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

Citation: Re ecoTECH, 2019 BCSECCOM 199 Date: 20190603

ecoTECH Energy Group Inc., currently known as Dong Fang Hui Le Inc., Colin V. Hall, Rolf Eugster, and Anne Sanders

Panel	Nigel P. Cave	Vice Chair; Commissioner
	Audrey T. Ho	Commissioner
	George C. Glover	Commissioner

Hearing dates	January 14, 2019
Submissions Completed	March 15, 2019
Decision date	June 3, 2019

Appearing

Olubode Fagbamiye Deborah Flood	For the Executive Director
Rolf Eugster	For Rolf Eugster and Colin Hall
Anne Sanders	For Anne Sanders

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, 1996, c. 418.

[2] In a notice of hearing issued May 3, 2018 (2018 BCSECCOM 144), the executive director alleged that:

a) ecoTECH Energy Group Inc. distributed securities while its securities were subject to a cease trade order and omitted to inform investors that the securities it distributed were subject to the order;

b) by engaging in the conduct described in subparagraph (a) above, ecoTECH:

i) breached the terms of the cease trade order; and

ii) made misrepresentations contrary to section 50(1)(d) of the Act; and

c) pursuant to section 168.2 of the Act, as directors or officers of ecoTECH, Colin V. Hall, Rolf Eugster and Anne Sanders, also:

i) breached the terms of the cease trade; and

ii) made misrepresentations contrary to section 50(1)(d) of the Act.

[3] During the hearing, the executive director called one witness (a Commission investigator), tendered documentary evidence and provided written and oral submissions.

[4] During the hearing, the executive director also refined his allegations of contraventions of section 50(1)(d) against ecoTECH (and thereby the individual respondents pursuant to section 168.2 of the Act) by limiting that allegation to certain issuances of shares for cash (as described in further detail below).

[5] No one appeared at the hearing on behalf of ecoTECH. At the set date hearing for this matter, an individual claiming to be a current director of ecoTECH attended on behalf of the corporation. That individual did not appear at the hearing. The individual respondents submitted that they still considered themselves to be directors and officers of ecoTECH and could represent ecoTECH at the hearing. However, the evidence during the hearing indicated that the individual respondents no longer appeared as directors or officers of ecoTECH in the Nevada corporate registry. The executive director also filed an affidavit setting out his service of the notice of hearing upon ecoTECH. We find that ecoTECH received the notice of the hearing pursuant to section 180 of the Act.

[6] With respect to the remaining respondents, Eugster and Sanders attended the hearing. Hall did not attend the hearing but provided a written authorization acknowledging that Eugster represented him at the hearing. The individual respondents tendered documentary evidence and provided written and oral submissions. We note that some of that evidence and those submissions would be equally applicable to ecoTECH during the period relevant to the allegations in the notice of hearing. Given the uncertainty regarding who represents ecoTECH and, as the individual respondents are alleged to have been responsible for ecoTECH's misconduct during the relevant period, we have treated that evidence and those submissions to be applicable to ecoTECH, even though the individual respondents did not expressly state that they were tendering that evidence or those submissions on ecoTECH's behalf.

[7] These are our findings with respect to the liability of the respondents with respect to the allegations in the notice of hearing.

II. Background

[8] ecoTECH is a corporation incorporated in the state of Nevada. Its shares are quoted on the over-the-counter market (OTC) in the United States. ecoTECH is a reporting issuer in British Columbia. ecoTECH changed its name to Dong Fang Hui Le Inc. in 2017.

[9] ecoTECH's public disclosure documents, during the period relevant to the matters in the notice of hearing, describe the corporation as in the business of developing energy technologies that generate sustainable electric power and in other green energy projects.

[10] Hall is currently a resident of Ontario but was a resident of British Columbia during the relevant period. He was the CEO and a director of ecoTECH from November 2010 to April 3, 2017.

[11] Eugster is a resident of British Columbia. He was the CFO of ecoTECH from December 2011 to April 3, 2017.

