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

Citation: Re DominionGrand, 2019 BCSECCOM 335 Date: 20190920

DominionGrand II Mortgage Investment Corporation, DominionGrand Investment Fund Inc., Donald Bruce Wilson, David Scott Wright and Patrick K. Prinster

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	George C. Glover, Jr.	Commissioner
Hearing Date	August 28, 2019	
Date of Decision	September 20, 2019	
Appearing		
Derek Chapman Deborah Flood	For the Executive Director	
Patrick K. Prinster	For himself	
Donald Bruce Wilson	For himself	

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 April 30, 2019 (2019 BCSECCOM 150) are part of this decision.

[2] We found that:

(a) DominionGrand II Mortgage Investment Corporation (MIC II) contravened section 57(b) of the Act with respect to 19 investors for $610,134[1];

[1] During oral submissions, counsel for the executive director indicated that our findings contained an error in paragraph 100 and that the proper numbers should have referenced 18 contraventions of section 57(b) of the Act with respect to $604,530. We agree that the numbers in paragraph 100 of our Findings were incorrect and that the numbers provided by the executive director are the correct numbers. Our decision is based on the corrected figures.

(b) DominionGrand Investment Fund Inc. (MIC III) contravened section 57(b) of the Act with respect to 21 investors for $506,693;

(c) each of David Scott Wright, Donald Bruce Wilson and Patrick K. Prinster contravened section 57(b) of the Act with respect to 19 investors for $610,134; and

(d) both Wright and Prinster contravened section 57(b) of the Act with respect to 21 investors for $506,693.

[3] Wright, Wilson, Prinster and the executive director provided written submissions on the appropriate sanctions in this case. Wilson, Prinster and the executive director provided oral submissions on the appropriate sanctions in this case.

II. Position of the Parties

[4] The executive director sought the following orders under sections 161 and 162 of the Act:

(a) orders providing for permanent market prohibitions under section 161 of the Act against each of the respondents;

(b) orders under section 161(1)(g) of the Act that:
- MIC II, Wright, Wilson and Prinster be jointly and severally liable to pay $567,083 to the Commission; and
- MIC III, Wright and Prinster be jointly and severally liable to pay (in the case of Wright and Prinster, a further) $500,961;

(c) orders under section 162 of the Act that:
- Wright and Prinster pay an administrative penalty of between $400,000 and $500,000; and
- Wilson pay an administrative penalty of between $200,000 and $250,000.

[5] The individual respondents did not suggest sanctions that they felt would be appropriate in the circumstances. As will be discussed in greater detail below, they did make general submissions that the sanctions sought by the executive director were excessive and not in the public interest.

[6] In his written and oral submissions, Wilson asked the panel to consider carve outs to any market prohibitions that we might impose to allow him to be: a) registered in some capacity under the Act; and b) a director, officer and shareholder in a company in which all of the other directors, officers and shareholders are members of his family or a "close group".

[7] During his oral submissions, Prinster appeared to suggest that he did not think that it was appropriate to ban him from acting as a director or officer of a company.

III. Analysis

A. Factors

[8] 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.

[9] 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

[10] The Commission has repeatedly found that fraud is the most serious misconduct under the Act. As noted in *Manna Trading Corp Ltd. (Re)*, 2009 BCSECCOM 595, "nothing strikes more viciously at the integrity of our capital markets than fraud".

[11] Notwithstanding that, the fraud in this case was not the most egregious form of fraud that this Commission sees. This case involved the diversion of investor funds from the purpose represented to the investors (to be invested principally in mortgages secured against real estate). Investor funds were, for the most part, diverted to companies related to the corporate respondents. We had little evidence of the purpose to which those funds were put nor, as will be discussed below, was there evidence of direct personal enrichment of the individual respondents. The evidence, such as it was, suggested that all of the misconduct occurred, in the broad sense, within the context of the respondents carrying out a real business and all of this differentiates the seriousness of the

misconduct, to some extent, from cases of fraud such as those which involve Ponzi schemes, direct theft of investor funds or wholly fictitious securities.

Harm to investors/enrichment

[12] There is no question that investors have been substantially harmed by the respondents' misconduct. All of the approximately $1.1 million raised from investors, other than a small amount which was paid to investors as purported returns, has been lost. We heard testimony from two investors as to the financial and other impacts of these losses.

