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

Citation: Re Wong, 2017 BCSECCOM 57 Date: 20170220

Siu Mui "Debbie" Wong, Siu Kon "Bonnie" Soo, Wheatland Industrial Park Inc., 1300302 Alberta Inc. and D & E Arctic Investments Inc.

Hearing

Panel	Audrey T. Ho	Commissioner
	Judith Downes	Commissioner
Hearing Date	November 28, 2016	
Date of Decision	February 20, 2017	

Appearing

James Torrance	For the Executive Director
H. Roderick Anderson Owais Ahmed	For Sui Mui "Debbie" Wong and Siu Kon "Bonnie" Soo
Kenneth Jang, for Lorne W. Scott, QC	For Wheatland Industrial Park Inc.
Harveen Thauli	For 1300302 Alberta Inc. and D & E Arctic Investments Inc.

Decision

I. Introduction

[1] This is the sanctions portion of a hearing pursuant to sections 161(1) and 162 of the *Securities Act*, RSBC, 1996, c. 418. The Findings on liability, made on June 16, 2016 (2016 BCSECCOM 208), are part of this decision.

[2] Sui Mui "Debbie" Wong and Siu Kon "Bonnie" Soo (the sisters) also made an application to vary paragraphs 356 and 360 of the Findings on liability, pursuant to section 171 of the Act. We heard that application at the same time as the oral submissions on sanction. Our decision on that application is contained herein.

[3] The panel found that:

1. The sisters perpetrated fraud, contrary to section 57(b) of the Act, when they:

a) transferred Wheatland Joint Venture units without consideration to the benefit of their husbands and adult children;
b) misappropriated $1,208,000 from the Wheatland joint venture;
c) inflated the purchase price of the Rocky View lands and lied about it to investors;
d) used mortgage proceeds for purposes other than the development of the Rocky View lands without investors' consent; and
e) withheld information about potential delays in Rocky View's development from one investor.

2. The respondents made illegal distributions, contrary to section 61 of the Act, as follows:

a) Wong, Soo and Wheatland Industrial Park Inc. – $2,000,000 in Wheatland securities to 25 investors;
b) Wong, Soo and 1300302 Alberta Ltd. - $2,785,000 in 1300302 securities to 44 investors, and
c) Wong, Soo and D & E Arctic Investments Ltd. - $1,105,000 in D & E Arctic securities to 19 investors.

II. Position of the Parties on Sanctions

[4] The executive director seeks:

a) permanent market bans against all the respondents, under sections 161(1)(b), (c) and (d) of the Act;

b) disgorgement orders totaling $9,857,850 against the respondents other than Wheatland, under section 161(1)(g), as follows:

- Wong and Soo on a joint and several basis - $9,857,850
- 1300302 (on a joint and several basis with Wong and Soo) - $2,785,000
- D & E Arctic (on a joint and several basis with Wong and Soo) - $1,105,000; and

c) administrative penalties of $10 million against each of Wong and Soo, under section 162.

[5] The sisters submit that the sanctions sought by the executive director are excessive and punitive, and that the disgorgement amounts exceed the Commission's jurisdiction under section 161(1)(g). They say the appropriate sanctions against them should be as follows:

a) permanent market bans, under sections 161(1)(b) and (d), subject to the carve-outs that each of them may:

- trade for her own account through a registered dealer, and

- act as a director and officer of an issuer if all of the issuer's securities are beneficially owned by her or members of her immediate family;

b) no order under section 161(1)(g); and

c) administrative penalties against each of the sisters in the range of $250,000 to $450,000.

[6] 1300302 and D & E Arctic (the Rocky View respondents) did not object to the market bans sought by the executive director, but submitted that the section 161(1)(g) orders sought against them do not serve the public interest and are punitive. They say that no section 161(1)(g) order should be made against them.

[7] The executive director had initially sought a section 161(1)(g) order against Wheatland. He withdrew that request after Wheatland submitted documentary evidence to show that the sisters and their families are no longer directors or officers of Wheatland, and have transferred the shares they held in Wheatland to third parties who appear to be unrelated to the Wong and Soo families.

[8] Wheatland did not object to the market bans sought by the executive director.

III. Additional Evidence

[9] The parties entered various affidavit and documentary evidence at the hearing for the purpose of sanctions.

[10] The evidence indicates that:

a) individuals who appear unrelated to Wong and Soo have replaced the sisters as directors and shareholders of Wheatland;
b) Soo's husband is the sole director and shareholder of 1300302; and
c) Wong remains the sole director and shareholder of D & E Arctic.

[11] Wong deposed that, among other things, the Wong and Soo families have funded all of the Farms Credit Canada mortgage payments, totaling approximately $562,000, on behalf of the Rocky View joint venture.

IV. Section 171 Application

A. The application and the parties' positions

[12] In the Findings, the panel found that the amount advanced under a $1.65 million mortgage from Farms Credit Canada and used by the sisters for purposes unrelated to the Rocky View lands exceeded the total amount of the outstanding loans owed by the Rocky View joint venture to the Wong and Soo families at any one time. The panel concluded that the sisters' use of those mortgage proceeds constituted a fraud, but only to the extent that the mortgage proceeds exceeded the outstanding loans owed by the Rocky View joint venture to the Wong and Soo families.

[13] In the section 171 application, the sisters asked the panel to vary those findings and to find, instead, that the outstanding loans from the Wong and Soo families did exceed $1.65 million and therefore, the executive director had not made out a contravention of section 57(b) in relation to the FCC mortgage.

[14] Based on evidence from the liability hearing, the executive director says the total amount of Wong and Soo family loans to the Rocky View joint venture was $1,370,000. In support of the section 171 application, the sisters now seek to rely on additional banking documents to show another $300,000 in family loans made to the Rocky View joint venture. That amount, when added to the $1,370,000, would exceed the FCC mortgage proceeds.

