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

Citation: Re Cook, 2017 BCSECCOM 260 Date: 20170808

Lance Sandford Cook and CBM Canada's Best Mortgage Corp.

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Don Rowlatt	Commissioner
Hearing Date	July 20, 2017	
Submissions Completed	July 20, 2017	
Date of Decision	August 8, 2017	

Appearing

David Hainey	For the Executive Director

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 19, 2017 (2017 BCSECCOM 136) are part of this decision.

[2] We found that:

a) Cook contravened section 61 of the Act with respect to six distributions of securities to four investors for total proceeds of $380,000;
b) CBM contravened section 61 of the Act with respect to three distributions of securities to two investors for total proceeds of $180,000; and
c) Cook was liable under section 168.2 of the Act for CBM's contraventions of section 61 of the Act.

We note that CBM was found to have contravened section 61 with respect to a subset of the six illegal distributions in which Cook also took part. In other words, this case deals with a total of $380,000 raised from four investors in contravention of section 61.

[3] The parties were given an opportunity to make written and oral submissions with respect to the appropriate sanctions for the respondents' misconduct. The executive director

provided written and oral submissions. The respondent Mr. Cook, provided written submissions only.

[4] We note that after our findings were released and prior to completion of written and oral submissions on sanction in this matter the Commission received an application from a third party for intervener status in the sanctions proceedings. Before a decision was reached on this issue the third party withdrew its application. The panel did not consider any of the materials associated with the third party's application for intervener status in reaching its decision with respect to the appropriate sanctions in this case.

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

II. Position of the Parties

[6] The executive director's position is that the following orders under sections 161(1) and 162 of the Act are appropriate sanctions for Cook's misconduct:

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

(b) that Cook be prohibited, for the later of five years or until such time as the amounts referred to in subparagraph (c) below have been paid:

i. under section 161(1)(b), from trading in or purchasing securities, except that he may trade and purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

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

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

(c) an order under section 161(1)(g) that Cook pay to the Commission $218,500, being the total amount of $380,000 obtained as a result of his contraventions of the Act, less total interest payments returned to investors of $161,500; and

(d) an order for an administrative penalty of $25,000 under section 162.

[7] The Executive Director also seeks an order under section 161(1)(b) that all persons permanently cease trading in and be permanently prohibited from purchasing any securities of CBM.

[8] The Executive Director submits that it is not seeking any orders under sections 161(1)(g) or 162 against CBM because: (i) CBM was not found to have engaged in any contraventions separate and apart from those engaged in by Cook in his personal capacity, (ii) the company was dissolved in 2014 and there is no evidence that it has any assets, and (iii) the company was essentially the alter-ego of Cook, who was its sole director and officer.

[9] The respondents did not provide us with any submissions on what, in their view, would be appropriate sanctions in the circumstances, from which we infer that they feel that there should be no sanctions against them.

[10] The respondents did provide us with numerous e-mails which could be construed as submissions. Those submissions can be summarized as follows:

- submissions contesting certain of the facts set out in our findings and contesting our liability determinations;
- Cook is impecunious and has no ability to pay any financial sanctions; and
- Cook has previously gone through bankruptcy proceedings and CBM has been dissolved, therefore, the effect of any financial sanctions would be to, in Cook's words, "make the BCSC a bill collector chasing after loans that were written off through a previous bankruptcy and after a person with no ability to pay."

[11] The respondents' submissions that go to our findings of fact and our findings on liability were not supported by the evidence during the hearing and we will not repeat those findings here. We will address the respondents' other submissions below.

III. Analysis

A. Factors

[12] 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.

[13] 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:
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> - 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

[14] Contraventions of section 61 of the Act are inherently serious. This section is one of the Act's foundational requirements for protecting investors and preserving the integrity of the capital markets. It requires those who wish to distribute securities to file a prospectus with the Commission or to have an exemption from this requirement. This is intended to ensure that investors receive the information necessary to make an informed investment decision.

[15] There was no evidence of any attempt by the respondents to comply with securities laws. In fact, a number of Cook's written communications to the Commission in this proceeding have indicated his ongoing belief that his actions did not fall within the jurisdiction of the Act. The respondents were either reckless or careless with respect to compliance with securities laws.

