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

Citation: Re Hamilton, 2019 BCSECCOM 115 Date: 20190403

Matthew John Hamilton[1]

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Gordon L. Holloway	Commissioner
Hearing Dates	March 5, 2019	
Submissions Completed	March 5, 2019	
Date of Decision	April 3, 2019	
Appearing		
Jennifer Whately	For the Executive Director	
Patrick J. Sullivan	For Matthew John Hamilton	

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) of the *Securities Act*, RSBC 1996, c. 418. The Findings of the panel on liability made on October 9, 2018 (2018 BCSECCOM 290) are part of this decision.

[2] We found that Matthew John Hamilton:

a) concealed his control and direction of a public company (Guru Health Inc.), including through the use of nominee directors and officers;

b) prepared and filed false disclosure documents in respect of Guru with securities regulatory authorities;

c) concealed his identity from critical gatekeepers in the capital markets in respect of activities carried on in respect of Guru;

[1] The original style of cause in this matter was Matthew John Hamilton and Braeden William Sinclair Lichti (aka Braeden Sinclair). In our findings on liability made on October 9, 2018, we found that Lichti did not engage in conduct contrary to the public interest. Therefore, the style of cause has been amended to refer only to the remaining respondent for whom sanctions must be determined.

d) delivered fabricated records to gatekeepers, with an intention that those gatekeepers would provide those records to securities regulatory authorities;

e) engaged in transactions that gave the false impression that trades in Guru shares had occurred involving 27 investors, when, in reality, all shares were paid for by Hamilton and his business partner; and

f) sold secret control over all the shares of Guru.

[3] We found that Hamilton's conduct (as described in paragraph 2) was abusive to the capital markets and that we should exercise our public interest jurisdiction to make orders against him.

[4] The parties made written and oral submissions with respect to the appropriate orders to be made with respect to Hamilton's conduct.

[5] This is our decision with respect to sanctions.

II. Additional evidence

[6] Hamilton filed an affidavit in connection with this sanction hearing.

[7] The affidavit outlined that Hamilton:

- acknowledges the seriousness of his conduct and that he had no intention of harming anyone;

- carried out the deception on the naïve belief that, through the use of nominee directors, he was merely taking advantage of the "friends and family" prospectus exemption;

- upon learning of the commencement of the investigation by Commission staff into this matter:

    - ceased involvement in another project similar to the one that was the subject matter of this hearing; and
    - resigned as a director and/or officer of a number of public entities;

- currently acts as an adviser to a start-up company and he has advised the CEO of that company about this proceeding and the panel's findings; and

- has experienced reputational damage as a consequence of the panel's findings.

III. Position of the parties on sanctions

[8] The executive director sought the following sanctions against Hamilton:

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

(b) that Hamilton be 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;

iv. under section 161(1)(d)(iii), from 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.

[9] Hamilton submitted that prohibitions on him trading in or purchasing securities were not necessary in the circumstances. He further submitted that market prohibitions of two years in duration, including a prohibition against him acting as a director of a company, a promoter or in a management or consultative capacity, were appropriate sanctions in the circumstances.

[10] Finally, Hamilton submitted that if we were to impose a prohibition on him trading in or purchasing securities, that he be permitted a carve-out from that prohibition permitting him to trade in securities for his own account through a registered dealer, provided that a copy of our order is given to that registered dealer. The executive director did not object to this requested carve out.

IV. Analysis

A. Factors

[11] 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.

[12] 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

[13] The executive director submitted that our finding that Hamilton's conduct was abusive to the capital markets means that we should view the risk that he poses to our capital markets in the same manner that we view those who have committed serious offences under the Act.

[14] In particular, the executive director submitted that Hamilton's conduct demonstrated an intention to obfuscate and deceive investors, gatekeepers and securities regulatory authorities and bore many hallmarks of serious fraudulent schemes. He further submitted that Hamilton's conduct was prolonged, premeditated and multi-faceted in nature.

[15] Hamilton acknowledged that his conduct was serious in nature. However, he submitted that the seriousness of a respondent's misconduct is but one of the factors to be considered in determining the appropriate sanctions, and that we should not place undue weight on this one factor.

[16] We agree with the submissions of both parties on this issue.

[17] Hamilton engaged in an extended, premeditated scheme to deceive the capital markets as to the true ownership and control of Guru and his role in connection with that entity. We do not agree that he was merely naïve in his lack of transparency or that his conduct was carried out merely in a mistaken attempt to make use of the "friends and family" prospectus exemption. That excuse does not begin to explain the litany of deception carried out by Hamilton over an extended period of time and in a wide variety of circumstances. His misconduct was intentional. That is extremely serious misconduct and our orders must account for the risk that persons who intend to deceive pose to our

capital markets. However, Hamilton's serious misconduct is only one of the factors that we must take into account in determining the appropriate sanctions in this case.

Harm to investors/enrichment of the respondent

[18] Hamilton received US $190,000 from the secret sale of control of Guru. His affidavit set out that after expenses associated with his conduct relating to Guru, taxes and legal fees associated with this proceeding, he has not retained any benefit from that transaction.

[19] We are not sympathetic to those submissions. We do not think it appropriate to consider the expenses incurred by a respondent in carrying out their misconduct, nor their subsequent legal costs relating to investigations and legal proceedings stemming from their misconduct, in determining the quantum of that respondent's enrichment. We find that Hamilton was enriched by US $190,000 from his misconduct.