[12] Sanders is a resident of British Columbia. She was a director of ecoTECH from November 2010 to April 3, 2017, and was identified in corporate filings and other records during that period variously as Vice President, Executive Vice President or President.

[13] In June 2012, staff at the Commission determined that ecoTECH's public disclosure record was deficient as a number of press releases and reports filed with the Securities and Exchange Commission in the United States had not been filed with the Commission as required under National Instrument 51-102 *Continuous Disclosure Obligations*.

[14] Commission staff contacted ecoTECH and spoke to Sanders about these deficiencies.

[15] On July 17, 2012, the executive director issued a cease trade order which required that all trading in the securities of ecoTECH cease until ecoTECH filed all required records in accordance with the Act and rules and the executive director issued an order revoking the cease trade order.

[16] A copy of the cease trade order was sent to ecoTECH and to Sanders on the date that it was issued.

[17] In interviews with Commission staff, each of the individual respondents indicated that they had knowledge of the cease trade order on the date of its issuance or shortly thereafter.

[18] The cease trade order was varied by the executive director on November, 15, 2017 to reflect the change of ecoTECH's name but the order has never been revoked and remains in effect.

[19] Following the date of issuance of the cease trade order, the evidence (including copies of subscription agreements, lock-up agreements, board resolutions, banking records and transfer agent records) clearly establish that ecoTECH:

a) between December 19, 2012 and December 31, 2013, issued 2,009,634 shares to a total of 16 investors for aggregate cash proceeds of $55,100; and

b) issued approximately 73 million shares to 15 persons as compensation for services rendered to ecoTECH at an effective issuance price of $0.045 per share.

[20] The subscription agreements entered into between the cash investors and ecoTECH do not include any mention of the cease trade order.

[21] During their interviews with Commission staff, each of the individual respondents set out their understanding of whether the cash investors were aware of the existence of the cease trade order at the time of making their investment in the shares of ecoTECH. Sanders and Hall stated that they did not believe that any of these investors were aware of the cease trade order at the date of their investment in ecoTECH. Eugster stated that he had no knowledge of the investors' awareness (or not) of the existence of the cease trade order at the date of their investment in ecoTECH as he had not been involved in dealing directly with these investors.

[22] In his capacity as CEO and director of ecoTECH, Hall executed nine of the 16 subscription agreements that ecoTECH entered into in connection with the sale of shares to the cash investors. He also signed directors' resolutions authorizing the issuance of all of the shares described in paragraph 19 above.

[23] In his capacity as CFO of ecoTECH, Eugster executed 15 of the 16 subscription agreements that ecoTECH entered into in connection with the sale of shares to the cash investors. In his interview with Commission investigators, he stated that in signing those agreements he viewed his role as acknowledging receipt of those agreements and ensuring that shares would ultimately be issued to those investors. He was also one of the recipients of the shares issued by ecoTECH in return for services. However, in his interview with Commission investigators he stated that he had no involvement in the decision to issue the shares as described in paragraph 19(b) above, and only learned of that decision after the directors' resolution.

[24] In her capacity as director of ecoTECH, Sanders signed directors' resolutions authorizing the issuance of all of the shares described in paragraph 19 above.

[25] During the hearing, the respondents attempted to file four documents relating to settlement discussions that they had with the executive director prior to the hearing. We heard initial submissions from the parties at the hearing, and allowed them the opportunity to provide further submissions in writing on the admissibility of the four documents. After reviewing the submissions of the parties, we find that the executive director has met his onus of establishing that the four documents in question were entitled to settlement privilege and that that privilege was not waived by the executive director. As a consequence, we did not admit into evidence the four documents in question.

III Analysis and Findings

A. Applicable Law

Standard of Proof

[26] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held (at paragraph 49):

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[27] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

[28] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, paragraph 35.

Misrepresentation

[29] Section 50(1)(d) of the Act sets out that a person "while engaging in investor relations activities or with the intention of effecting a trade in a security, must not … make a statement that the person knows, or ought reasonably to know, is a misrepresentation".

[30] The Act defines "investor relations activities" to mean "any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer."