[15] The section 171 evidence consists of an affidavit from Wong, a cancelled cheque and a bank statement from 2008.

[16] The executive director asks the panel to dismiss the section 171 application, on the basis that the sisters have not met the threshold for a variation in the Findings. He says the threshold requires either new evidence (namely, evidence that was not reasonably available for use at the hearing), or a significant change in circumstance.

[17] The executive director says that the outstanding family loan amounts, movement of funds in and out of D & E Arctic's bank account, and FCC mortgage proceeds usage were extensively canvassed in direct and cross-examinations of Wong at the liability hearing, and the sisters had plenty of opportunity to introduce the section 171 evidence during the liability phase of the hearing.

[18] The executive director submits that there must be finality to litigation, and to allow the sisters to re-litigate the issue in these circumstances could lead to an interminable cycle of liability rulings, further evidence and further section 171 applications to re-litigate liability.

[19] However, the executive director says it is fair to consider the section 171 evidence in the sanctions phase. The executive director initially took the position that the FCC mortgage proceeds exceeded the outstanding family loans by $280,000. In light of the section 171 evidence, the executive director reduced the section 161(1)(g) order sought against the sisters by $280,000. The amounts referred to in paragraph 4(b) and elsewhere in this decision are the reduced amounts.

[20] The sisters do not dispute that the section 171 evidence was readily available at the time of the liability hearing. They say it was not withheld as part of their litigation strategy. Rather, it was over-looked in the course of a lengthy and complex liability hearing with a large volume of documentation. They say that given the broad wording of section 171, there is no limit on the panel's authority to vary its Findings provided it is not prejudicial to the public interest. They further say that, regardless of section 171, the panel has the authority to vary its Findings because the enforcement hearing is ongoing and the panel is not *functus* until it has issued a sanctions order, and in any event, the panel is the master of its own procedures. They also rely on section 173(b) of the Act, which requires the person presiding at a hearing to receive all relevant evidence submitted by a respondent.

B. The law on section 171 applications

[21] Section 171 of the Act states:

> If the commission … considers that to do so would not be prejudicial to the public interest, the commission … may make an order revoking in whole or in part or varying a decision the commission … has made under this Act, … whether or not the decision has been filed under section 163.

[22] *BC Policy 15-601 - Hearings* sets out procedures for hearings under the Act. Section 8.10(a) provides guidance on revoking or varying a decision. It states, in part:

> … Before the Commission changes a decision, it must consider that it would not be prejudicial to the public interest. This usually means that the party must show the Commission new evidence or a significant change in the circumstances.

[23] The Commission has consistently applied the thresholds described in *BC Policy 15-601*.

[24] In *Re Pyper* 2004 BCSECCOM 238, the respondent applied under section 171 to vary the sanctions imposed on him. The Commission panel stated:

> For an application under section 171 to succeed, the applicant must show us new and compelling evidence or a significant change in circumstances, such that, had we known them when we issued our sanctions decision, we would have made a different decision.

[25] In *Re Steinhoff* 2014 BCSECCOM 211, the panel followed *Re Pyper* and adopted the two-prong test used in *Foresight Capital Corporation* 2006 BCSECCOM 529 and 2006 BCSECCOM 531 to determine whether evidence is new evidence:

> d) First, the evidence must be relevant to the allegations in the notice of hearing.
> e) Second, the applicant must explain why the evidence was not reasonably available for use at the hearing.

[26] In *Re McIntosh* 2015 BCSECCOM 162, at paragraph 12, the panel said:

> Section 171 of the Act does not provide an unfettered opportunity for a respondent to re-litigate the liability or sanctions portion of an enforcement hearing. A party seeking a variation must meet the threshold outlined in s. 8.10(a) of BC Policy 15-601, and identify new evidence, or a significant change in circumstances, before the Commission will change a decision.

C. Application of the facts to the law

[27] The executive director does not dispute that the section 171 evidence is relevant to the allegation of fraud with respect to the FCC mortgage proceeds in the notice of hearing.

[28] The sisters do not dispute that the section 171 evidence was reasonably available for use at the liability hearing, and there has not been any significant change in circumstances since the liability hearing. The sisters were represented by experienced and capable counsel. The issues to which the section 171 evidence relates were extensively canvassed by both the sisters and the executive director during the liability hearing.

[29] However, if we had the section 171 evidence before us at the time of the liability hearing, we would have reached the opposite conclusion on the FCC mortgage proceeds fraud allegation. We would have found that the total amount of the outstanding loans owed by the Rocky View joint venture to the Wong and Soo families exceeded the FCC mortgage proceeds, and concluded that the use of the FCC mortgage proceeds by the sisters did not constitute fraud under section 57(b).

[30] It is in the public interest to ensure finality to litigation, and to avoid re-litigation. That is why an application to vary a decision is not unfettered.

[31] In this instance, there would be no prejudice to that aspect of the public interest if we were to vary the Findings, since the enforcement proceeding is ongoing, and the section 171 application was made before the sanction hearing such that the section 171 evidence can be taken into account by the parties in their submissions on sanctions.

[32] We do not see any other prejudice to the public interest by granting the sisters' application. The executive director already concedes that to be fair to the sisters, this new evidence should be taken into account in the sanctions phase. Having done so, we do not see any purpose in allowing the finding of liability to stand. Indeed, to do so would lead to an odd outcome of disregarding that fraud for the purpose of sanctions but not putting it aside for the purpose of liability.

[33] The prior Commission decisions cited by the executive director suggest that for a section 171 application to succeed, an applicant must show that the proposed new evidence was not readily available at the time of the hearing or that there has been a significant change in circumstance.

