

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

Citation: Re Malone, 2016 BCSECCOM 257

Date: 20160803

William Raymond Malone

Panel	Nigel P. Cave George C. Glover, Jr. Gordon L. Holloway	Vice Chair Commissioner Commissioner
Hearing Dates	March 14 and 15, 2016	
Submissions Completed	May 12, 2016	
Date of Findings	August 3, 2016	
Appearing	Jennifer Whately For the Executive Director	

Findings

I. Introduction

- [1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- [2] In a notice of hearing issued October 8, 2015 (2015 BCSECCOM 374), the executive director alleged that the respondent acted as a de facto director and/or officer of an issuer and conducted investor relations activities on behalf of such issuer, in breach of an order (Order) of this Commission made on January 29, 2009 against the respondent.
- [3] During the hearing the executive director called two witnesses, a Commission investigator and one investor, tendered documentary evidence and provided written and oral submissions.
- [4] Although he had notice of the hearing, the respondent did not attend the hearing, tender any evidence or provide any written or oral submissions.

II. Background

- [5] Malone is a resident of Richmond, British Columbia.
- [6] On January 29, 2009 Malone entered into a settlement agreement with the executive director pursuant to which he agreed to the terms of the Order.

- [7] In the settlement agreement, it was agreed that an issuer named Canadian Rockport Homes International (Rockport) made
- a) forward looking projections to investors in an offering memoranda, business plans and an executive summary that were not reasonable under the circumstances; and
 - b) misleading claims in newsletters that were mailed to investors and posted on a website, in the business plans and in the executive summary.
- [8] Further, it was agreed that Rockport acted contrary to the public interest in making the projections and breached section 50(1)(d) of the Act by disseminating and publishing the misleading claims. Malone, as an officer and director of Rockport, agreed that he had authorized, permitted or acquiesced to Rockport's contravention of the Act and its conduct contrary to the public interest. Malone agreed to the terms of the Order.
- [9] Under the terms of the Order, Malone was prohibited from acting as a director or officer of any issuer and from engaging in investor relations activities of any issuer before the later of
- a) three years from the date of the Order; and
 - b) the date Malone successfully completed a course of study satisfactory to the executive director concerning the duties and responsibilities of directors and officers.
- [10] As of January 26, 2015, the respondent confirmed in writing to Commission staff that he had not completed a course of study of the type required by the terms of the Order. Therefore, the terms of the Order remained in effect until at least January 26, 2015.
- [11] In March 2010, Malone incorporated a British Columbia company named Lion King Resources Inc. (Lion King). Lion King is not a reporting issuer in British Columbia.
- [12] The initial director of Lion King was Malone's son (RM).
- [13] In an interview with Commission staff under oath, RM confirmed that Malone was the founder of Lion King and that Malone had incorporated the company.
- [14] The business of Lion King was to promote and develop an iron ore property in the Atacama region in Chile.
- [15] In an interview with Commission staff under oath, Malone confirmed that he had previously done business in Chile and had numerous contacts within the country. He outlined that he looked at a number of opportunities for mining and exploration properties in Chile.

