

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

Citation: Re Nickford, 2018 BCSECCOM 57

Date: 20180202

Lynne Rae Nickford
(aka Lynne Rae Zlotnik dba Lynne Zlotnik Wealth Management)

Panel	Suzanne K. Wiltshire	Commissioner
	Judith Downes	Commissioner
	Don Rowlatt	Commissioner

Submissions completed November 24, 2017

Date of Decision February 2, 2018

Appearing
Jennifer Whately For the Executive Director
Lynne Nickford For herself

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 18, 2017 (2017 BCSECCOM 272) are part of this decision.
- [2] We found that the respondent, Nickford, contravened section 57(b) of the Act by perpetrating fraud on 13 investors in the aggregate amount of at least \$318,141.
- [3] The parties provided written and oral submissions with respect to the appropriate sanctions for the respondent's misconduct.
- [4] This is our decision with respect to sanctions in this matter.

II. Positions of the Parties

- [5] The executive director seeks:
 - 1. permanent orders against Nickford under sections 161(1)(b)(i) and (ii), 161(c) and 161(1)(d)(i), (ii), (iii), (iv) and (v) of the Act;
 - 2. an order under section 161(1)(g) of the Act that Nickford pay \$318,141 to the Commission; and

3. a \$400,000 administrative penalty under section 162 of the Act.

[6] Nickford's position is that:

1. she is sorry for the financial losses of her investors, never meant to hurt them and takes full responsibility for this tragic outcome;
2. she has already been sanctioned by reason of FICOM's March 12, 2010 order freezing her property and assets and the Insurance Council of British Columbia's March 16, 2010 decision and order which, among other things, prohibited her from accepting any money from clients and from issuing any promissory notes or debt instruments or obtaining any loans, except from a Canadian financial institution;
3. as a result of the actions of FICOM and the Insurance Council of British Columbia she was pushed into bankruptcy, lost her business, was publicly shamed, lost lifelong friends who invested with her and lost her health;
4. she has paid the trustee in bankruptcy more than \$68,000 since April 2010 and continues to pay a small monthly amount.
5. she is not in a position to pay any monetary sanctions because she has a limited income, no assets, no expectations of inheriting money, and no one to borrow from; and,
6. she suffers from a mental illness and this should be given weight as a mitigating circumstance.

III. Analysis

A. Factors

[7] 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.

[8] 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/Damage to integrity of capital markets

- [9] Commission panels have consistently found that fraud is the most serious misconduct prohibited by the Act.
- [10] Nickford's misconduct was particularly egregious. In the guise of supporting investors and providing investor education and empowerment, she preyed on clients of her financial services firm, her friends and members of her religious community, many of them in or nearing retirement, to raise \$1,818,750 million for her financial services business. She then diverted at least \$318,141 of the investors' funds for personal uses, including gambling.
- [11] As noted in *Manna Trading Corp. Ltd. (Re)*, 2009 BCSECCOM 595 at paragraph 18, "nothing strikes more viciously at the integrity of our capital markets than fraud".

Harm to investors/enrichment

- [12] The harm to investors in this case was much greater than the amount diverted by Nickford for her personal use. She commingled the investors' funds with other funds making tracing difficult, she transferred funds from her business account to her personal account and as we have found she used at least \$318,141 of the investors' funds for personal expenses, some of which included gambling. The use of the business funds in this manner exacerbated the losses suffered by the investors.
- [13] With the failure of the respondent's business, the investors lost all of their investments. Some were left in precarious financial circumstances at a time in life when they had little or no opportunity because of their age to rebuild their financial position, to carry out their retirement plans or to benefit their families as they had intended.
- [14] The harm to investors extended beyond their financial losses. They had trusted and relied on Nickford as a financial advisor, friend, and/or member of their religious community. They were emotionally impacted and left with feelings of stress, humiliation and guilt. In some cases their health was seriously affected.

[15] Nickford was enriched by the amounts diverted by her for her personal uses, including gambling. We have found this amount to be at least \$318,141.

Mitigating Factors

[16] Nickford has expressed sorrow that the investors suffered financially and says that she takes full responsibility for their losses but, in fact, she fails to do so. Indeed, she continues to attribute the investors' losses and her own current situation to the regulatory actions taken by FICOM and the Insurance Council of British Columbia, which she asserts resulted in her bankruptcy and the loss of her business. We reject her expression of sorrow as a mitigating factor.

[17] In her submissions, Nickford submits that she suffers from mental illness and her gambling is attributable to that illness. She argues that her mental illness must be taken into account as having "the full impact of a mitigating circumstance".