[16] The breaches of section 61 in this case are more serious than some illegal distributions as they arose in circumstances in which the respondents were holding themselves out to three of the four investors as providing one regulated financial service (mortgage brokerage) and, instead, convinced them to invest in a completely different financial product (which activity the respondents carried out illegally). The executive director characterizes this as a breach of trust. While it may not rise to the level of a breach of trust, there is an element of conflict of interest or abuse of the investing public in that activity that must be reflected in our sanctions.

Enrichment; harm to investors

[17] The respondents raised a total of $380,000 from the four investors. However, the investors did receive varying amounts of interest payments. In total, the investors received $161,500 in interest on their notes. All of the principal of the notes has been lost. The respondents have been enriched by $218,500, being the net difference between the total amount raised from the four investors and the interest payments made on the investors' notes.

[18] The harm to investors is not limited to the losses described above. The evidence was that several of the investors borrowed the money (in the form of refinancing their existing mortgages) that they, in turn, lent to the respondents. Interest payments and repayment of principal obligations have been borne by these investors as a consequence. Several of the

investors were retired or close to retirement at the time of entering into the loan arrangements with the respondents. These investors have little opportunity to recover their losses.

Mitigating or aggravating factors; past conduct

[19] There are no mitigating or aggravating factors in this case.

Risk to investors and markets

[20] Recklessness or carelessness with respect to compliance with securities laws in the context of illegal distributions represents a significant risk to our capital markets. In *Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 357 (para 23), the panel said:

> Although we did not find that Solara or Beattie knowingly contravened the Act, they were sloppy about ensuring that the exemptions were available. Their carelessness and demonstrated failure to ensure compliance with requirements when raising capital suggests the potential for significant risk to our capital markets were they to continue to participate in them unrestricted.

[21] We agree with these comments as they apply to the respondents.

Specific and general deterrence

[22] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous Orders

[23] The executive director directed us to six decisions of this Commission as guidance in determining the appropriate sanctions in this case: *Pacific Ocean Resources Corporation (Re)*, 2012 BCSECCOM 104, *Waters (Re)*, 2014 BCSECCOM 369, *John Arthur Roche McLoughlin, MCL Ventures Inc. (Re)*, 2011 BCSECCOM 299, *Wireless Wizard Technologies Inc. (Re)*, 2015 BCSECCOM 443, *Cinnabar Explorations Inc. (Re)*, 2014 BCSECCOM 26, and *Snider (Re)*, 2016 BCSECCOM 13.

[24] Of these decisions, the executive director submits that *Waters* and *McLoughlin* are the most analogous to this case.

[25] In *Waters*, the respondent illegally distributed securities to 45 investors for total proceeds of $312,977. The respondent's sanctions were market prohibitions of six years and an administrative penalty of $20,000. This case had some aggravating factors (the respondent's status as a registrant, lack of remorse and abusive conduct to Commission staff) and some factors that suggest that the respondent's conduct was less serious than in the case at hand (no evidence of enrichment by the respondents or harm to investors).

[26] In *McLoughlin*, the respondents illegally distributed securities to 22 investors for total proceeds of $317,636. One of the individual respondents breached a prior order of the Commission that arose from a previous illegal distribution and continued his later misconduct after receiving two warnings from the Commission. The Commission

permanently cease traded the corporate respondents. It imposed 15 year market prohibitions and a $50,000 administrative penalty on the individual respondent who was found to have breached a prior order of the Commission. Another individual respondent (who had no prior history of securities regulatory misconduct), received 5 year market prohibitions, an order for $14,607 (commissions earned on the illegal distributions) under section 161(1)(g) and a $20,000 administrative penalty.

[27] We have considered all six of the decisions cited to us by the executive director and we agree that they offer general support for the sanctions sought by the executive director in this case.

C. Appropriate Orders

Market prohibitions

[28] The executive director has asked for broad market prohibitions that will last 5 years against Cook. The executive director has asked for an order that the securities of CBM be permanently cease traded.

[29] We have found the respondents' misconduct to be serious. They were careless or reckless with respect to compliance with securities laws. For that reason, we believe that they represent a serious risk to our capital markets and that significant market prohibitions are appropriate in the circumstances.

[30] The decisions set out above, are generally supportive of the duration and breadth of the market prohibitions requested by the executive director against Cook. For example, Cook's misconduct was more serious than that found in *Waters* due to the harm to investors and Cook's personal enrichment. However, there are no aggravating factors in this case as there was in *Waters*. Cook's misconduct was similar to the individual respondent (who did not have a history of prior securities regulatory misconduct) in *McLoughlin*. We find that broad, five year market prohibitions are appropriate in the circumstances.