[31] The Act defines "misrepresentation" to include "an untrue statement of a material fact" and "an omission to state a material fact that is … necessary to prevent a statement that is made from being false or misleading…"

[32] The Act defines "material fact" as "a fact that would reasonably be expected to have a significant effect on the market price or value" of an issuer's securities.

Liability under section 168.2

[33] Section 168.2 of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is an employee, officer, director or agent of the company also contravenes the same provision of the Act, if the individual "authorizes, permits or acquiesces in the contravention".

[34] There have been many decisions which have considered the meaning of the terms "authorize, permits or acquiesces". In sum, those decisions require that the respondent have the requisite knowledge of the corporate contraventions and have the ability to influence the actions of the corporate entity (through action or inaction).

B. Analysis

Positions of Parties

[35] The executive director submitted that:

a) ecoTECH distributed securities for valuable consideration (which is a "trade" as defined in the Act) while the cease trade order was in effect and that those issuances contravened the terms of that order;

b) ecoTECH failed to disclose the existence of the cease trade order to any of the 16 investors who acquired shares of ecoTECH for cash, and in so doing, ecoTECH:

i. omitted to tell those investors a material fact that was required to be stated or necessary to prevent a statement that was made from being false or misleading in the circumstances in which it was made;

ii. the existence of the cease trade order was a material fact that would reasonably be expected to have a significant effect on the value of the ecoTECH shares; and

iii. therefore, ecoTECH contravened section 50(1)(d) of the Act; and

c) each of the individual respondents was a director and/or officer of ecoTECH who authorized, permitted or acquiesced to ecoTECH's contraventions of the cease trade order and section 50(1)(d) of the Act and that, pursuant to section 168.2 of the Act, each of the individual respondents therefore also contravened the cease trade order and section 50(1)(d).

[36] The individual respondents submitted that:

a) the respondents have been prejudiced due to an unreasonable delay in the Commission proceedings in this matter, relying on *R. v. Jordan*, [2016] 1 SCR 631;

b) ecoTECH has never been in violation of the strategic objectives or the public interest mandate of the Commission;

c) the executive director erred in issuing the cease trade order due to an inadequate investigation into whether ecoTECH was in compliance with its continuous disclosure requirements;

d) they did not know that the cease trade order applied to private placements of shares by ecoTECH; and

e) there have been no investor complaints and all investors:

i) executed subscription agreements in which they acknowledged that they were purchasing highly risky securities and that they could lose all of their respective investments;

ii) received shares that were subject to significant resale restrictions in the United States resulting from United States securities laws; and

iii) executed lock-up agreements in which the investors agreed that they would not trade their shares for six months after acquisition.

Analysis

Breach of cease trade order

[37] The facts with respect to the allegation that ecoTECH contravened the cease trade order are straightforward. The cease trade order against ecoTECH was in effect at the time of the issuances of shares by ecoTECH described in paragraph 19 above. Those share issuances were dispositions of securities for valuable consideration (cash or services) and therefore constitute "trades" under the Act. The cease trade order prohibited any trades in securities of ecoTECH, unless the order was revoked in whole or in part (to permit the trade(s) prior to the trade.

[38] That leaves only the respondents' submissions. We will address each of the respondents' submissions in paragraph 36 (a) through (d) above in the section below (as those submissions apply most directly to the allegation that ecoTECH contravened the cease trade order) and the respondents' submission in subparagraph (e) above in the section below dealing with the misrepresentation allegations.

Undue delay

[39] The respondents submit that under principles set out by the Supreme Court of Canada in *Jordan* (and other subsequent decisions from courts across Canada), we should dismiss the allegations in the notice of hearing because the respondents' rights under the *Canadian Charter of Rights and Freedoms* have been violated as a result of undue delay in these proceedings.

[40] These submissions were not specific as to the section or sections of the *Charter* that they say are applicable to the circumstances of this case. Nor did the submissions set out the manner in which the respondents have been prejudiced by the delay. It was clear, however, that in referencing "undue delay", the respondents were speaking to both the time period between the alleged misconduct and the date of the notice of hearing, and the time period following the issuance of the notice of hearing.

