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

Citation: Re Hable, 2017 BCSECCOM 340 Date: 20171107

Volkmar Guido Hable

Panel	Nigel P. Cave	Vice Chair
	Don Rowlatt	Commissioner
	Suzanne K. Wiltshire	Commissioner
Submissions Completed	September 22, 2017	
Date of Decision	November 7, 2017	
Appearing		
Shaneel Sharma	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 June 26, 2017 (2017 BCSECCOM 209) are part of this decision.

[2] We found that Hable contravened:

(a) section 57(a) of the Act when he created an artificial price for the securities of Samaranta Mining Corp.; and
(b) section 168.1(1)(a) of the Act when he submitted a fabricated document to a Commission investigator.

[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 executive director provided written submissions. The respondent did not make any written or oral submissions.

[4] This is our decision with respect to sanctions in this matter.

II. Position of the Executive Director

[5] The Executive Director seeks:

(a) permanent orders against Hable under sections 161(1)(b)(ii), 161(1)(c), and 161(1)(d)(i), (ii), (iii), (iv) and (v) of the Act;

(b) an order under section 161(1)(g) of the Act that Hable pay $157,596.96 to the

Commission; and

(c) a $225,000 administrative penalty under section 162.

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 the 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

[8] Commission panels have consistently found that a market manipulation is some of the most serious misconduct contemplated in the Act. Contraventions of section 57(a), or market manipulations, share two significant similarities with fraudulent misconduct. Like fraud, a contravention of section 57(a) requires a finding of intent on the part of the respondent and some element of deceit (i.e. creating a misleading appearance of trading activity in, or an artificial price for, a security). As a consequence, a market manipulation is one of the most serious misconducts contemplated by the Act.

[9] While all market manipulations involve an element of deceit, the form of market manipulation carried out by Hable was particularly cynical and designed to deceive public investors. He fabricated a take-over bid; a bid that was made more credible by virtue of Hable's past association with the target. Hable's misconduct was a particularly egregious form of market manipulation.

[10] In addition, Hable fabricated a document and provided that to the Commission. This is serious misconduct, in and of itself. The fabricated document was designed to mislead Commission investigators and to misrepresent the offeror's financial circumstances.

Harm suffered by investors and the enrichment of the respondent

[11] Hable was clearly enriched by his misconduct. Hable (and on behalf of his minor children) was the beneficial owner of five accounts that sold shares of Samaranta during the market manipulation (February 19, 2013 through February 23, 2013) for gross proceeds of $157,596.96.

[12] There was no evidence of a specific investor having suffered a specific quantum of loss or damage arising from the respondent's misconduct.

[13] However, by the very nature of the misconduct, members of the investing public were deceived as to the value of the Samaranta shares that were sold by Hable. While we are unable to attach a specific figure to the harm suffered by investors as a consequence, we are able to say that the harm to investors was significant because investors were trading the Samaranta shares based upon false information.

Aggravating or mitigating factors

[14] There are no mitigating factors in this case.

[15] Hable does not have a history of securities regulatory misconduct.

[16] The executive director submits that the following are aggravating factors:

(a) that Hable's misconduct occurred in the junior capital markets; and
(b) Hable's experience in being a director and officer of public companies.

[17] In the circumstances of this case, we do not find it to be an aggravating factor that Hable's misconduct occurred in the junior capital markets. Frankly, Hable's misconduct could have been carried out in respect of the securities of any publicly listed entity and its impact would have been significant.

[18] However, we do find it to be an aggravating factor that Hable was an officer (and had previously been a director) of Samaranta at the time of his misconduct. That he was an officer (and large shareholder) of the target company gave his deceitful take-over bid announcement more credibility. Hable misused his position as an officer of Samaranta for his own financial gain.

Continued participation in the capital markets/fitness to be a registrant or a director or officer of an issuer

[19] Participation in our capital markets is a privilege not a right.

[20] Those who engage in market manipulation represent serious risks to our capital markets. Those who engage in market manipulation intend to deceive and harm the investing public.