[31] CBM has been dissolved. However, as this Commission has noted in several decisions (for example, see *Williams (Re)*, 2016 BCSECCOM 283 at paragraph 75), it is possible that dissolved corporate entities may be reinstated. It may, therefore, still be appropriate to impose market prohibitions against dissolved corporate entities. We think it appropriate to do so in this case.

[32] The executive director has asked only for a cease trade order with respect to CBM but has requested that it be made permanent. In support of a permanent cease trade order, the executive director submitted that because he was not seeking any monetary orders, a permanent prohibition was necessary for purposes of specific and general deterrence.

[33] We do not agree with that submission. Obviously, sanctions must be viewed in their totality in order to assess their appropriateness from the perspective of specific and general deterrence. However, market prohibitions serve a different purpose (to keep respondents from participating in some manner in our capital markets) than do monetary

awards. In this case, the absence of any monetary awards against CBM does not lead us to the conclusion that in order to serve the purposes of specific and general deterrence we must make a permanent cease trade order against the company. The executive director did not provide any reasons why it would be in the public interest to prohibit third parties from trading CBM securities. We find there are none. We find that the market prohibitions against Cook and CBM should be similar in scope and in duration. Their misconduct was identical (not surprisingly in that CBM, as will be discussed below, was really the corporate alter ego of Cook). We find that broad, five year market prohibitions are also appropriate for CBM.

Administrative penalty

[34] The executive director is not seeking an administrative penalty against CBM. He is seeking an administrative penalty of $25,000 against Cook.

[35] A review of the previous orders for administrative penalties in the six cases set out above, suggest a range of $7,500 to $50,000 for cases of this type. At the lower end of that range, the misconduct involved was significantly less serious in terms of the dollar amounts raised and/or number of investors involved. At the upper end of that range, the misconduct was significantly more serious in terms of the aggravating factors involved (notably a history of prior securities regulatory misconduct).

[36] Cook's submissions raise the issue of his inability to pay any monetary sanctions. His submissions were not supported by any evidence tendered by the respondents. However, following one of Cook's e-mails on this issue, the executive director tendered into evidence certain materials that he had obtained as part of the Commission's investigation. That included a copy of materials confirming Cook's bankruptcy in late 2014 and tax documents for the 2014 and 2015 calendar year for Cook in which he declared a modest income. The executive director also suggested to Cook that he provide more current and/or fulsome evidence in support of his current financial circumstances. Cook did not provide any further evidence.

[37] A respondent's ability to pay a monetary award is a factor to consider with respect to specific deterrence, but it is not determinative in and of itself. It has no role with respect to a consideration of general deterrence.

[38] The executive director submitted that the onus is on the respondents to demonstrate their inability to pay. He says that it is insufficient for a respondent to claim impecuniosity without providing evidence in support of those claims. We agree with that proposition.

[39] However, there has been some evidence tendered with respect to Cook's financial circumstances. It is neither fulsome nor up to date. As a consequence, we have not given this evidence much weight but we have not ignored it either. We have taken Cook's limited financial circumstances into account in making our monetary orders.

[40] Given the seriousness of the misconduct, the need for both specific and general deterrence, Cook's limited financial circumstances and the previous orders, we find an

administrative penalty of $25,000 against Cook under section 162 of the Act to be appropriate in the circumstances.

Section 161(1)(g) order

[41] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, recently 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.

[42] 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.

[43] 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?

[44] The *Poonian* decision was made in the context of determining whether orders under section 161(1)(g) could be made for amounts obtained, directly or indirectly, by the respondents arising from their contraventions of the Act.

[45] The case at bar is unusual in that the contraventions of the Act (i.e. the illegal distributions in contravention of section 61 of the Act) that occurred within the limitation period did not result in the respondents obtaining any further amounts from the four investors.

[46] All of the original loan amounts were advanced outside of the limitation period. However, within the limitation period, previously issued loans came due and were renewed by issuing new notes in contravention of the Act.

[47] Section 161(1)(g) of the Act sets out that orders can be made for "any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention" (emphasis added).