[34] However, what *BC Policy15-601* actually says is that before the Commission will change a decision under section 171, a party must ***usually*** show the Commission new evidence or a significant change in circumstances. This means that there may be circumstances where it would not be prejudicial to the public interest to vary or revoke a decision even if those tests are not met. Such is the case here, for the reasons stated.

[35] Accordingly, we allow the section 171 application, and we vary the Findings with respect to the fraud allegation of obtaining an unauthorized mortgage and using it for purposes other than the Rocky View development, as follows:

1. with respect to paragraphs 356, 359 and 360, we find that the amount advanced under the $1.65 million FCC mortgage and used by the Wong and Soo families did not exceed the outstanding loans owed by Rocky View to the Wong and Soo families, and a prohibited act has not been established with respect to this fraud allegation; and

2. with respect to paragraph 378(2)(b), we revoke the finding that Wong and Soo breached section 57(b) and committed fraud with respect to the Rocky View joint venture, by using mortgage proceeds for purposes other than the development of the Rocky View lands without the consent of investors.

V. Analysis on Sanctions Submissions

A. Factors

[36] Orders under sections 161(1) and 162 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.

[37] 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 the conduct

[38] The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595, the Commission, at paragraph 18, said, "Nothing strikes more viciously at the integrity of our capital markets than fraud."

[39] The sisters committed multiple acts of fraud totaling around $12 million against a large number of investors. Their misconduct is very serious. We view as most significant, their inflating the purchase price of the Rocky View lands, through the use of a nominee company, and lying about it to investors.

[40] Contraventions of section 61 of the Act are also inherently serious. It is one of the Act's foundational requirements for protecting investors and preserving the integrity of the capital markets. It is intended to ensure that investors receive the information necessary to make an informed investment decision.

[41] Exemptions from section 61 are available if the issuer and those who trade in securities meet certain specified requirements. These requirements are also designed to protect investors and markets, so persons who intend to rely on the exemptions must ensure that they are met.

[42] Here, the sisters raised $5.9 million from 88 investors in contravention of section 61.

Harm to investors; damage to capital markets

[43] Investor witnesses testified that they have suffered financially and emotionally. Some borrowed money to finance their joint venture investments and had to reduce living expenses to support those loans. One investor testified that "it's mental torture and a financial loss."

[44] To date, investors have not received any returns on their investments. Both properties are held by the respective joint ventures, and it remains to be seen if there is any value left in them.

[45] The sisters acknowledge that fraud necessarily damages the integrity of the capital markets. We agree.

[46] The sisters also acknowledge that the investors that were part of the illegal distributions suffered harm in that they were denied the protection afforded by the Act. They further acknowledge that the one investor from whom they withheld information about potential delays in the Rocky View development may not have invested if she were aware of the potential delays.

[47] However, the sisters deny that the investors have otherwise suffered any harm as a result of their misconduct. They say that the outcome of the Wheatland and Rocky View joint ventures is still to be determined and it is not yet known if investors will suffer any losses. Even if they do suffer losses, the sisters say it is as a result of the 2008 economic crisis and not as a result of their misconduct.

[48] We do not agree. Investors testified as to their mental anguish and increased financial burdens. They have suffered those harms even if they later recoup their investments (for which there is no evidence to suggest that it is a possibility).

[49] We find there has been significant harm to Wheatland and Rocky View investors.

Enrichment

[50] The sisters were personally enriched when they inflated the purchase price of the Rocky View lands and lied about it to investors. The executive director quantified the amount of this enrichment at $2,317,850 (the difference between the total amount raised from arms-length investors in Rocky View and the amount actually paid to the third party vendor to purchase the Rocky View lands).

[51] The sisters deny that the executive director has proven that they were enriched as a result of that fraud, on two bases.

[52] Firstly, they rely on *Re Zhong* 2015 BCSECCOM 383 to say that the executive director has not met the burden of proving a reasonable approximation of the amount obtained by the sisters as a result of this misconduct.

[53] *Re Zhong* is distinguishable. In that case, the executive director provided a global number for the commissions earned by Zhong during a specified time period, but could not quantify the portion of the commissions that pertained to the misconduct.

[54] Here, we find $2,317,850 as calculated by the executive director to be a reasonable approximation of the amount of enrichment.

[55] Secondly, the sisters argue that the executive director did not tender any evidence that reflects how much, if anything, the sisters individually received from the sale of the Rocky View lands to the Rocky View joint venture.

[56] We have found that 1276420 Alberta Ltd. (LCco) acted at all times as a nominee for the sisters and their families in buying the Rocky View lands from an arms-length vendor and then selling the lands to the joint venture. Wong insisted at the liability hearing that LCco was paid the inflated purchase price. That would mean that LCco received $2,317,850 as a nominee for the sisters and their families.

[57] Accordingly, we are satisfied that the sisters were enriched by $2,317,850. We had found the sisters acted jointly in their misconduct; it is not necessary to apportion the enrichment between the sisters.

Mitigating or aggravating factors

[58] The sisters say that the following factors are relevant in considering the seriousness of their misconduct:

a) They are relatively uneducated and unsophisticated, and had no prior experience distributing securities or any knowledge of securities laws. They thought they were only dealing with land and did not realize they were also dealing with securities.

b) They have now paid for the 33.5 Wheatland joint venture units allocated without consideration to their families.

c) They repaid the related company loans borrowed from Wheatland well before the executive director's investigation started.

d) They voluntarily disclosed the existence of the Wheatland related company loans to investors, partially paid for the Grant Thornton report, and cooperated with Grant Thornton in the preparation of that report.

e) The sisters did their best to support the two joint ventures and prevent losses by investors, by using their own money and family money to cover various Wheatland and Rocky View mortgage payments and expenses, and by giving personal guarantees to secure Wheatland and Rocky View mortgages.

f) The Rocky View lands had a value of $65,000 per acre at the time of the distribution, the inflated amount represented by the sisters.