[21] As noted above, Hable also leveraged his status as an officer of Samaranta to lend credibility to his deceitful conduct and to harm the investing public and our capital markets. Hable represents a very significant risk to our capital markets. He has demonstrated a lack of fitness to participate in our capital markets, as a registrant or as a director or officer of an issuer.

[22] We would also note that Hable's fabrication of a document, in response to Commission inquiries, raises substantial questions about his ability to be regulated and participate in a highly regulated industry.

Specific and general deterrence

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

Previous decisions

[24] The executive director provided three previous decisions of this Commission in support of the requested sanctions in this case: *Re Sungro*, 2015 BCSECCOM 281, *Re Poonian*, 2015 BCSECCOM 96 and *Re Hu*, 2011 BCSECCOM 514.

[25] In *Sungro*, three individual respondents were found to have contravened section 57(a) of the Act and, in addition, one of the three respondents was found to have made false or misleading statements to a Commission investigator. One of the individual respondents also had a significant aggravating factor in that he had a history of securities regulatory misconduct.

[26] The panel imposed broad, permanent market prohibitions against each of the respondents in *Sungro*. There was also specific evidence as to the enrichment of two of the respondents arising from the market manipulation and orders were made against the two respondents under section 161(1)(g) in the amount of their enrichment. Finally, the panel considered each of the three respondents to be equally responsible for the misconduct and ordered administrative penalties (before consideration of the additional misconduct of providing false or misleading information) of $700,000 against each of the respondents for the market manipulation. The panel also ordered an additional $100,000 administrative penalty against one of the respondents who was also found to have made false and misleading statements to the Commission.

[27] In *Poonian*, five individual respondents were found to have engaged in a market manipulation. There were no other findings of contraventions against any of the respondents.

[28] The panel imposed broad, permanent market prohibitions against each of the respondents. The respondents were ordered to pay administrative penalties that varied between $10 million (against the mastermind of the scheme) and $1 million. The panel found that there were significant differences in the contributions to and the responsibility for the market manipulation and these differences were reflected in the relative magnitudes of the administrative penalties imposed against each of the five respondents.

[29] *Hu* is a decision in which the respondent was found to have breached the insider trading provisions of the Act and to have lied to Commission investigators about that trading activity. Among other sanctions, the respondent received a $500,000 administrative penalty for having lied to Commission investigators to cover up his improper trading activity. While Hable's fabrication of a document bears some similarities to Hu's lying to investigators, we do not find the circumstances of the *Hu* decision to be generally analogous to those involving Hable.

IV. Appropriate Orders

A. Market prohibitions

[30] Hable represents a significant risk to our capital markets. He acted with intent to harm the investing public and in a manner that is totally inconsistent with conduct acceptable for a registrant or a director or officer of an issuer. Broad, permanent market prohibitions against Hable are necessary and appropriate to protect our capital markets.

B. Section 161(1)(g) orders

[31] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, recently adopted a two-step approach to considering applications for orders under section 161(1)(g) (para 144):

> I now turn to apply these principles to the three appeals before this Court. I agree with and adopt the two-step approach identified by Vice Chair Cave in *SPYru* at paras 131-132:
>
> > [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
> >
> > [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[32] The Court of Appeal in *Poonian* further adopted several principles to apply in interpreting section 161(1)(g) (para 143):

1. The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e. by ensuring the person does not retain the "benefit" of their wrongdoing.

2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under Part 3 of the *Securities Regulation* or the s.157 compliance proceedings in the *Act*.

3. There is no "profit" notion, and the "amount obtained" does not require the Commission to allow for deductions of expenses, costs, or amounts other persons paid to the Commission. It does, however, permit deductions for amounts returned to the victim(s).

4. The "amount obtained" must be obtained *by that respondent, directly or indirectly*, as a result of the failure to comply with or contravention of the *Act*. This generally prohibits the making of a joint and several order because such an order would require someone to pay an amount that person did not obtain as a result of that person's contravention.

