

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

Citation: Re Davis, 2018 BCSECCOM 284

Date: 20180919

Larry Keith Davis

Panel	Suzanne K. Wiltshire	Commissioner
	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner

Hearing Date July 6, 2018

Submissions Completed July 6, 2018

Date of Decision September 19, 2018

Appearing

Stephen Zolnay For the Executive Director

Larry Keith Davis For himself

Decision

I. Introduction

- [1] This hearing is held pursuant to the British Columbia Court of Appeal's remission of this matter under section 167(3) of the *Securities Act*, RSBC 1996, c. 418 to the Commission for reconsideration of its decision to impose permanent market prohibitions on Davis.
- [2] In its Findings (*Re Davis*, 2016 BCSECCOM 214), the Commission found Davis perpetrated fraud contrary to section 57(b) of the Act on one investor in the aggregate amount of \$7,000.
- [3] In its Decision (*Re Davis*, 2016 BCSECCOM 375), which incorporated the Findings, the Commission ordered permanent market prohibitions against Davis under section 161 of the Act and also ordered Davis to pay an administrative penalty to the Commission of \$15,000 under section 162.
- [4] Pursuant to section 167(1) of the Act, Davis sought leave to appeal the findings of fraud in the Findings and the penalties in the Decision. Leave to appeal the Findings and the Decision was granted.
- [5] In its decision (*Davis v. British Columbia Securities Commission*, 2018 BCCA 149), the Court of Appeal dismissed the appeal from the Findings but allowed the appeal from the Decision in part, setting aside the section 161(1) permanent market prohibitions listed in

paragraph 61(1) of the Decision and remitting the issue of those sanctions to the Commission for reconsideration.

[6] We requested written submissions from the parties with respect to the reconsideration of those sanctions and at the request of Davis also set a date for hearing of oral submissions.

[7] The executive director made written and oral submissions with respect to the reconsideration of sanctions. Davis made no written submissions but did attend the oral submissions hearing and made oral submissions.

II. Background

A. Findings

[8] In its Findings, the Commission concluded:

- In June 2011, Davis purported to sell 40,000 shares of FormCap Corp., a Nevada company trading in a U.S. over-the-counter market, to the investor for \$4,000.
- In April 2012, Davis purported to sell an additional 30,000 shares of FormCap to the investor for \$3,000.
- Davis represented to the investor that he owned the shares of FormCap that he was purporting to sell her when he knew he did not, putting the monies she had invested with him at risk.
- Davis' testimony about a collateral oral agreement with the investor was not credible.
- Davis spent the \$7,000 he received from the investor on personal expenses shortly after receiving the funds from her.
- When the investor requested the return of her \$7,000 in early 2013 because she had not received any FormCap shares, Davis continued his deceit, making statements to the investor to the effect that:
 - a) her investment in FormCap had resulted in her becoming a shareholder,
 - b) the investment was "still sound and intact just not liquid at this time",
 - c) the investment was in the form of shares tied to the stock market and this was why he had had her open a brokerage account,
 - d) she would "receive her shares once the certs are issued...", and
 - e) finally stating "You don't own these shares...I do".
- The investor never received any FormCap shares.
- The investor pursued repayment through court proceedings, eventually obtaining repayment of her \$7,000 through two payments into court in the fall of 2015.

[9] The Commission found Davis liable for fraud in the amount of \$7,000 contrary to section 57(b) of the Act.

B. Decision

[10] In its Decision, the Commission reviewed the factors identified in *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, drawing a number of conclusions. We repeat the portions of those conclusions below which we agree with and rely on for the purposes of this decision.

Seriousness of the conduct

[11] Fraud is the most serious misconduct prohibited by the Act...

[12] In this case, [Davis] purported to sell the investor shares he did not own on two separate occasions. ... when the investor asked in the spring of 2013 for the return of her funds [Davis] continued the deceit..."