[41] Although the respondents' submissions on this matter were not framed in this manner, the question of "undue delay", in addition to a possible *Charter* challenge, may raise questions of procedural fairness under administrative law principles and we will address that issue as well below.

[42] The first and most significant problem with these submissions is that the respondents did not provide any evidence of any prejudice arising from the length of time between 2013 (the period of the misconduct) and the date of the hearing. For example, there was no evidence of documents that had been lost during the period or witnesses (who would have evidence material to the allegations) who were no longer alive or available to give evidence. There was no evidence of any kind to that effect – the only evidence was the actual length of the time periods. This submission would fail (even without our following findings) on this ground alone.

[43] The second problem with these submissions is that they, in theory, seek a remedy (i.e. dismissal of the allegations) under the *Charter*. The respondents' submissions are less than clear on this point. To the extent that the respondents are seeking a remedy under the *Charter*, they are required to comply with the provisions of the *Constitutional Questions Act* RSBC 1996 c. 68. The respondents failed to comply with the notice provisions of that Act. Had there been any merit to these submissions, we would have required the respondents to comply with the provisions of the *Constitutional Questions Act* before considering them in any detail.

[44] The British Columbia Court of Appeal in *British Columbia (Securities Commission) v. Cicci*, 1993 CanLII 902 (BCCA) considered the issue of delay in both bringing allegations following the date of the alleged misconduct and in holding a hearing following the issuance of a notice of hearing. The Court of Appeal rejected submissions that either section 7 or 11 of the Charter was applicable to administrative proceedings such as the matter before us.

[45] We also find that the evidence does not support a finding that, under administrative law principles, the respondents have been subject to undue delay or abuse of process. Although the Court of Appeal in *Cicci* did not engage in a full analysis of the administrative law principles that might arise from a delay in bringing a notice of hearing following the date of the misconduct, they did highlight the role that the limitation period under the Act plays in that regard. The decision noted that the allegations in that case were brought within the limitation period and that there was no evidence that the delay in issuing the notice of hearing arose from some improper purpose.

[46] Just as in *Cicci*, the allegations in the matter before us were brought within the limitation period in the Act, and there is no evidence of an improper purpose causing any delay in issuing the notice of hearing. Nor, as mentioned above, was there any evidence of prejudice.

[47] The allegations in the notice of hearing relate to matters that occurred within the limitation period under the Act. The notice of hearing was issued on May 3, 2018, and the hearing proceeded in a timely manner on January 14, 2019, with all submissions from the parties being completed by March 15, 2019. As noted above, the respondents did not provide any evidence of any prejudice arising from that timeline.

No violation of the Commission's principles and that the cease trade order should not have been issued

[48] The respondents raised a number of related submissions, essentially to the effect that:

a) ecoTECH met the spirit of the Commission's ongoing disclosure obligations (prior to the issuance of the cease trade order);

b) the market, at the time of the cease trade order, had adequate knowledge of all material events relating ecoTECH; and

c) for these and a number of other reasons, the cease trade order should not have been issued by the executive director.

[49] All of these submissions are irrelevant. Whether the market did or did not have sufficient information about ecoTECH, arising from its disclosure documents filed in the United States or Canada, is not relevant. Nor is the validity of the issuance of the cease trade order relevant. The fact is that the cease trade order was in existence during the period in which ecoTECH breached its terms. There is no question that the Commission had the jurisdiction to issue it when it did. It is not open to the respondents, after the fact and after a breach of the terms of that order, to argue whether the order was necessary in the first instance. The Act provides mechanisms for both a review of a decision by the executive director as well as an opportunity for someone subject to an order to apply to the Commission for a variation or revocation of that order under section 171 of the Act. None of the respondents availed themselves of that opportunity.

Mistake of law

[50] The respondents' submissions that they were not aware that the cease trade order prohibited ecoTECH from issuing its shares in private placements (either for cash or for services), amounts to a form of "mistake of law" argument.