- [16] RM had never been a director or an officer of a company prior to his appointment as a director of Lion King. RM also had no previous experience in connection with the mining business prior to his appointment.
- [17] Following his appointment to the board of Lion King, RM did take the Canadian Securities Course and did take a temporary position with a silver mining company, both with a view to furthering his education.
- [18] In October 2011, five additional directors were added to the board of directors of Lion King. In April 2013, a seventh director was added to the board of directors of Lion King.
- [19] Lion King only ever had one in-person directors' meeting, held in Edmonton on March 16, 2013. Minutes from this meeting set out that Malone attended and participated at that meeting. RM did not attend or participate in this meeting. This was also confirmed to Commission staff by one of the other Lion King board members.
- [20] Malone was responsible for certain other aspects of Lion King's operations including:
- a) he commissioned the preparation of a technical report on Lion King's iron ore property;
 - b) he was an authorized signatory on Lion's King's bank account, his residential address was the address to which bank statements were sent and that address also appeared on Lion King's cheques;
 - c) he was responsible for identifying, visiting and negotiating contracts with respect to Lion King's acquisition of interests in mining properties in Chile; and
 - d) he sought and received legal advice on behalf of Lion King.
- [21] In September 2012, the Commission cease traded the securities of Lion King due to issues with a mining technical report.
- [22] In early 2013, Lion King engaged in negotiations with a third party with respect to a joint venture. Texts were exchanged, including RM and another director, with respect to Lion King board approval of the joint venture. The following is the text sent by RM in this connection:
- Great. You know my vote is essentially bills vote ken so whatever he wants to do thats how I will vote, thanks
- The "bill" referred to in the text above is Malone.
- [23] Various e-mails to and from other board members of Lion King were tendered into evidence which suggest that the Lion King board members viewed Malone as being a key member of the mind and management of Lion King and all its business activities.

- [24] Investor K testified that he was engaged by Malone to sell Malone's house. Shortly thereafter, in July 2010, Investor K purchased 33,333 shares of Lion King for \$5,000.
- [25] Investor K testified that he was introduced to the opportunity to purchase securities of Lion King by Malone, that he never spoke to anyone else about that opportunity. Further, Investor K testified that Malone explained to him the nature of Lion King's project in Chile and even provided Investor K with samples of sand taken from the property that contained iron ore.

III. Analysis and Findings

A. Applicable law

- [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:

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, para. 35.

B. Positions of the parties

- [29] The executive director submits that Malone engaged in investor relations activities in his dealing with Investor K in breach of the terms of the Order.
- [30] The executive director also submits that Malone was either or both a de facto director or officer of Lion King in breach of the terms of the Order.
- [31] The executive director submits that the totality of Malone's activities acting on behalf of Lion King must be considered in determining whether Malone was a de facto director and/or officer. In particular, the executive director submits that the previous securities regulatory decisions in *Alexander (Re)*, 2007 BCSECCOM 645 and *Momentas Corporation*, 2006 29 OSCB 7408, establish a framework (discussed below) for considering this issue and Malone's conduct fits within this established framework. The executive director also submits that the facts of this case are similar to those in *Re Jardine*, 2016 BCSECCOM 82 where the respondent was found to have acted as a de facto director or officer of an issuer.

C. Analysis

Breach of Order through investor relations activities

- [32] Section 1(1) of the Act defines “investor relations activities” to be “any activities or oral or written communications, by or on behalf of an issuer ..., that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer ...”
- [33] The shares of Lion King sold to Investor K are clearly securities under the Act.
- [34] It is also clear, even without considering whether Malone was acting as a director or officer of Lion King, that at the time of his conversations with Investor K Malone was engaged in a material capacity on behalf of the issuer.
- [35] Finally, the oral testimony of Investor K wherein he described the nature of his conversations with Malone, including Malone’s description of Lion King’s property and that property’s prospects, it is evident that said conversations were designed to promote the purchase of Lion King securities.
- [36] The Order was clearly in effect at the time of Malone’s conduct with respect to Investor K.
- [37] Investor K is a resident of British Columbia.
- [38] Therefore, we find that Malone breached the Order while the Order was in effect by conducting investor relations activities in the Province with respect to the sale of Lion King shares to Investor K.

Breach of Order by acting as a de facto director or officer

- [39] The Order contains a prohibition on Malone acting as a director or officer of any issuer during the currency of the Order.
- [40] There is no evidence that Malone was ever formally made a director or officer of Lion King. The question is whether Malone, without this formal appointment, was nonetheless acting as a de facto director or officer of Lion King.
- [41] In *Alexander*, the Commission considered the respondent Alexander’s involvement in managing a company’s business in an effort to determine whether he had breached an order by acting as a de facto director or officer of that company. The panel’s analysis covered two prongs of business “management”:
- (a) management of operational activities, including managing expenditures, organizational structure, exploration program, contracts, budgets, relationships with governments;
 - (b) management of financing activities and soliciting potential investors.