[18] We considered the evidence of Nickford's mental health in our findings, concluding:

The medical evidence does not establish the respondent was suffering from the alleged mental illness during the relevant period. Nor does the medical evidence establish that if the respondent had been suffering from the alleged mental illness during the relevant period, that mental illness would have rendered her incapable of forming the requisite mental intent (subjective knowledge of the acts of deceit and deprivation) of fraud.

[19] During the sanctions portion of this hearing, Nickford submitted additional documentary evidence concerning her health. As well, she referred in her submissions to a history of mental illness within her family of origin.

[20] Some of that evidence duplicates the documentary evidence entered by Nickford at the time of the liability portion of this hearing and previously considered and addressed by us in the liability findings.

[21] The new medical evidence provided shows Nickford continued to see a psychiatrist after September 2010, the date of the last psychiatric report entered into evidence during the liability portion of this hearing, and that she is currently suffering from a number of illnesses for which she takes a variety of medications. This evidence does not shed any new light on her mental health during the relevant period.

[22] Another new document is a 2012 letter from a friend Nickford visited for a week sometime in the spring of 2009, indicating that some of Nickford's behavior during that short visit seemed to later make sense to the friend in relation to the type of drugs Nickford received when she subsequently sought psychiatric treatment. We note this evidence but it is speculative in nature and insufficient to establish that Nickford was suffering from the specific mental illness she alleges during the period relevant to the findings of fraud against her.

[23] Finally, there are screenshots recently taken by Nickford from internet searches she made concerning the mental illness she submits she was suffering from during the period of the fraud and which she says support her attribution of her gambling addiction to that mental illness. We have reviewed these documents, but they do not establish Nickford was suffering from the alleged mental illness during the relevant period. Nor do they establish a connection between the alleged mental illness and an addiction to gambling, but only suggest the possibility of such a connection.

[24] We reiterate our finding that Nickford has not provided evidence of her mental health sufficient for it to be a factor to consider in these proceedings.

Aggravating factors

[25] The executive director lists three aggravating factors. The first of these is that Nickford took advantage of affinity and trust relationships. We have already dealt with this aspect of Nickford's conduct in connection with the additional emotional harm such conduct causes to investors and do not consider it an additional aggravating factor.

[26] The second aggravating factor listed by the executive director is poor record keeping.

[27] In *Re Schouw*, 2017 BCSECCOM 168, at paragraph 24, the Commission found lack of proper record keeping was an aggravating factor.

[28] Similarly, we find Nickford's co-mingling of funds and her failure to maintain or produce credible records with respect to the use of proceeds of the funds she raised from investors is an aggravating factor. Like Schouw, she was the sole controlling mind and management of her business. She controlled both the business and personal bank accounts where the investors' funds ended up. She transferred funds from her business account to her personal account without regard as to whether or not they were investor funds and then made cash withdrawals of almost a million dollars for which there are no receipts from her personal account. Her record keeping falls far short of the standard of record keeping expected of those who wish to participate in the capital markets and makes her a significant risk to the capital markets.

[29] The third aggravating factor listed by the executive director is that Nickford is a former registrant and an industry professional. Rather than considering this an aggravating factor, we have dealt with her former status as a registrant and her long history as a financial industry professional below in regard to her continued participation in the capital markets and her fitness to be a registrant, advisor to issuers, or a director or officer of an issuer

Past conduct

[30] Nickford does not have a history of securities regulatory misconduct.

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

- [31] Nickford was a former registrant under the Act and a longtime industry professional. She perpetrated fraud, knowingly deceiving and financially depriving clients, friends and members of her religious community who invested in her business.
- [32] Public confidence in our capital markets is dependent on the honesty and integrity of those who participate in them. Any continued participation by her in the capital markets represents a significant risk to investors and the integrity of the capital markets.
- [33] That risk extends to her acting in any capacity in connection with the capital markets, including as a director or officer of an issuer. It is a duty of directors and officers to act honestly and in good faith with a view to the best interests of the company. Persons who perpetrate fraud are not fit to act as directors or officers of issuers. Although Nickford conducted her business as a sole proprietor, it is important to note that the operation of that business included her acting as the sole director and officer of Lynne Zlotnick Wealth Management Inc., the agency through which she conducted the insurance aspects of her business.
- [34] Nickford is not fit to be a registrant, an advisor to issuers, or a director or officer of an issuer.