[59] The executive director says there are no mitigating factors. He says it is an aggravating factor that the sisters deliberately set out to enrich themselves by inflating the purchase price of the Rocky View lands.

[60] We find there are no mitigating factors. The factors cited by the sisters are not mitigating factors, for the following reasons:

a) Prior to setting up the Wheatland and Rocky View joint ventures, the sisters were participants in a significant Alberta joint venture to purchase and develop land. In that Alberta joint venture, they were more than passive investors. For example, Wong signed one agreement on behalf of a managing venturer, and the sisters approved certain financial statements. They (or companies in which they had an interest) were parties to voluminous joint venture documentation that referenced the Act, the fact that no prospectus was filed, and prospectus exemptions under the Act including an attached form of accredited investors' questionnaire.

   Their ignorance is not a mitigating factor because their active involvement in the prior Alberta joint venture should have alerted them to the application of securities law and prompted them to seek professional advice.

b) The sisters advised Wheatland investors of the units issued to their families, the unauthorized mortgages and related company loans only when they needed investors to inject more money into the joint venture and had to account to investors for the funds raised.

c) Although the sisters subsequently paid for the Wheatland joint venture units, that was only after investors started court proceedings to protect their interests. Similarly, the sisters co-operated with Grant Thornton and paid part of its audit fees only after investors found out about the sisters' unauthorized activities and pressed for payment.

d) That the sisters voluntarily repaid the unauthorized related company loans does not mitigate the fact that they improperly took that money in the first place for personal use and at the joint venture's expense.

e) That the sisters and their families used their own money to cover Wheatland and Rocky View mortgage payments and expenses, and to provide personal guarantees to secure mortgages, also are not mitigating factors.

   Their misconduct was due in part to their using family money and joint venture money interchangeably and moving money around to where they felt it was needed most. So the fact that they used family resources to support the joint ventures when money was needed most there does not mitigate their illegal acts.

f) With respect to their bridge loan to the Rocky View joint venture and their guarantees and payments on the FCC mortgage, we agree with the executive director that the bridge loan (used to pay off the Rocky View vendor-take-back mortgage) and the FCC mortgage would not have been necessary if the sisters had used investors' subscription proceeds to pay off the vendor-take-back mortgage. The sisters raised $7,857,850 from third party investors, which was more than sufficient to pay the purchase price of the Rocky View lands to the arms-length vendor (cash and vendor-take-back mortgage totaling $5.54 million), as well as

the FCC mortgage payments ($562,000). It is not a mitigating factor to guarantee or make payments on unnecessary loans.

g) With respect to their personal guarantees and payments on Wheatland's mortgages, the sisters obtained the mortgages without investors' consent in contravention of the Wheatland joint venture agreement. Further, Wheatland had to pay increased interest costs and mortgage fees associated with these mortgages because the sisters diverted Wheatland's funds for personal use. Guaranteeing and making payments on unauthorized mortgages in these circumstances do not mitigate the illegal acts.

h) With respect to the fraud of inflating the Rocky View purchase price, the prohibited act was never about misrepresenting the value of the lands. It was about misrepresenting the sisters' cost and deceiving investors into believing that they were buying units at cost without having to pay a mark-up to the sisters. Even if those lands were worth $65,000 per acre at the time and the investors did not overpay for their units, that is not relevant to the prohibited act and is not a mitigating factor.

[61] We find there are no aggravating factors. Although we have found that the sisters knowingly misled Rocky View investors about the actual cost of acquiring the Rocky View lands, that subjective knowledge of the deceit was one of the elements necessary for a finding of fraud. As such, it is not an aggravating factor to the fraud.

Past conduct

[62] There is no evidence that the respondents have any history of regulatory misconduct.

Risk to investors and markets

[63] Those who commit fraud represent the most serious risk to our capital markets. Here, the fraud is significant.

[64] The sisters are not fit to participate in the capital markets. They took joint venture money for personal use. They ignored legal obligations in the joint venture and bare trust agreements. They did not exercise any due diligence to ascertain legal requirements before issuing joint venture units. They seriously mismanaged the Wheatland joint venture without accounting to investors until pressed to do so.

[65] Significantly, Wong does not believe that the sisters did anything wrong even though their actions were objectively dishonest. There is no evidence that Soo now appreciates that their actions were wrong. We find the sisters to be a serious ongoing risk to the capital markets and permanent market bans are warranted.

[66] We do not find a similar risk with respect to Wheatland. Wheatland's only contravention was illegal distributions, and it acted at all times under the control and direction of the sisters. It took no action independently from the sisters.

[67] The executive director's request for a market ban on Wheatland is not based on any specific concerns, but out of an abundance of caution given Wheatland's fund-raising history.

[68] Now that Wheatland is no longer directed or controlled by the sisters, we have no evidence that Wheatland poses any risk to the capital markets. Accordingly, we decline to order any market ban against Wheatland.

[69] We reach the opposite conclusion with respect to D & E Arctic and 1300302.

[70] Wong is the sole director and shareholder of D & E Arctic. As long as it remains under the control and direction of Wong, D & E Arctic poses an on-going risk to the capital markets and a market ban is necessary.

[71] Soo's husband is now the sole director and shareholder of 1300302. Given the sisters' history of using family members (including Mr. Soo) to facilitate their activities, we are not persuaded that 1300302 under Mr. Soo's stewardship would act independently from the sisters. We find that 1300302 poses an on-going risk to the capital markets and a market ban is necessary.

Specific and general deterrence

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

Previous orders

[73] The executive director referred us to two recent decisions of this Commission that dealt with fraud: *Re Lathigee* 2015 BCSECCOM 78, and *Re Zhu* 2015 BCSECCOM 264.

[74] In *Lathigee*, the respondents raised $21.7 million from 698 investors without telling them of a severe cash flow problem. There was no finding that the individual respondents were personally enriched. The panel ordered permanent market bans, an administrative penalty of $15 million against each individual respondent, plus a section 161(1)(g) order against all the respondents for the money that was raised illegally.