[42] In the appeal of *Alexander*, the British Columbia Court of Appeal affirmed the panel's decision finding that Alexander acted as a de facto director and officer, cited the test in *Momentas Corporation* (2006), 29 OSCB 7408 at paras. 77-79:

77 Mr. Alexander submits that the majority erred in its finding that he was actively managing the Project on behalf of Pinewood during the material time by failing to examine the evidence within the context of the legal test for a finding that an individual acted as a *de facto* director or officer. That test was articulated by the Ontario Securities Commission in *Re Momentas Corp.*, 2006 LNONOSC 778 at para. 101: "whether, under the particular circumstances, the alleged director is an integral part of the mind and management of the company, taking into account the entirety of the alleged director's involvement within the context of the business activities at issue (*Re World Stock Exchange* (2000), 9 A.S.C.S. 658 [Alta. Securities Comm.] at 18)." In *Re IMAGIN Diagnostic Centres Inc.*, 2010 LNONOSC 632, the Ontario Securities Commission said (at para. 138) that a *de facto* director is one "... who maintains control over the affairs of the company and exercises the powers of a director and/or officer ...".

78 In *Momentas Corp.* (at para. 102), the commission listed the following factors that were identified in *World Stock Exchange* for consideration in applying the test:

- a) appointed nominees as directors;
- b) responsible for the supervision, direction, control and operation of the company;
- c) ran the company from their office;
- d) negotiated on behalf of the company;
- e) company's sole representative on a trip organized to solicit investments;
- f) substantially reorganized and managed the company;
- g) selected the name of the company;
- h) arranged a public offering; and or
- i) made all significant business decisions.

79 The findings of fact by the majority in support of their conclusion that Mr. Alexander was acting as a *de facto* director and officer of Pinewood during the material time included a consideration of many of these factors. While they may not have expressly articulated the legal test, I am satisfied they applied the proper considerations mandated by the test in arriving at their ultimate determination. Their findings of fact overwhelmingly support their conclusion that Mr. Alexander was acting as a *de facto* director and officer of Pinewood contrary to the 1999 Order. These findings fell squarely within their area of expertise and are entitled to deference.

[43] In this case the evidence overwhelmingly supports the conclusion that Malone was acting as a de facto director or officer of Lion King during the relevant time. The following factors support this conclusion:

- Malone organized the creation of Lion King;
- Malone was responsible for identifying, visiting, negotiating for and securing rights to Lion King's Chilean property;
- Malone had signing authority over corporate bank accounts and his residential address was listed as the address of Lion King on banking documents;

- Malone appears to have made most if not all operational decisions of Lion King;
- the correspondence of RM and the other directors clearly indicates their view that Malone was integral to the operational and business affairs of Lion King.

[44] The legal and practical roles and responsibilities of a director versus an officer of a company are very different. As a consequence, there may be circumstances where there is a need to analyze whether an individual was acting as a de facto director versus acting as a de facto officer. This is not one of those cases. The evidence is clear that Malone was an integral part of Lion King's mind and management, whether viewed through the lens of his being a de facto director or de facto officer.

[45] We find that Malone breached the Order by acting as a de facto director and/or officer of Lion King during the currency of the Order.

[46] We direct the parties to make their submissions on sanction as follows:

By August 26, 2016 The executive director delivers submissions to the respondent and to the secretary to the Commission.

By September 9, 2016 The respondent delivers response submissions to the executive director and to the secretary to the Commission.

Either party seeking an oral hearing on 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 September 16, 2016 The executive director delivers reply submissions (if any) to the respondent.

August 3, 2016

For the Commission

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Gordon L. Holloway
Commissioner