[13] While the quantum involved in this case is relatively small, [Davis'] initial and ongoing deceit is misconduct properly characterized as falling within the most serious misconduct prohibited by the Act.

Harm suffered by the investor

[14] While the investor was successful in eventually recovering her \$7000 investment, she had to expend considerable time and effort to do so.

[17] Eventual repayment pursuant to civil proceedings does not negate the deprivation caused by the fraud perpetrated by [Davis].

[18] The investor was negatively impacted in other ways...she has not invested since this experience, has lost trust in people and had to seek counselling over the experience.

Enrichment

[19] [Davis] was enriched personally. He treated the funds as his own and used them...to pay his personal expenses.

Aggravating or mitigating factors and past conduct

[24] ...the eventual repayment of the funds pursuant to proceedings brought by the investor...is not a mitigating factor.

[26]...not hindering the investigation and the hearing process is not a mitigating factor.

[27] There are no aggravating factors.

[29] ...[Davis] has no prior regulatory history.

Continued participation in the capital markets and fitness to be a registrant or director

[31] While the aggregate amount of [Davis'] fraud was not large, the misconduct perpetrated by [Davis] was carried out over an extended period, involving the

purported sale of shares to the investor that he did not own on two separate occasions as well as ongoing deceit.

[32] [Davis'] misconduct evidences that he represents a serious future risk both to investors and capital markets.

Specific and general deterrence

[33] The sanctions imposed must be sufficient to deter [Davis] and others from engaging in future misconduct.

- [11] The executive director did not seek an order under section 161(1)(g) of the Act in respect of the amount obtained by Davis as a result of his misconduct because the investor had recovered her \$7,000.
- [12] The Commission ordered Davis to pay an administrative penalty of \$15,000.
- [13] The Commission imposed permanent market prohibitions against Davis with respect to trading in securities, application of exemptions, acting as a director, officer, registrant or promoter, acting in a management or consultative capacity in connection with activities in the securities market, and engaging in investor relations activities.

C. *Appeal decision*

- [14] As noted in the appeal decision (paragraph 73), Davis challenged only the permanent market prohibitions on the basis that they were unreasonable because the panel failed to consider his previously unblemished record and the principle of proportionality.
- [15] The Court agreed with Davis, stating at paragraph 74 of the appeal decision:
- When the sanctions decision is read in its entirety, it is apparent the panel proceeded on the basis that permanent market bans are appropriate in fraud cases, regardless of the circumstances of the offender. As we will explain, in our view that approach renders the decision unreasonable.
- [16] The Court concluded that the Commission had failed to conduct an individualized assessment since the Commission did not mention the evidence before it of Davis' personal circumstances, in particular his testimony that he had worked in the investment industry for many years without incident.
- [17] The Court observed at paragraph 87 of the appeal decision:
- The Commission may well have determined that continued participation by Mr. Davis in the market is a risk that could not be ameliorated by a remedy short of a lifetime full market ban, but its reasons for doing so must demonstrate a consideration of individual circumstances and alternative sanctions.
- [18] The Court also recognized "the *outcome* reached by the Commission may ultimately be justified by the seriousness of Mr. Davis's conduct" (at paragraph 88).

[19] The Court remitted the imposition of market prohibitions on Davis to the Commission for reconsideration in accordance with the reasons set out in the appeal decision.

D. *Davis' Individual Circumstances*

[20] The following summarizes Davis' testimony at the liability hearing in February 2016 and the statements he made under oath when interviewed by Commission staff in December 2013 regarding his career in the securities industry and the means by which he earns his livelihood.

[21] Davis testified that following the sale of his family's business in the food industry in 1986, he took the securities course but did not write the exam because he began working in 1987 in a small capital firm formed at the time by a former broker. He was the firm's director of communications, doing lead generation and follow-up and establishing communications between the firm and the financial community until 1989 when the firm broke up.