Specific and general deterrence

- [35] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.
- [36] Nickford says that she has already been sanctioned because FICOM froze her assets and the Insurance Council of British Columbia made orders prohibiting her from obtaining further loans for her business, resulting in her bankruptcy.
- [37] We disagree. Such actions are not sanctions but steps taken by those bodies to preserve assets and halt ongoing misconduct.

Ability to pay

- [38] Nickford submits that her financial circumstances should be taken into account in determining financial sanctions. She provided some documentary evidence during the sanctions portion of this hearing that she currently has a limited income, the trustee in bankruptcy has received assets and payments from her of approximately \$68,000 and she continues to pay a small monthly amount to the trustee.
- [39] The executive director submits that Nickford's ability to pay is only one factor for the panel to consider and that it must be weighed against the seriousness of her misconduct and the harm caused by her, both of which the executive director submits are at the extreme end of the range.

[40] The executive director points to the recent decision in *Re Cook*, 2017 BCSECCOM 206 at paragraph 37 where a Commission panel found that “[a] respondent’s ability to pay a monetary award is a factor to consider with respect to specific deterrence, but is not determinative in and of itself”.

[41] The executive director also submits that ability to pay is not relevant to a consideration of general deterrence, citing *Hogan v. British Columbia Securities Commission*, 2005 BCCA 53 at paragraph 17 as to the negative consequences of making a penalty commensurate to a respondent’s ability to pay, or giving undue weight to an individual’s financial circumstances:

...if Mr. Hogan were correct in saying that the amount of the penalty should be commensurate with his ability to pay, then individuals such as himself, who have no other assets and who do not make their living as licensed players in the market, could engage in the same type of activity as Mr. Hogan, and because of their straightened financial circumstances (after disgorging any profit they made), face no real penalty. The amount of the administrative penalty in this case recognizes the need to deter just those types of players from manipulating the market.

[42] We note and agree with the conclusions of the Commission panel on the issue of ability to pay in the case of *The Falls Capital Corp. (Re)*, 2015 BCSECCOM 422 at paragraph 49, where the Commission panel said:

We agree that a respondent’s inability to pay a financial sanction is not relevant to the question of whether it is appropriate to make an order under section 161(1)(g). We also agree that a respondent’s inability to pay an order under section 162 should not be determinative of whether such an award should be made. It should be but one of the considerations in determining what orders are appropriate for specific deterrence in the circumstances. A respondent’s ability to pay is not relevant to issues of general deterrence.

[43] Following *The Falls*, the evidence provided by Nickford as to her ability to pay is relevant to our consideration of the appropriate administrative sanction under section 162, but not determinative.

Previous decisions

[44] The executive director referred us to four previous decisions in support of the requested sanctions in this matter: *Re Spangenberg*, 2016 BCSECCOM 180, *Zhong (Re)*, 2015 BCSECCOM 383, *The Falls*, cited above, and *Re Eaglemark*, 2017 BCSECCOM 42.

[45] *Spangenberg* involved a \$171,446 fraud, as well as findings of illegal distribution. The individual respondent, Spangenberg, raised money from investors on the basis of an intent to invest in a business focused on renewable energy financing. Instead, he spent the majority of investors’ funds on personal expenses and utilized corporations that he controlled to help carry out his fraud. Spangenberg received lifetime market prohibitions and was ordered to pay \$171,446 under a section 161(1)(g) order and an administrative penalty of \$225,000 under section 162.

- [46] In *Zhong*, the respondent was found to have traded in securities without being registered to do so, made prohibited representations to investors and committed fraud because of failure to fully disclose the nature of his compensation and the risks of that type of investment. The investors' funds were remitted to arm's length third parties for forex trading as the investors intended and Zhong did not use the investors' money for personal purposes. The 14 investors suffered losses totaling approximately \$400,000. The respondent received lifetime market prohibitions, was ordered to pay approximately \$400,000 under a section 161(1)(g) order and was ordered to pay to the Commission an administrative penalty of \$250,000.
- [47] *The Falls* involved a fraud in the amount of \$517,500. The individual respondent took investors' funds from business bank accounts and used the funds on personal expenses. He used corporations that he controlled to carry out the fraud. He also made false statements to Commission investigators. The individual respondent received lifetime market prohibitions, was ordered to pay \$517,500 under section 161(1)(g) and was ordered to pay an administrative penalty of \$500,000.
- [48] In *Eaglemark*, the two individual respondents, Lian and Keller, were found to have committed fraud, contravened a cease trade order and contravened a temporary order and Keller was found to have traded in securities without being registered to do so. They raised funds from 315 investors, ostensibly to assist a company to resolve outstanding legal and financial impediments and become an issuer in good standing. Instead, Lian spent \$2.4 million of the investors' funds for matters unrelated to the issuer. Lian and Keller received lifetime market prohibitions and were ordered to pay administrative penalties of \$2.4 million each. Lian was also ordered to pay \$2.4 million under section 161(1)(g).