[75] In *Zhu*, the respondents raised more than $14 million from hundreds of investors in a well-organized fraud. The respondents took steps to disguise their activities and avoid detection. Two individuals were enriched, by at least $52,646 and US$118,266 respectively. The panel ordered permanent market bans, an administrative penalty of $14 million against each of the two individual respondents, plus a section 161(1)(g) order for not less than $14 million against all the respondents for the money that was raised illegally.

[76] The sisters say *Lathigee* and *Zhu* are distinguishable and not useful precedents.

C Appropriate Orders

a) Market prohibitions

[77] Fraud is the most serious misconduct prohibited by the Act. Permanent market bans are common for those found to have committed fraud.

[78] For the reasons already stated, we conclude that it is not in the public interest to allow the sisters to participate in the capital markets. We find that a permanent market ban against each of them is necessary to protect the markets and the investing public, subject to two carve-outs:

a) We are prepared to allow each of them to trade for her own accounts through a registered dealer or advisor. We do not see any risk to the investing public by doing so.

b) We are also prepared to allow each of them to act as a director and officer of an issuer if all of its securities are owned by her or her immediate family. Subject to our comments in the next paragraph about possible risks to the Rocky View investors, we do not see any risk to the investing public by doing so.

[79] We recognize that the sisters or members of their immediate families are the directors, officers and shareholders of 1300302 and D & E Arctic. We were advised by their counsel that it had been difficult to find arms-length individuals to take over the control and management of these companies given their regulatory problems. We were advised at the hearing that two Rocky View investors unrelated to the Wong and Soo families may be willing to take over from Wong as directors and shareholders of D & E Arctic, but it is not yet certain that would happen.

[80] It is not in anyone's interest to have these two companies exist without directors or shareholders when they hold legal ownership of the Rocky View lands. Nor are we satisfied that the Rocky View investors would be better protected if Wong and Soo family members take over as directors in place of the sisters. We are prepared to grant the carve-outs so that the sisters may continue to act as directors of these companies if necessary. We believe the Rocky View investors' interests can be protected by the section 161(1)(g) orders that we issue, for the reasons set out in the next section.

b) Orders under section 161(1)(g)

[81] Section 161(1)(g) states that the Commission may order:

> "(g) if a person has not complied with this Act, … that the person pay to the commission <u>any amount obtained</u>, or payment or loss avoided, <u>directly or indirectly, as a result of the failure to comply or the contravention</u>;" (emphasis added)

Scope of section 161(1)(g)

[82] The sisters challenge our authority to make a section 161(1)(g) order (sometimes referred to as a "disgorgement order") against them. They argued that, for section 161(1)(g) to apply, the respondent against whom the order is issued must have obtained a payment or avoided a loss, directly or indirectly, as a result of the contravention of the Act. They say there is no evidence that either sister obtained any payment or avoided any loss as a result of her contraventions of the Act.

[83] The sisters argued that to order disgorgement against a respondent who has not obtained any money as a result of that person's misconduct would go beyond the underlying puprose of section 161(1)(g) and constitute a penalty. They rely on *Manna Trading*, which stated (in paragraph 36) that the purpose behind section 161(1)(g) orders is to remove "the incentive of profiting from illegal misconduct" and to return money obtained by contravening the Act. They also rely on the dissent in *Re Streamline Properties* 2015 BCSECCOM 66.

[84] The executive director disagreed. He relies on the majority decision in *Re Streamline Properties*, which was followed by the majority in *Re SPYru* 2015 BCSECCOM 452.

Our analysis on section 161(1)(g)

[85] This Commission, in a number of recent decisions, considered the breadth of the orders that may be made under section 161(1)(g).

[86] In *Oriens Travel & Hotel Management Ltd.* 2014 BCSECCOM 91, at paragraph 63, the panel held that section 161(1)(g) is clearly worded and there is no limitation on the Commission to only order a respondent to pay an amount that is obtained *by that respondent*.

[87] In *Re Michaels* 2014 BCSECCOM 457, paragraph 42, the Commission concluded that section 161(1)(g) should be read broadly to achieve the purposes of:

a) compelling a respondent to pay any amounts obtained from contraventions of the Act, and

b) not focus on compensation or restitution or act as a punitive or deterrent measure over and above compelling the respondent to pay any amounts obtained from the contraventions of the Act, and

section 161(1)(g) should not be read narrowly to either limit orders:

c) to amounts obtained, directly or indirectly, *by that respondent*, or

d) to a narrower concept of "benefits" or "profits",

although that may be the nature of the order in individual circumstances.

[88] In *Re Streamline Properties*, the majority concurred with the analysis in *Oriens Travel*, and held that an order under section 161(1)(g) is not limited to personal gains enjoyed by a respondent or to some notion of profits. An order may be made against a respondent with respect to all the money raised as a result of that respondent's misconduct even if all or some of the money raised was not kept by that respondent for personal gain. Section 161(1)(g) orders need not be limited to amounts obtained by a particular respondent or equate to a respondent's enrichment in the circumstances. The majority began with the general principle that the full amount raised in an illegal distribution should be disgorged. It then considered if it is equitable, in the public interest and not punitive in the circumstances of that case, to order payment of the full amount, as opposed to an order to pay a lesser amount or no order at all.

[89] We do not propose to reiterate the extensive legal analysis undertaken in the above cases. We concur with them, and with the interpretation and approach set out in them.