[22] In 1991, Davis incorporated Bravo International Services. When the company ceased to be incorporated some four to five years later, he continued doing business under the same name, operating primarily in the investor relations business. He stated that he had been involved in investor relations "off and on over the years" up to the time that he began doing work for FormCap in 2009. He had worked for public companies in several capacities, including reverse takeover consolidations and capital raising through private placements, as well as website development, marketing and branding.

[23] When interviewed in December 2013, Davis stated that Bravo had ceased to be active about one and a half to two years prior to that time. At the time of the interview, he stated he was not earning his living in the capital markets but working for a Victoria based fruit and produce distribution company to develop its Vancouver and Lower Mainland markets. Prior to that he had earned his living by boarding international students and relying on his spouse's income.

[24] Davis testified at the liability hearing in February 2016 that he was no longer engaged in investor relations. He said he had worked for a brief period from January to August 2014 with Digitech California with respect to that company having Canadian representation and opening offices in Vancouver. He explained that at the time of the hearing he was the sole shareholder of a company named MedLeaf Medicinal Marijuana Corporation that had entered into a letter of intent with a public company based in Australia relating to the purchase of a property.

III. Positions of the Parties

A. *Executive Director*

[25] The executive director submits that it remains open to the Commission to make whatever findings are supported by the evidence and to impose whatever orders it considers to be in the public interest.

- [26] Referring to the evidence Davis gave at the liability hearing and his statements during his interview, the executive director submits that Davis' livelihood was not at stake and the Commission did not deprive him of his livelihood in November 2016 when it issued the market prohibitions against him under section 161(1).
- [27] The executive director submits that Davis' misconduct was not minor. It involved a contravention of the fraud provision in section 57 - the most serious misconduct found under the Act. Davis lied to an investor repeatedly over an extended period of time and was untruthful when he testified at the liability hearing. This is the type of misconduct that demonstrates a lack of honesty and integrity and indicates Davis poses a significant risk to investors and the capital markets. It is this risk and not general deterrence that is the primary consideration in this case.
- [28] The executive director submits that while the Commission considers several factors when it makes orders under section 161(1), the paramount and overarching consideration, as mandated by the language of section 161(1), is the public interest. This means that when the Commission crafts orders under that provision, it should aim to protect investors, promote the fairness and efficiency of the capital markets, and preserve public confidence in those markets.¹
- [29] Section 161(1) orders are not punitive. They are protective and preventative in nature and prospective in application.² The purpose of section 161(1) orders is to prevent future harm to the capital markets.³ The Commission furthers this goal by "removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets".⁴
- [30] The executive director submits that it is in the public interest to make permanent orders against Davis prohibiting him from participating in the capital markets and from acting as a director, officer or registrant under sections 161(1)(b)(ii), (c), and (d)(i), (ii), (iii), (iv) and (v).

B. Davis

- [31] Davis' submissions focused primarily on the liability Findings. His position was that without a reversal of the finding of fraud, a change in the sanctions ordered against him would be of no use to him. However, a reconsideration of the finding of fraud was not before us. The only issue that was returned to the Commission for reconsideration by the Court of Appeal is what market prohibitions under section 161 of the Act are appropriate, given the liability Findings.

¹ *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 (CanLII) at paras. 41 and 45; *Cartaway Resources Corp. (Re)*, 2004 SCC 26 (CanLII) at para. 58; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58 at para. 59

² *Asbestos* at paras.42-43; *Cartaway* at para. 58

³ *Asbestos* at para. 42

⁴ *Asbestos* at para. 43

[32] His submissions on the issue of sanctions were limited in nature. He opposed, on a general basis, the executive director's submissions in all respects but made no substantive submissions on appropriate sanctions arising from his misconduct.

IV. Analysis

[33] We have considered Davis' individual circumstances, in particular the evidence respecting his work career over the years in relation to the securities industry and how he earns his livelihood.