5. However, a joint and several order may be made where the parties being held jointly and severally liable are under the direction and control of the contravener such that, in fact, the contravener obtained those amounts *indirectly*. Non-exhaustive examples include the use of a corporate *alter ego*, use of other person's accounts, or use of other persons as nominee recipients.

[33] Finally, the Court of Appeal in *Poonian* approved an approach to determining the amounts obtained, directly or indirectly, by a respondent that requires the executive director to provide evidence of an "approximate" amount, following which the burden of proof switches to the respondent to disprove the reasonableness of this number.

Step 1 – Can a section 161(1)(g) order be made?

[34] Hable obtained $157,596.96 through his beneficial ownership of the trading accounts that sold Samaranta securities during the relevant period. An order under section 161(1)(g) could be made against Hable in this amount.

Step 2 – Is it in the public interest to make a section 161(1)(g) order?

[35] There remains only the question of whether it is in the public interest for us to make a section 161(1)(g) order against Hable in all of the circumstances.

[36] This case raises the issue of whether it is appropriate for us to order the full amount of the proceeds of sale of Samaranta shares by Hable during the relevant period. The Samaranta shares that were sold during the relevant period had a value prior to Hable's misconduct. Should this value be taken into account in making our order under section 161(1)(g)?

[37] In the circumstances of this case, we do not think it necessary or appropriate to adjust the quantum of our order under section 161(1)(g) to reflect some inherent value of the

Samaranta shares that were sold by Hable during the period in which he carried out a market manipulation. There may be circumstances, with the necessary evidence, where it would be appropriate to do so.

[38] The evidence was that Hable tried to sell his Samaranta shares in the trading days leading up to his misconduct. He was only able to sell a small portion of those shares. The remainder went unsold. This is consistent with the evidence of the trading history in the period immediately preceding Hable's misconduct. The market for the Samaranta shares was illiquid and the shares traded in small daily volumes. The evidence before us was that Hable was not able to sell his shares without his misconduct. Further, there was no evidence from the respondent as to what the inherent value of his Samaranta shares was. Without valuation evidence, we would simply be speculating as to whether the shares had any particular value.

[39] We find it in the public interest to make a section 161(1)(g) order against Hable. We do not find there to be any reason in the public interest to make an order under section 161(1)(g) in an amount less than $157,596.96.

C. Administrative penalties

[40] The executive director has suggested that an administrative penalty under section 162 of the Act of $225,000 is appropriate in the circumstances. The executive director did not attempt to quantify a portion of this amount as being allocable to Hable's separate contraventions of section 57(a) and section 168.1(1)(a).

[41] Firstly, we think it important to recognize in our sanctions that Hable did carry out two distinct forms of misconduct (i.e. market manipulation and providing false documents to the Commission). Both aspects of Hable's misconduct were extremely serious and cynical in nature.

[42] We find Hable's misconduct in both respects to be similar to that of the respondent McLeary in the *Sungro* decision. Hable fabricated a set of financial statements in order to attempt to obfuscate his original misconduct. Hable's breach of section 168.1(1)(a) was egregious. Further, Hable carried out an extremely serious form of market manipulation, and which misconduct was aggravated by his being an officer of Samaranta at the relevant period.

[43] Having considered the need for both specific and general deterrence, the precedents provided by the executive director and the circumstances of this case we find it to be in the public interest to order that Hable pay an administrative penalty of $100,000 for his contravention of section 168.1(1)(a) and $300,000 for his contravention of section 57(a).

V. Orders

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

(a) under section 161(1)(d)(i), Hable resign any position he holds as a director or officer of an issuer or registrant;

(b) Hable is permanently prohibited:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;

(ii) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;

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

(iv) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(v) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(vi) under section 161(1)(d)(v), from engaging in investor relations activities; and

(c) Hable pay to the Commission $157,596.96 pursuant to section 161(1)(g) of the Act; and

(d) Hable pay to the Commission an administrative penalty of $400,000 under section 162 of the Act.

November 7, 2017

For the Commission

Nigel P. Cave
Vice Chair

Don Rowlatt
Commissioner

Suzanne K. Wiltshire
Commissioner