[13] The corporate respondents were enriched by their misconduct. They were the direct recipients of the investors' funds.

[14] Records from the corporate respondents' bank accounts showed that the vast majority of these funds were paid to related corporations. During the hearing, the individual respondents submitted that these related companies were paid these amounts as reimbursements of start-up costs associated with the businesses of the corporate respondents. However, there was no evidence tendered in support of that assertion. There was also no evidence that any of the individual respondents (other than an immaterial amount) were enriched, directly or indirectly, by this diversion of investor funds. There was no evidence that the individual respondents beneficially owned these related companies or any documentary evidence of what those entities did with those funds.

Risk to investors and the markets and fitness to be a director or officer

[15] Those who commit fraud, because of the *mens rea* associated with the misconduct, represent a significant risk to our capital markets.

[16] The executive director submitted that the risk posed to the capital markets by the individual respondents was heightened by the following factors:

- that a witness who was hired as the CFO of MIC II had resigned that position and expressed concerns to the individual respondents about the use of investor funds in a related mortgage investment corporation that the individual respondents were running;

- notwithstanding the concerns expressed by this witness, the individual respondents continued to operate the corporate respondents in a similar manner (which resulted in the diversion of investor funds from their intended purpose);

- the Commission cease traded MIC II in December 2012 as a result of the offering memorandum associated with the sale of shares in MIC II not being in compliance with securities laws; and

- rather than rectify the deficiencies associated with the offering memorandum for MIC II, Wright and Prinster then commenced selling shares in MIC III.

[17] These factors are additional "red flags" as to the potential risk that the individual respondents pose to our capital markets as, despite warnings and concerns expressed to them from multiple sources, the individual respondents continued in their non-compliant conduct.

[18] We are also concerned about the role that the individual respondents played as actual or *de facto* officers and directors of the corporate respondents[2]. At the heart of this case was the diversion of corporate funds by the corporate respondents. That diversion occurred at the direction and control of the individual respondents. This case highlights the very specific risks that the individual respondents pose when they act in the capacity as directors and officers of corporate entities.

Mitigating or aggravating factors; past misconduct

[19] None of the respondents has any history of securities related misconduct.

[20] The executive director submitted that there were no aggravating or mitigating circumstances.

[21] The individual respondents submitted that the following should be considered mitigating factors:

- they provided disclosure to investors relating to the risks associated with investing in the corporate respondents;

- they complied with cease trade orders issued by the Commission with respect to trading in securities of MIC II and MIC III;

- they entered into an undertaking with the Commission to cease raising funds for real estate related entities and have since complied with the terms of the undertaking; and

- the misconduct in this case was simply a failure to provide the investors with better disclosure related to the use of investor funds.

[22] We do not agree that any of these factors represent a mitigating factor. Compliance with the cease trade orders and their undertaking is merely compliance, which is not a mitigating factor. We reject the notion that the misconduct in this case was simply a failure to provide better disclosure to investors. As set out in our Findings, all of the requisite elements of fraud were found in this case, including, most importantly with respect to this point, the subjective knowledge of the *actus reus*.

[23] Wilson filed an affidavit setting out his current financial circumstances. He submitted that we should consider his financial circumstances as a mitigating factor. We will address this issue in further detail below.

[2] Prinster was never a director or officer of either of the corporate respondents, but we found that he was a *de facto* officer and/or director of both.

Specific and general deterrence

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

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

Prior orders in similar circumstances

[26] The executive director directed us to two decisions of the Commission as guidance as to the appropriate sanctions in this case: *Re Zhong*, 2015 BCSECCOM 383 and *Re Braun*, 2019 BCSECCOM 65.

[27] In *Braun*, the individual respondents were found to have committed fraud with respect to two investors with investments totaling $450,000. The panel found that the misconduct in that case was exacerbated by the predatory nature of the misconduct against a vulnerable investor. With respect to the individual respondent, A. Braun, the panel made orders against him imposing permanent market prohibitions, a disgorgement order of $325,000 (being the amount that he obtained from his misconduct) and an administrative penalty of $450,000.