[90] The purpose of section 161(1)(g) is to remove from a respondent any amounts obtained through a violation of the Act. Notably, section 161(1)(g) does not limit an order to any amount *obtained by a respondent*. In our view, this omission is intentional and makes clear that we can make an order against a respondent with respect to all the money illegally obtained from investors as a result of that respondent's misconduct, and we are not limited to the ill-gotten gains obtained by that specific respondent. The plain wording of section 161(1)(g) supports our interpretation. To hold otherwise would be tantamount to importing into section 161(1)(g) a requirement that payment be limited to benefits, personal gains or some notion of profits enjoyed by a respondent.

[91] Whether the money obtained was used for the stated purpose or not, the end result is the same – the investors have been denied the protections required by our securities laws and were harmed as a result of the misconduct. In light of the critical importance of investor protection, the fact that capital was obtained and used for the stated purpose of the investments and not used for personal gains, should not limit the scope of section 161(1)(g), nor should it automatically reduce the size of an order under section161(1)(g). Similarly, we should not read section 161(1)(g) narrowly to shelter individuals where the amounts were obtained by the entities that they directed and controlled.

[92] We note that *Re Streamline Properties* primarily involved illegal distributions. The reasoning expressed by the majority there is even more compelling in cases where a respondent obtained investors' funds through fraud or used them for personal gain.

[93] We do not read *Manna Trading* as supporting the sisters' interpretation of section 161(1)(g). The panel there found four sisters to have perpetrated a fraud and ordered each of them to pay to the Commission under section 161(1)(g) the full amount obtained by the fraud without regard to the finding that they were personally enriched by different amounts. That panel concluded it was not necessary, in making orders under section 161(1)(g), to trace investor funds into the hands of the respondents. It said (at paragraph 44) that each respondent's individual contraventions, directly or indirectly, resulted in the investment of US$16 million in the Manna Ponzi scheme and ordered each of them to pay that amount under section 161(1)(g), as it was "the amount obtained, directly or indirectly, as a result of their individual contraventions of the Act."

[94] This issue was recently considered by the Ontario court. In *David Charles Phillips and John Russell Wilson v. Ontario Securities Commission* 2016 ONSC 7901, the Ontario Superior Court of Justice, Divisional Court, considered *Re Streamline Properties*, as well as a series of OSC decisions under a provision of the Ontario *Securities Act* that is substantially similar to section 161(1)(g). The OSC had ordered the two respondents to jointly and severally disgorge the amount obtained as a result of their non-compliance with Ontario securities law. The Commission also ordered one of the respondents to disgorge a further amount obtained as a result of his non-compliance. The entities that obtained the funds were not named as respondents. On appeal, the respondents argued that it was unreasonable for the Commission to have ordered them to disgorge amounts that were not obtained by them personally and were obtained by entities that were not named as respondents in the proceeding.

[95] At paragraph 78, the Court held that the OSC's decision that it had authority to order disgorgement against the two respondents in these circumstances was consistent with the plain wording of the legislation, the purpose of the legislation and prior case law. At paragraph 80, it held that the disgorgement orders, including the provision that they be joint and several, fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law".

[96] Accordingly, we find that we have the authority to order the sisters to pay the full amounts obtained by fraud or in illegal distributions, on a joint and several basis. Next, we consider if we should do so in the circumstances of this case.

[97] Adopting the approach taken in *Re Streamline Properties*, we begin with the general principle that the full amount obtained from misconduct should be paid to the Commission. We then consider if it is in the public interest and not punitive to order payment of the full amount, as opposed to a lesser amount or no payment at all.

Orders against Wong and Soo

[98] The executive director seeks a section 161(1)(g) order against the sisters in the amount of $9,857,850, calculated as follows:

Misconduct	Calculation, if necessary	Amount Obtained	Section 161(1)(g) Amount
Wheatland - illegal distributions	--	$2 million	$2 million
Wheatland - allocated units to family without consideration	33.5 units @ $85,000 per unit	$2,847,500 (repaid)	None (amount was repaid)
Wheatland - $1,208,000 misappropriated	--	$1,208,000 (repaid)	None (amount was repaid)
Rocky View - inflated purchase price of lands	120.89 units sold to arms-length investors @ $65,000 per unit	$7,857,850	$7,857,850
Rocky View - illegal distributions	$2,785,000 - 1300302, $1,105,000 - D & E Arctic	$3,890,000 (part of $7,857,850)	None (to avoid double counting)
Rocky View – withheld information about potential delays from one investor	One unit @ $65,000	$65,000 (part of $7,857,850)	None (to avoid double counting)

[99] We agree with the executive director that in determining the amount of any order against the sisters, we should reduce it by the amount the sisters have paid back to Wheatland for the 33.5 joint venture units and for the related company loans. It would not be equitable for the sisters to have to pay the same amount twice for the same misconduct. That is consistent with the approach taken in prior Commission decisions. See *Re Nelson* 2016 BCSECCOM 50 para. 127*; and Re Cho* 2013 BCSECCOM 454.

[100] The sisters submitted the following:

a) With respect to the $2 million in Wheatland illegal distributions, an order is not appropriate because the money was used to purchase the Wheatland lands, there was no personal enrichment or fraud relating to the receipt and use of this money.

b) With respect to the $7,857,850 raised in the Rocky View joint venture, at most, the panel should only make an order for $2,317,850 (the amount of personal enrichment alleged by the executive director) less $562,000 in FCC mortgage payments that Wong deposed the sisters had made for the benefit of the Rocky View joint venture.

[101] The sisters cited the following Commission decisions where the Commission did not make a section 161(1)(g) order: *Re Pacific Ocean Resources Corporation* 2012 BCSECCOM 104; *Re Saafnet Canada Inc.* 2014 BCSECCOM 96; *Re Photo Violation Technologies Corp.* 2013 BCSECCOM 276; *Re Solara Technologies Inc.* 2010 BCSECCOM 357; *and Re John Arthur Roche McLoughlin* 2011 BCSECCOM 299.

