market,

v) be prohibited from engaging in investor relations activities, and

vi) that the prohibitions in paragraphs (ii) through (v) remain in place until the later of seven years from the date of the orders and the date on which the administrative penalty, ordered under section 162, has been paid; and

(b) under section 162 of the Act, that Malone pay to the Commission an administrative penalty of $60,000.

III. Analysis

A. Factors

[5] 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.

[6] 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:
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> - 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

[7] Orders made following enforcement proceedings are an integral part of the Commission's regulatory function. If those who are subject to these orders can simply ignore them with impunity then the enforcement role of the Commission would be greatly impaired.

[8] The respondent incorporated Lion King but made his son, who had no previous experience being an officer or director of a company or in the mineral exploration business, the sole director of the company. The respondent participated in the only formal meeting of the board of Lion King. His son did not. The respondent knew that he was prohibited from acting in the capacity of a director or officer of an issuer so he structured his affairs to appear to be in compliance with the Order by not being formally appointed as a director or officer of Lion King. At the same time, however, he was performing the functions of a *de facto* officer and/or *de facto* director of Lion King, ultimately engaging in the very conduct prohibited by the Order. It is clear that the respondent's breach of the Order was intentional. Therefore, the respondent's breach of the Order is serious misconduct.

Harm to investors

[9] The evidence with respect to the harm to investors arising from the respondent's misconduct is not clear. There is evidence that suggests that the management of Lion King fractured and that the company did not successfully continue to carry on. However, the status of the investments of the Lion King shareholders was not made clear to us.

[10] We do know that one investor was introduced to, and purchased securities of, Lion King pursuant to the conduct of the respondent in breach of the Order. It is not unreasonable to infer that that investment would not have occurred without this misconduct.

Enrichment

[11] There is no evidence of the respondent having been enriched through his misconduct.

Aggravating and mitigating factors

[12] There are no aggravating or mitigating factors in this case.

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

[13] The respondent represents a significant risk to our capital markets. He was previously sanctioned for misconduct in our capital markets and, despite the Order, simply carried on conduct in breach of the regulatory restrictions imposed on him. This raises questions about whether Malone will allow himself to be regulated.

[14] Malone's misconduct has arisen in the context of his acting as an officer and/or director, or a *de facto* officer and/or *de facto* director of an issuer. This raises significant concern about his fitness to be an officer or director of an issuer. The proper functioning of our capital markets requires that those who are officers or directors of issuers need to act honestly and with integrity. Those that circumvent the orders of the Commission and attempt to disguise their actions are not individuals who should be in management roles.

[15] A term of the Order was that Malone complete a course of study satisfactory to the executive director concerning the duties and responsibilities of directors and officers. That term has yet to be satisfied. We think that that term should continue in our sanctions for this misconduct, both to reflect the terms of the Order and to reflect our concern over Malone's fitness to be an officer and/or director of an issuer.

Specific and general deterrence

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

Previous orders

[17] The executive director submits that the facts of this case are similar to those found in *Re Jardine,* 2016 BCSECCOM 82.

[18] In *Jardine*, the respondent was subject to an order prohibiting him from acting as a director or officer of an issuer. The order arose from misconduct relating to misleading statements made by an OTC issuer. Notwithstanding the terms of the order, the respondent proceeded to form a new company, in which friends of the respondent were appointed as nominee directors. The respondent then acted as the *de facto* controlling mind of the newly formed issuer in contravention of the original order. During the hearing, the respondent admitted to the breach of the order and he and the executive director made joint submissions to the panel on sanction. The panel ordered that Jardine be subject to seven year market prohibitions and to pay an administrative penalty of $40,000.

[19] The executive director submits that while this decision should serve as a guide to our sanctions in this case, we should take into account that Jardine, during the hearing, admitted to the breach of the order and thereby shortened the proceedings significantly. The executive director submits that the size of the administrative penalty against Malone should be larger than that of Jardine, as Jardine received a credit for his early admissions. We agree with the executive director's submissions in this regard.

IV. Appropriate Orders

A. Market prohibitions

[20] Malone continues to be subject to the terms of the Order as he has not completed a course of study satisfactory to the executive director concerning the duties and responsibilities of directors and officers. That term should continue within our orders in this proceeding.

[21] We agree that the facts of *Jardine* are substantially similar to those before us. There are no mitigating or aggravating factors with respect to Malone. Market prohibitions of seven years are appropriate in the context of specific and general deterrence.

B. Administrative penalty

[22] The executive director suggests that an order under section 162 in the amount of $60,000 is appropriate in the circumstances. This amount is larger than that found in *Jardine*, as the executive director says that Jardine received a credit in his sanctions as his admissions significantly shortened the enforcement proceedings. We agree that Malone is not entitled to the credit for an early admission that Jardine received.

[23] We had no evidence before us of Malone's personal circumstances.

[24] The amount of $60,000 is appropriate in light of the seriousness of the misconduct and the need to send a strong message for general deterrence purposes to our capital markets with respect to compliance with our orders.

V. Appropriate Orders

[25] 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)(d)(i) through (v), Malone:

    a) resign any positions he holds as, and is prohibited from becoming or acting as, a director or officer of any issuer,

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

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

    d) is prohibited from engaging in investor relations activities,

until the later of:

a) the date that Malone successfully completes a course of study satisfactory to the executive director concerning the duties and responsibilities of directors and officers;

b) the date that Malone pays to the Commission the amount in subparagraph 25 (2); and

c) October 3, 2023; and

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

October 3, 2016

For the Commission

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Gordon L. Holloway
Commissioner