[20] This is not a case where we have evidence of specific harm to individual investors. However, the deceptive manufacturing of shell companies causes significant harm to our capital markets.

Aggravating or mitigating circumstances

[21] Hamilton does not have a history of securities regulatory misconduct. There are no aggravating or mitigating circumstances is this case.

Participation in our capital markets and fitness to be a registrant, director or officer

[22] Core obligations for a registrant and for a director or officer of an issuer are honesty, integrity and an ability to act in the best interests of the issuer (or others, in the case of a registrant). Hamilton's misconduct involved a failure to do all of those things. He was a *de factor* officer and director of Guru and clearly engaged in conduct that was not in Guru's best interest nor did he act with honesty or integrity. Our orders must take this into consideration.

Specific and general deterrence

[23] The sanctions that we impose must be sufficient to establish that both the respondent and others will be deterred from engaging in conduct similar to that carried out by Hamilton.

[24] Our orders must also be proportionate to the misconduct (and the circumstances surrounding it) of the respondent.

Previous decisions

[25] The executive director and the respondent both noted that there were no previous decisions from this Commission or from other securities regulatory authorities in Canada that were directly analogous to the circumstances of this case. The respondent submitted that we should look to his unique circumstances to craft sanctions that are appropriate.

[26] The executive director directed us to the decision in *Re Wood*, 2015 BCSECCOM 28 for some guidance in the circumstances.

[27] In *Wood*, the respondent, a registrant, was found to have lied to Commission investigators and to have engaged in conduct contrary to the public interest by secretly trading through offshore accounts during blackout periods imposed by Wood's employer (without any evidence that he was in possession of any material undisclosed information about the issuers in whose securities he traded). Wood's conduct was characterized as being deceitful and lacking integrity. He received market prohibitions of six months for lying to Commission investigators and a further six months for his conduct contrary to the public interest.

[28] While there are some similarities between the conduct of the respondent in *Wood* and Hamilton, in their lack of transparency and dishonesty, we do not see that decision as generally supportive of permanent market prohibitions.

[29] The respondent directed us to several decisions from courts and from securities regulatory authorities across Canada (see: *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149 (CanLII), *Re Hills*, 2007 ABASC 41, *Anderson (Re)*, 2007 ABASC 369, *Re Cerisse*, 2017 BCSECCOM 27) to further the following submissions:

- that our sanctions must be proportionate to the respondent's misconduct and that we must look to the respondent's individual circumstances in order to fashion the appropriate sanctions;

- that even in cases where a respondent's misconduct has been found to be very serious and founded in deception and a lack of integrity, permanent market prohibitions are not always appropriate or necessary; and

- a respondent's lack of experience in the capital markets and remorse for misconduct should play a significant role in our deliberations.

[30] The respondent also directed us to two settlements of this Commission (see *Re Morrice*, 2015 BCSECCOM 139 and *Re Byrne*, 2015 BCSECCOM 138) involving two respondents who were engaged in manufacturing a shell company and using nominee directors to do so. The respondents also misled foreign regulators about various issues relating to the shell company. The respondents agreed to market prohibitions of twelve and four years, respectively, in the settlement agreements.

[31] We note that the historical practice of this Commission is to give settlement decisions little weight in our hearing process as settlements are derived in a different context than decisions arising from a hearing.

Market Prohibitions

[32] This case involves very serious misconduct, which included a litany of deception that Hamilton engaged in over a significant period of time and caused significant harm to our capital markets. That misconduct causes us to consider him to be a significant risk to our capital markets.

[33] However, we must weigh that factor against:

a) Hamilton's expressed remorse (as stated in his affidavit and demonstrated through his voluntary removal from the capital markets upon learning of the investigations into this matter);

b) the lack of harm to individual investors;

c) Hamilton's admissions of his conduct throughout the investigation phase of this matter; and

d) Hamilton's relatively young age.

[34] Those factors lead us to conclude that permanent market prohibitions are not necessary nor appropriate in the circumstances.

[35] The respondent submitted that a prohibition on trading in securities was not required in the circumstances. He submitted that none of the misconduct involved the public trading in securities in a manner that was inappropriate.

[36] We do not agree. While Hamilton did not carry out any of his misconduct through public trading in securities, an important feature of his misconduct was the fabrication of trades to 27 purported investors in Guru. These were not real trades in securities and those actions cause us to have concerns about Hamilton's unfettered right to trade in securities during the period of our market prohibitions. The executive director did not object to providing a carve-out to this prohibition allowing Hamilton to trade securities for his own account through a registrant and we see no reason not to grant that request.

[37] Considering all of the applicable *Eron* factors, including the seriousness of the misconduct and Hamilton's individual circumstances, as set out above, we consider broad market prohibitions lasting for seven years to be in the public interest and proportionate in the circumstances.

V. Orders

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

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

(b) Hamilton is prohibited for seven years:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase securities or exchange contracts for his own account (including one RRSP account, one

TFSA account and one RESP account) through a registered dealer, if he gives the registered dealer a copy of this decision;

(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;

[39] April 3, 2019

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Gordon L. Holloway
Commissioner