[51] The respondents did not tender any evidence in support of this submission (i.e. the basis upon which they formed this conclusion, what steps they took to determine the legal effect of the order, etc.). They point to the fact that investors were asked to enter into lock-up agreements as evidence that the respondents were trying to prohibit the free trading of these shares. Without evidence of why the investors were asked to enter into the lock-up agreements, any conclusion at this point would be pure speculation. Indeed, there could just as easily have been commercial reasons for the agreements. In any event, a cease trade order cannot be satisfied by an issuance of securities to investors who contract not to resell those securities. Nor is the existence of the lock-up agreements conclusive as to any mistake of law in the minds of the respondents. A "mistake of law" may have an impact on sanction for a contravention but does not act as a defence to a finding of liability for having committed the contravention.

[52] As a consequence, we find that ecoTECH breached the cease trade order with respect to each of the issuances of shares described in paragraph 19 above.

Liability under section 168.2 of the Act

[53] The evidence was clear the each of the individual respondents was a director and/or officer of ecoTECH at the time of its breaches of the cease trade order.

[54] The evidence was also clear that each of Hall and Sanders, as directors of ecoTECH, were involved in passing directors' resolutions issuing the shares associated with each of the trades in the shares of ecoTECH that contravened the cease trade order. Therefore each of them authorized, permitted or acquiesced to ecoTECH's misconduct. Pursuant to section 168.2 of the Act, we find that each of Hall and Sanders also breached the cease trade order with respect to the issuances of securities described in paragraph 19 above.

[55] The evidence with respect to Eugster's involvement in the trades in securities, described in paragraph 19 above, differs between the shares issued for cash and the shares issued for services. With respect to the shares of ecoTECH issued for cash, it is clear that Eugster was responsible for signing subscription agreements associated with those trades and had an important administrative role in those transactions. He permitted and acquiesced to those transactions. The evidence suggests that his role was fundamentally different with respect to the shares of ecoTECH issued for services. In those transactions, there is no evidence that he authorized, permitted or acquiesced to ecoTECH's issuance of shares in contravention of the cease trade order. Therefore, we find that Eugster, pursuant to section 168.2, breached the cease trade order with respect to the issuances of securities described in paragraph 19(a) above only.

Misrepresentations

[56] The executive director refined the allegations of contraventions of section 50(1)(d) of the Act to be limited to only the issuances of shares for cash by ecoTECH described in paragraph 19 above.

[57] The evidence establishes that the cash investors were not made aware of the existence of the cease trade order prior to their investment in the shares of ecoTECH.

[58] Section 50(1)(d) of the Act sets out that a person "while engaging in investor relations activities or with the intention of effecting a trade in a security, must not … make a statement that the person knows, or ought reasonably to know, is a misrepresentation". The definition of "misrepresentation" provides that a misrepresentation may occur by omission of a material fact as well as by express statement of a material fact.

[59] First, we find that ecoTECH engaged in investor relations activities. That term is defined to mean "any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer." ecoTECH engaged in investor relations activities by employing finders, and providing the finders with the necessary documentation to meet with the cash investors and arrange for the sale of ecoTECH shares to them.

[60] Secondly, we find that ecoTECH omitted to tell the cash investors about the cease trade order.

[61] Lastly, we find that the existence of the cease trade order was a "material fact". This specific issue was addressed by a panel of this Commission in *Oriens Travel & Hotel Management Corp.*, 2014 BCSECCOM 91 which found that the fact that a security was issued in contravention of a cease trade order of the Commission and that that order imposed a prohibition on resale of the securities by the investors was a fact that could reasonably be expected to have a significant effect on the value of those securities. We agree with that finding.

[62] A number of the respondents' submissions set out above could be applicable to the misrepresentation allegation. We will not restate what we said above other than to say that we do not find any of the respondents' submissions to be defences to the allegation of contraventions of section 50(1)(d).

[63] The respondents further submitted that the cash investors were subject to resale restrictions imposed by US securities laws and entered into agreements with ecoTECH in which they acknowledged that there were significant risks associated with the investment and that they could lose all of their money. They also entered into lock-up agreements under which they contractually agreed not to trade their securities for six months.