IV. Appropriate Orders

A. Market Prohibitions

- [49] Nickford represents a significant risk to investors and to the integrity of our capital markets. Broad permanent market prohibitions against Nickford are necessary and appropriate to protect our capital markets and the investing public. Broad permanent market prohibitions are also consistent with the market prohibitions invariably imposed on those who commit fraud against British Columbia investors.

B. Section 161(1)(g) order

- [50] The executive director seeks an order under section 161(1)(g) in the amount of \$318,141.
- [51] The purpose of section 161(1)(g) is to deter persons from contravening the Act by ensuring the person does not retain the "benefit" of their wrongdoing.
- [52] We have found Nickford directly obtained at least \$318,141 from investors in contravention of section 57(b), the fraud provision in the Act.

[53] We have found Nickford was enriched by the amount she obtained, using the funds she obtained for her personal expenses. The amount she obtained does not include any amounts returned to investors. As for the assets and payments received by the trustee in bankruptcy from Nickford of approximately \$68,000, the investors' evidence was that they have not received any repayment of the amounts they invested and there is no evidence before us that the trustee in bankruptcy has repaid the investors any portion of the amounts invested by the investors. It is therefore appropriate to order payment of the amount Nickford obtained in full, without deduction.

[54] We find it is in the public interest to make a section 161(1)(g) order against Nickford in the amount of \$318,141.

C. Administrative penalty

[55] An administrative penalty must be proportionate to the conduct of the individual respondent and responsive to their breach of the Act, while still serving as a general deterrent to others who might consider engaging in similar conduct.

[56] The executive director submits an administrative penalty under section 162 of the Act of \$400,000 is appropriate in the circumstances and proportionate to the misconduct and has referred us to the four previous decisions discussed above as being comparable.

[57] We view two of those decisions, *Spangenberg* and *The Falls*, as being most similar in their circumstances to the present case. Both concern the misappropriation of investors' funds for personal expenses and the amounts of the fraud in those cases bracket the amount of the fraud in this case. The administrative penalty in each of those cases is similar in amount to the amount of the funds that were found to have been diverted by the individual respondent for his personal use.

[58] While in Spangenberg's case the administrative penalty against him was approximately \$50,000 higher than the amount diverted to his personal use, that penalty was awarded globally and not split between the finding of fraud and the additional finding that Spangenberg carried out illegal distributions.

[59] In *The Falls*, the administrative penalty is approximately equal to the amount diverted for personal expenses, notwithstanding the additional finding that the individual respondent made false statements to Commission investigators.

[60] We have considered these two decisions as well as the factors reviewed above and the evidence of Nickford's current ability to pay and poor health in coming to our decision on the administrative penalty.

[61] Notwithstanding Nickford's current financial circumstances and poor health, we have concluded her misconduct requires a significant administrative penalty for purposes of both specific and general deterrence but one less than that sought by the executive director.

[62] Balancing the seriousness of Nickford's misconduct, the damage fraud causes to the integrity of the capital markets, the devastating harm (both financial and emotional) suffered by the investors in this case, the aggravating factor of Nickford's poor record keeping with respect to her use of investor funds, and Nickford's personal circumstances, we find that an administrative penalty of \$300,000 is appropriate.

V. Orders

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

1. under section 161(1)(b)(i), all persons cease trading in, and are permanently prohibited from purchasing, any securities or exchange contracts of Lynne Zlotnick Wealth Management;
2. under section 161(1)(d)(i), Nickford resign any position she holds as a director or officer of an issuer or registrant;
3. Nickford is permanently prohibited:
 - a) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;
 - b) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;
 - c) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;
 - d) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;
 - e) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
 - f) under section 161(1)(d)(v), from engaging in investor relations activities;
4. Nickford pay to the Commission \$318,141 pursuant to section 161(1)(g) of the Act; and

5. Nickford pay to the Commission an administrative penalty of \$300,000 under section 162 of the Act.

February 2, 2018

For the Commission

Suzanne K. Wiltshire
Commissioner

Judith Downes
Commissioner

Don Rowlett
Commissioner