[102] These cases are either distinguishable or not helpful. In *Re Pacific Ocean*, all of the illegal distribution proceeds went to an entity that the respondents did not control. In *Re Photo Violation*, the respondents took considerable steps to obtain legal advice to ensure compliance with the Act, and one respondent admitted to the misconduct at the start of the proceedings. In *Re Saafnet*, the respondents were diligent and personally involved in taking steps to ensure compliance; they had consulted three sets of lawyers in their repeated attempts to comply with the Act. In *Re Solara*, the executive director did not seek a section 161(1)(g) order and the panel did not discuss that section. In *Re McLoughlin*, the panel did not discuss why it ordered the respondent Collins to pay the amount he personally received but not the entire amount raised in the illegal distributions.

[103] With respect to the $2 million in Wheatland illegal distributions, there is no question that Wheatland obtained the money. The sisters were the directing and controlling minds of Wheatland and the joint venture at all relevant times. They should not be protected or sheltered from sanctions by the fact that the illegal distributions were carried out through corporate vehicles.

[104] As a general principle, we do not find payment of the full amount obtained to be inequitable or punitive in circumstances where the proceeds were used for the purpose of the investments and not kept for personal gain by the respondents. We find no factors present to justify ordering the sisters to pay less than the full $2 million.

[105] With respect to the $7,857,850 raised in the Rocky View joint venture, there is no question that 1300302 and D & E Arctic obtained the money. The sisters were the directing and controlling minds of those companies and the Rocky View joint venture at all relevant times. They should not be protected or sheltered from sanctions by the fact that the illegal distributions were carried out through corporate vehicles. In addition, the sisters raised that amount through fraud on more than 60 investors. The sisters hid behind LCco and deceived investors. All the investments were premised on a lie. The principles articulated in the cited cases are even more compelling in the case of fraud. It is not inequitable or punitive to require them to pay the entire amount raised through fraud.

[106] Similarly, it is not appropriate or equitable to reduce the order against the sisters by the $562,000 FCC mortgage payments.

[107] First, these payments were in relation to an unauthorized and unnecessary mortgage.

[108] Second, a section 161(1)(g) order is focused on “the amount obtained” as a result of a respondent’s misconduct. On their plain reading, these words do not suggest any concept of “netting out” a respondent’s business expenses or outflows. To do so would inappropriately limit the sanction to a narrower concept of “benefit” received by a respondent and would be inappropriate. See *Re Michaels* (paragraph 46).

[109] We therefore find it is in the public interest to order Wong and Soo to pay to the Commission under section 161(1)(g), jointly and severally, the sum of $9,857,850.

Order against Wheatland

[110] The executive director does not seek a section 161(1)(g) order against Wheatland.

[111] At all relevant times, Wheatland only acted under the control and direction of the sisters. The sisters and their families no longer direct or control Wheatland. Its issued shares are held in trust now for the benefit of the Wheatland investors. To require Wheatland to pay any money under section 161(1)(g) would only punish the investors. We find it is not in the public interest to make a section 161(1)(g) order against Wheatland.

Orders against D & E Arctic and 1300302

[112] These respondents argue that any section 161(1)(g) order against them would be inequitable, contrary to the public interest and punitive to the investors, for the following reasons:

a) It is possible that the Rocky View lands have some value, and that money should go to the investors.

b) The sisters directed and controlled all the Rocky View activities.

c) Wong and Soo are no longer shareholders of 1300302. There is no risk that they would receive any proceeds from 1300302 as shareholders.

d) The 1300302 bare trust agreement mitigates any risks that Soo would receive any profits or proceeds from the Rocky View lands, because it stipulates that 1300302 has no beneficial interest in the Rocky View lands, and that profits and proceeds from the lands do not belong to 1300302 but are subject to the order and control of investors.

e) Although Wong remains a shareholder of D & E Arctic, the D & E Arctic bare trust agreement similarly mitigates any risks that Wong would receive any profits or proceeds from that company.

[113] There is no question that the Rocky View corporate defendants obtained the amounts raised in the illegal distributions.

[114] But they acted, at all relevant times, only under the control and direction of the sisters.

[115] However, we are not satisfied that the Rocky View investors' interests are adequately protected based on the current ownership structure and the sisters' past conduct.

[116] Unlike Wheatland, the sisters or members of their immediate families continue to control 1300302 and D & E Arctic.

[117] These two companies hold legal title to the Rocky View lands. As such, they have apparent ownership and authority to deal with and receive money generated from these lands.

[118] When the sisters obtained the FCC mortgage, they did not tell FCC the fact that these companies did not own the beneficial interest in the lands.

[119] The bare trust agreements had not effectively protected the investors. The sisters previously mortgaged these lands without investors' consent, in direct contravention of those agreements.

[120] For these reasons, we find a section 161(1)(g) order is appropriate, in order to protect the Rocky View investors and provide them with the mechanism intended by the Act to facilitate recovery of their investments.

[121] Accordingly, we find it is in the public interest to order these two respondents to pay the full amounts of the illegal distributions made by them, as follows:

a) D & E Arctic - $1,105,000; and

b) 1300302 - $2,875,000.

[122] D & E Arctic and 1300302 are free to make a section 171 application to vary this order in the event they can demonstrate that the sisters and the Wong and Soo families have ceased to direct or control them or hold shares in them.

c) Administrative Penalty

[123] Under section 162 of the Act, where the Commission has determined that a person has contravened a provision of the Act, it "may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention".

[124] In *Lathigee*, all of the $21.7 million was raised fraudulently. The respondents solicited investors without telling them that the business had a severe cash flow problem and a small number of potential events could trigger its insolvency in a very short time frame. The respondents used $9.9 million from the amount raised for a purpose other than what investors were told. The individual respondents had a regulatory history and one of them remained active in the capital markets but was not forthcoming about his regulatory history.