[64] While these may be accurate descriptions of the US resale rules and the contractual framework agreed to by the cash investors, none of these submissions is responsive to the allegations of misrepresentation.

[65] An investor acknowledging the significant risk of loss associated with an investment (up to and including full loss of the investment) is not equivalent to acknowledging or authorizing that the issuance of securities is prohibited or that the investment has been or may be sold to them through misrepresentation. One of the acceptable risks associated with an investment (no matter how risky) cannot be the risk of misrepresentation.

[66] That the investors were subject to significant resale restrictions imposed by US securities laws and entered into lock-up agreements does not mean that a misrepresentation was not made (by omission) to those investors. The regulatory resale restrictions and lock-up agreements are not responsive to the fact that the shares were issued in breach of the cease trade order nor that, by operation of the cease trade order (rather than by contract), the acquired shares could not be traded in Canada.

[67] Therefore, we find that ecoTECH contravened section 50(1)(d) with respect to 2,009,634 shares issued to a total of 16 investors for aggregate proceeds of $55,100.

Liability under section 168.2 of the Act

[68] As set out above, the evidence was clear that each of the individual respondents was a director and/or officer of ecoTECH at the time of its contraventions of section 50(1)(d).

The evidence was clear that each of the individual respondents were directly involved in ecoTECH's issuance of shares to the cash investors. In the case of Hall and Sanders, each was responsible for passing directors resolutions authorizing the issuance of shares. Hall and Sanders were aware that the cash investors were not told of the existence of the cease trade order. Hall and Sanders clearly authorized and permitted the corporation's contraventions of section 50(1)(d). In Eugster's case, he was responsible for executing 15 subscription agreements to facilitate the sale of shares to those cash investors. In doing so, Eugster was instrumental in one of the last necessary steps that formed part of the private placements that allowed ecoTECH to issue shares to those 15 cash investors. Eugster's evidence was that he did not know if those investors were aware of the existence or not of the cease trade order. The concept of "acquiescence" must include situations in which an officer of a corporation is directly engaged in a transaction in which such information is a material fact and that officer does not take steps to ensure that those investors are made aware of that material fact. By engaging in this conduct, Eugster authorized, permitted or acquiesced to ecoTECH's contraventions of section 50(1)(d).

[69] Therefore, pursuant to section 168.2 of the Act, we find that each of Hall, Eugster and Sanders also breached section 50(1)(d) in the same manner as ecoTECH.

IV Conclusion

[70] In conclusion, we find that:

a) ecoTECH breached a cease trade order of the Commission with respect to

   i) 2,009,634 shares issued to a total of 16 investors for aggregate proceeds of $55,100; and

   ii) approximately 73 million shares issued to 15 persons as compensation for services rendered to ecoTECH at an effective issuance price of $0.045 per share;

b) ecoTECH contravened section 50(1)(d) of the Act with respect to 2,009,634 shares issued to a total of 16 investors for aggregate proceeds of $55,100;

c) each of Hall and Sanders authorized, permitted or acquiesced to ecoTECH's contraventions as set out above, and therefore, pursuant to section 168.2 of the Act, they also breached the cease trade order and section 50(1)(d) in the same manner as ecoTECH; and

d) Eugster authorized, permitted or acquiesced to ecoTECH's contraventions set out in subparagraph (a)(i) and (b) above, and therefore, pursuant to section 168.2 of the Act, he also breached the cease trade order and section 50(1)(d) in the same manner as ecoTECH (in subparagraphs (a)(i) and (b), above).

V Submissions on Sanctions

[71] We direct the executive director and the respondents to make their submissions on sanction as follows:

By June 24, 2019	The executive director delivers submissions to the respondents and to the secretary of the Commission.
By July 8, 2019	The respondents deliver response submissions to the executive director and the secretary to the Commission. Any party seeking an oral hearing of the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By July 15, 2019	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

June 3, 2019

For the Commission

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

George C. Glover, Jr.
Commissioner