[28] In *Zhong*, the respondent was found to have engaged in trading without being registered under the Act, made misrepresentations and committed fraud. The respondent represented to investors that he would invest their funds in foreign exchange trading. While the investors' funds were deposited into currency trading accounts, the respondent deceived investors about the risks of their investment and his compensation. In total, 14 investors were found to have lost approximately $400,000 as a consequence of the respondent's misconduct. The panel made orders against Zhong imposing permanent market prohibitions, a disgorgement order of approximately $400,000 and an administrative penalty of $250,000.

[29] While the quantum of the investors' losses in this case were more significant than in either of these two decisions, we find the nature of the respondents' misconduct to be different, and less serious, than that of the respondents in *Braun* and *Zhong.* In *Braun*, the fraudulent misconduct resulted in the misappropriation of investor funds for the personal use of the individual respondents. Further, there was a significant aggravating factor in that the respondent was found to have preyed upon a vulnerable investor. In *Zhong*, there were findings of significant misconduct in addition to fraud (i.e. the respondent's unregistered trading and misrepresentations). Given the distinction between these cases and the one before us, our sanctions in this case must reflect the difference in the seriousness of the misconduct from that of *Braun* and *Zhong*.

C. Analysis of appropriate orders

Market prohibitions

[30] The executive director submitted that broad market prohibitions of permanent duration against each of the respondents was appropriate in the circumstances.

[31] We agree with the executive director's submissions on this point. As noted above, we view those who commit fraud to represent a significant risk to our capital markets. In this case, there are additional "red flags" in the conduct of the respondents that heighten our concern in this regard.

[32] Wilson and Prinster submitted that we should provide for carve-outs from any market prohibitions that would allow them to act as directors and/or officers. Wilson was more specific and submitted that the carve-out be limited to acting as a director, officer and shareholder in a company in which all of the other directors, officers and shareholders are members of his family or a "close group". Wilson also submitted that we should provide for a carve-out to allow him to be registered under the Act.

[33] The requests for these carve-outs were founded on submissions that permanent prohibitions on them acting as a director and/or officer of a company and a registrant would prevent the individual respondents from earning a living, from repaying investors and paying any administrative penalties that we might impose.

[34] We do not agree with Wilson's and Prinster's submissions in this regard.

[35] There was no evidence that broad market prohibitions would materially impair the individual respondents' ability to make a living. None of the individual respondents was registered under the Act nor have they been during any recent period of time. None of the individual respondents is or has been employed in the capital markets. There was abundant evidence that they were all experienced businessmen in various real estate related fields.

[36] With respect to their request that they be allowed to act as directors and/or officers (even in the limited capacity suggested by Wilson), we have specific and heightened concern about the risk that the individual respondents pose to our capital markets when acting as an actual or *de facto* director and/or officer. The misconduct in this case was carried out while the three of them were acting in that capacity in "closely held" and controlled companies. The diversion of corporate assets while acting in a fiduciary capacity was at the heart of this case. As a consequence, we are not prepared to grant any of the carve-outs requested by individual respondents. We note that section 171 of the Act allows respondents to apply for a variance of our orders at some point in the future. This would provide the individual respondents with an opportunity, at that time, to demonstrate why a specific variance might not be prejudicial to the public interest in the specific facts and circumstances of that application.

[37] Our orders will provide broad market prohibitions against each of the respondents of a permanent duration.

Section 161(1)(g) orders

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

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

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

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

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

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

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

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

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

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

[41] The evidence established that the corporate respondents directly obtained the following amounts raised from investors through their respective fraudulent misconduct:

- MIC II - $604,530
- MIC III - $506,693

[42] Accordingly, we could make an order under section 161(1)(g) of the Act against MIC II in the amount of $604,530 and against MIC III in the amount of $506,693.

[43] However, as noted in *Poonian,* in determining the quantum of an order under section 161(1)(g), we may take into account amounts returned by the respondent to investors. In this case, the evidence established that MIC II returned $43,051 to investors and MIC III returned $5,732 to investors. We will reduce our orders against the corporate respondents under section 161(1)(g) by those amounts to $561,479 and $500,961, respectively.

[44] There was no evidence that the individual respondents directly obtained any of the amounts derived from the misconduct in this case. However, as noted above in paragraph 5 of the principles from *Poonian*, section 161(1)(g) specifically allows us to make orders (including joint and several orders) in circumstances where a respondent has "indirectly" obtained amounts from their misconduct.