[125] The panel in *Zhu* found the respondents' business to be not legitimate; it appears that the business was conducted for the purpose of committing a fraud on investors. The individual respondents attempted to conceal information by giving false information to a Commission investigator. The respondents took steps to disguise their activities and avoid detection.

[126] In this case, the sisters committed multiple frauds totaling close to $12 million, and were personally enriched by over $2 million.

[127] While they are not mitigating factors, we also find the following relevant in assessing the seriousness of the sisters' misconduct in the spectrum of frauds:

a) there was a real business behind each joint venture;

b) the co-mingling of personal and joint venture funds was not part of a deliberate plan to defraud investors (Wong genuinely thought there was nothing wrong with what they did; they did not just take money out but they also put in their own money to pay joint venture expenses);

c) they did not abandon the Wheatland joint venture when it ran short on funds; and

d) they did repay the related company loans before investors found out about them.

We also took into account the fact that the investors have beneficial ownership of the lands and both sets of lands may have some residual value.

[128] The amounts and the number of investors involved in this case are less than those in *Lathigee* and *Zhu*. Notwithstanding the multiple findings of fraud against the sisters and the significant personal enrichment, taken as a whole, we find the seriousness of their misconduct to be materially less egregious than that in *Lathigee* and *Zhu*.

[129] We considered each sister's misconduct globally in arriving at a single administrative penalty. In our view, an administrative penalty of $6 million against each of them is proportionate to the harm done, making it appropriate for them personally and sufficient to serve as a meaningful and substantial general deterrence to others.

[130] We have found that the sisters acted jointly in all their activities. There is no material distinction between their individual responsibilities for the misconduct. The administrative penalty should be the same with respect to both of them.

[131] We do not find it serves the public interest or any useful purpose to impose an administrative penalty against any of the corporate respondents. They were controlled by the sisters and did not act independently from their directions. There is no need for specific deterrence against the corporate respondents. In our opinion, general deterrence can be achieved through administrative penalties against the sisters.

VI. Orders

[132] Considering that it would not be prejudicial to the public interest, pursuant to section 171 of the Act, we vary our Findings of June 16, 2016 (BCSECCOM 208) and revoke the finding at paragraph 378(2)(b) that Wong and Soo each breached section 57(b) of the Act and committed fraud with respect to Rocky View when they used mortgage proceeds for purposes other than the development of the Rocky View lands without the consent of investors.

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

1. ***Wong***
   a) subject to the exception in subparagraph (b)(ii) below, under section 161(1)(d)(i), Wong resigns any position she holds as a director or officer of an issuer or registrant;

   b) Wong be permanently prohibited:
      i. under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that she may trade and purchase them for her own account through one registered dealer or advisor if she gives that dealer or advisor a copy of this decision;
      ii. under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant, except that she may act as a director or officer of an issuer whose securities are solely owned by her or by her and her immediate family members (being: Wong's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law, or brother or sister-in-law);
      iii. under section 161(1)(d)(iii), from becoming or acting as a promoter;
      iv. under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
      v. under section 161(1)(d)(v), from engaging in investor relations activities;

   c) under section 161(1)(c), except for those exemptions necessary to allow Wong to trade or purchase securities and exchange contracts for her own account, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to Wong, on a permanent basis;

   d) subject to subparagraph 5 below, under section 161(1)(g), Wong pays to the Commission $9,857,850; and

   e) under section 162, Wong pays an administrative penalty of $6 million;

2. ***Soo***
   a) subject to the exception in subparagraph (b)(ii) below, under section 161(1)(d)(i), Soo resigns any position she holds as a director or officer of an issuer or registrant;

b) Soo be permanently prohibited:
   i. under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that she may trade and purchase them for her own account through one registered dealer or advisor if she gives that dealer or advisor a copy of this decision;
   ii. under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant, except that she may act as a director or officer of an issuer whose securities are solely owned by her or by her and her immediate family members (being: Soo's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law, or brother or sister-in-law);
   iii. under section 161(1)(d)(iii), from becoming or acting as a promoter;
   iv. under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
   v. under section 161(1)(d)(v), from engaging in investor relations activities;

c) under section 161(1)(c), except for those exemptions necessary to allow Soo to trade or purchase securities and exchange contracts for her own account, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to Soo, on a permanent basis;

d) subject to subparagraph 5 below, under section 161(1)(g), Soo pays to the Commission $9,857,850; and

e) under section 162, Soo pays an administrative penalty of $6 million;

3. ***1300302***
   a) under section 161(1)(b)(ii), 1300302 permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts;

   b) under section 161(1)(c), on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to 1300302;

   c) under section 161(1)(d)(v), 1300302 is permanently prohibited from engaging in investor relations activities; and

   d) subject to subparagraph 5 below, under section 161(1)(g), 1300302 pays to the Commission $2,785,000;

4. ***D & E Arctic***
   a) under section 161(1)(b)(ii), D & E Arctic permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts;

b) under section 161(1)(c), on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to D & E Arctic;

c) under section 161(1)(d)(v), D & E Arctic is permanently prohibited from engaging in investor relations activities; and

d) subject to subparagraph 5 below, under section 161(1)(g), D & E Arctic pays to the Commission $1,105,000.

5. ***Section 161(1)(g) payments***
The total of the amounts payable by the respondents under subparagraphs (1)(d), (2)(d), (3)(d) and (4)(d) above shall not exceed $9,857,850, and the respondents' obligations to pay under those subparagraphs shall be as follows:

a) $2,785,000 - 1300302, Wong and Soo on a joint and several basis;

b) $1,105,000 - D & E Arctic, Wong and Soo, on a joint and several basis; and

c) $5,967,850 - Wong and Soo, on a joint and several basis.

[134] We make no orders against Wheatland.

February 20, 2017

For the Commission

Audrey T. Ho
Commissioner

Judith Downes
Commissioner