[48] The Court of Appeal in *Poonian* stated (at paragraph 86) that the words "payment or loss avoided" in section 161(1)(g) "clearly contemplates a contravention that benefits wrongdoers, not by a positive enrichment, but by allowing them to avoid a loss….Clearly, that benefit, being the loss avoided, may be disgorged under s.161(1)(g)…"

[49] Cook and CBM avoided a loss or avoided having to make repayments on previously issued notes due within the limitation period, by issuing new notes in contravention of section 61 of the Act. We are of the view that everything that the British Columbia Court of Appeal said in *Poonian* is equally applicable to avoided payments or loss.

[50] The executive director has only asked for a section 161(1)(g) order against Cook. However, some of the illegally issued loans were issued by Cook personally and some were issued by CBM. The question is whether we can make an order against Cook under section 161(1)(g) for all of the avoided loan repayments.

[51] The Court of Appeal in *Poonian* said the following (at paragraphs 130 and 131) about interpreting section 161(1)(g):

> [130] In establishing the link between the "amount obtained" and the person subject to the order by using the words "directly or indirectly", the Legislature

> ensured the purpose of s.161(1)(g) was not frustrated by difficulties presented by complex schemes. As stated, "directly or indirectly" modifies "obtain".
>
> [131] In my view, the use of these explicit words indicates that the amount need not be obtained directly by the person who has contravened the *Act* (who is also the person against whom the order to pay is made). In addition, it could be obtained *indirectly*. By using these words, the Legislature intended "amount obtained" to capture amounts the wrongdoer obtained through indirect means (e.g., through agents, nominees, *alter egos*), as opposed to direct means (i.e., where the money is received directly into that wrongdoer's "pockets" or accounts)….

[52] "Directly or indirectly" also modifies payment or loss avoided in s.161(1)(g).

[53] We have no difficulty in concluding that this is a circumstance in which Cook can be found to have directly *or indirectly* avoided paying the loan amounts on the loans in the name of CBM. CBM was clearly the corporate alter ego of Cook. Cook was an officer and the sole director of that entity. Several of the loans switched back and forth from being corporate obligations to personal obligations during the tenancy of the loan arrangements with no apparent reason. Interest payments on the loans were made by persons that did not correspond to the borrower of the funds in all cases. The evidence is clear that there was no real separation of financial affairs between Cook and CBM.

[54] We find that Cook, directly or indirectly, avoided the full amount of the loan payments (i.e. $380,000) and we can make an order against Cook for that amount.

[55] However, the evidence is clear that interest payments were made to the investors. As set out in *Poonian*, a return of investor funds may be a permissible deduction from the quantum of a section 161(1)(g) order. We think it appropriate to make a deduction in this case. Therefore, we find that we can make an order under section 161(1)(g) against Cook in the amount of $218,500.

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

[56] There remains only the question of whether it is in the public interest for us to make a section 161(1)(g) order against Cook in all of the circumstances.

[57] Although not directed specifically at orders under this section, Cook generally submits that we should not act as a "bill collector" for investors who have had their claims against him expunged by virtue of an earlier bankruptcy proceeding.

[58] We do not agree with this submission. This submission suggests that when we make an order under section 161(1)(g) we are engaged in an exercise of victim compensation. As the *Poonian* decision clearly sets out that is not the purpose of an order under this section. That Cook's creditors may have had their claims expunged by virtue of his earlier bankruptcy, is not relevant to our determination of whether an order under section 161(1)(g) is appropriate in the circumstances.

[59] In our view, it is in the public interest, for purposes of general and, to a lesser extent, specific deterrence for us to make a section 161(1)(g) order against Cook. He has benefited from not having to pay investors back and has done so illegally. There is not sufficient evidence of the respondents' representations to investors of the respondents' intended use of the loan proceeds nor the actual use of those proceeds to support any arguments in favour of reducing the amount of the order based on the respondents' use of proceeds or on any other public interest basis.

[60] We find that an order under section 161(1)(g) against Cook in the amount of $218,500 is appropriate in all of the circumstances.

IV. Orders

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

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

(b) Cook be prohibited, for the later of five years or until such time as the amounts referred to in subparagraphs (c) and (d) below have been paid:

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 through a registered dealer, if he gives the registered dealer a copy of this decision;

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

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;

(c) under section 161(1)(g) that Cook pay to the Commission $218,500, being the total amount of $380,000 he avoided paying as a result of his contraventions of the Act, less total interest payments returned to investors of $161,500; and

(d) an administrative penalty of $25,000 against Cook under section 162;

(e) CBM be prohibited for five years:

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

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

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

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

August 8, 2017

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Don Rowlatt
Commissioner