[45] This case raises the sometimes challenging issue of when is it appropriate for us to consider that a respondent has indirectly obtained amounts derived from misconduct?

[46] The evidence was clear that Wilson, Wright and Prinster were the actual or *de facto* directors and officers of MIC II and controlled all of its affairs and its bank accounts. It was also clear that Wright and Prinster were the actual or *de facto* directors and officers of MIC III and controlled all of its affairs and its bank accounts.

[47] However, what is lacking in this case is any evidence that any of the individual respondents personally benefitted, directly or indirectly, from their fraudulent misconduct. This is not a case where the corporate respondents can be said to be the *alter egos* of the individual respondents. Further, there was no evidence that any of the individual respondents had any economic interest in either MIC II or MIC III. There was no evidence of who owned or controlled any of the entities to which MIC II and MIC III forwarded investor funds and no evidence to suggest that any of the individual respondents personally benefitted, directly or indirectly, from any of those funds.

[48] A review of the principles set out by the Court of Appeal in *Poonian* (and set out above in paragraph 39) sets out that in order for us to find that an individual respondent indirectly obtained funds derived from misconduct (and thus make an order under section 161(1)(g)) there must be evidence of more than just direction and control of entities which commit the misconduct. Indeed, the purpose of section 161(1)(g), as outlined by the Court of Appeal, is to ensure the person at issue "does not retain the "benefit" of their wrongdoing". There must be some evidence or indicia of personal benefit to the respondent before an order can be made under this section. In this case, there was no evidence of any "benefit" derived by the individual respondents, and we are therefore unable to make any orders under section 161(1)(g) against any of the individual respondents.

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

[49] Given the finding above, it is unnecessary to consider step 2 of this analysis.

Administrative penalties

[50] The executive director asked that we make orders under section 162 against the individual respondents as follows:

- Wright and Prinster pay an administrative penalty of between $400,000 and $500,000; and

- Wilson pay an administrative penalty of between $200,000 and $250,000;

and the executive director cited the decisions of *Braun* and *Zhong* in support of those amounts.

[51] The executive director did not seek an order under section 162 against either of the corporate respondents.

[52] As noted above, Wilson provided affidavit evidence which set out his limited income and financial circumstances. That evidence was not challenged by the executive director at the sanctions hearing and we accept that evidence.

[53] Evidence of a respondent's ability (or lack thereof) to pay financial sanctions is something that we must consider and we have taken that into account in determining the appropriate financial sanctions to order against Wilson, but his financial circumstances are not, in and of themselves, determinative of what financial sanctions should be ordered. Impecuniosity is clearly relevant to issues of specific deterrence but of no relevance to issues of general deterrence.

[54] As set out above, we find that the individual respondents' misconduct in this case was less serious (or lacked an aggravating factor) than that of the respondents in *Braun* and *Zhong*. Our orders take that into account. Our orders also take into account the fact that Wilson was not involved in the misconduct relating to MIC III and his current financial circumstances.

[55] Other important considerations in this case include that significant investor losses and the lack of evidence of personal enrichment.

[56] Taking all of this into account we consider that orders under section 162 of $250,000 against each of Wright and Prinster and $150,000 against Wilson to be in the public interest and appropriate and proportionate in the circumstances.

IV. Orders

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

Wilson

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

(b) Wilson is permanently prohibited:

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

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

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

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

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

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

(c) Wilson pay to the Commission an administrative penalty of $150,000 under section 162 of the Act;

Wright

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

(e) Wright is permanently prohibited:

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

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

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

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

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

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

(f) Wright pay to the Commission an administrative penalty of $250,000 under section 162 of the Act;

Prinster

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

(h) Prinster is permanently prohibited:

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

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

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

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

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

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

(i) Prinster pay to the Commission an administrative penalty of $250,000 under section 162 of the Act;

MIC II

(j) MIC II is permanently prohibited:

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

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

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

(k) MIC II pay to the Commission $561,479 pursuant to section 161(1)(g) of the Act; and

MIC III

(l) MIC III is permanently prohibited:

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

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

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

(m) MIC III pay to the Commission $500,961 pursuant to section 161(1)(g) of the Act.

September 20, 2019

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

George C. Glover, Jr.
Commissioner