[34] While he had taken the securities course in approximately 1987, Davis had never written the exam and never became a registrant under the Act.

[35] From approximately 1991, Davis carried on business under the name Bravo International Services "off and on over the years", working primarily in the area of investor relations but also engaging in other types of work such as website development, branding and marketing.

[36] Davis ceased to earn his livelihood in the capital markets sometime in late 2011 or early 2012 and received no remuneration for work in respect of investor relations after that time.

[37] When the Commission imposed the market prohibitions in November 2016, Davis was earning his livelihood through work outside the capital markets. His livelihood at that time was not impacted by the market prohibitions and there is no evidence that, going forward, his livelihood would be impacted by the reinstatement of similar market prohibitions.

[38] Even if there was evidence that his livelihood would be impacted by the imposition of market prohibitions, in our view the risk Davis presents to the integrity of the capital markets and to investors warrants his removal from the capital markets.

[39] The capital markets of British Columbia are highly regulated, and persons seeking the privilege of participating in them are held to high standards of honesty and integrity.⁵ As a result, individuals who are active in our capital markets should expect that the Commission will make protective orders removing them from the markets if they commit securities fraud.

[40] We agree with the executive director's submissions that a high level of candour, honesty and integrity are critical for persons who engage in investor relations.

[41] Davis has been found liable for fraud. While the amount of the fraud was small, it involved ongoing deceitful conduct over a period of about two years. He also continued to demonstrate a lack of candour when testifying at the liability hearing.

⁵ *Erickson v. Ontario (Securities Commission)*, (2003) 169 O.A.C. 80, [2003] O.J. No. 593 at paras 55-56 (Div.Ct.)

- [42] As the executive director has pointed out, this is not a case of a single isolated incident, quickly acknowledged, with expressions of remorse and acceptance of responsibility.
- [43] Davis' conduct demonstrates that he lacks integrity and poses a serious risk to investors and the capital markets. He lied repeatedly over an extended period to a good friend who trusted him and then attempted to justify his misconduct years later when he testified at the hearing.
- [44] The executive director argues and we agree that Davis' misconduct indicates an absence of integrity and good character that is unlikely to resolve itself merely with the passage of time.
- [45] The Court of Appeal considered the reasoning in *Stetler v. The Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234, 311 D.L.R. (4th) 109, pertinent to Davis' appeal. In that case, the marketing board cancelled a life-long tobacco farmer's entire quota when he sold a small amount of tobacco in excess of his basic production quota. The farmer had no prior regulatory history. The Court of Appeal for Ontario found the marketing board erred in failing to consider the farmer's unblemished record and emphasized the need for some degree of proportionality between the wrongdoing and the penalty imposed.
- [46] The Court of Appeal also referred to *Rahmani (Re)*, 2009 BCSECCOM 279, a review of an Investment Industry Regulatory Organization of Canada decision, as being indicative of the correct approach: one which reserves the harshest penalties for circumstances in which the Commission considers lesser measures to be inadequate to protect the public interest.
- [47] The Court of Appeal in summary stated at paragraph 85:
- Stetler, Eron, and Rahmani* show it is incumbent upon the tribunal to consider whether measures short of a permanent ban would protect the investing public where a person's livelihood is at stake. Sections 161 and 162 of the *Securities Act* facilitate this approach by granting the Commission jurisdiction to craft a wide range of remedies tailored to a particular offence and offender. In doing so, principles of proportionality should be considered by the Commission or, put as the Commission did in *Eron*, the harm suffered by the investor and the extent to which the respondent was enriched are factors pertinent to determination of the appropriate sanctions.
- [48] It is the risk Davis poses to both investors and to the integrity of the capital markets that distinguishes the present case from cases like *Stetler and Rahmani*. Unlike *Stetler*, Davis' misconduct was not minor, nor was his livelihood at stake for we have found he had ceased to earn any remuneration from his investor relations activity some time before sanctions were first imposed. As for *Rahmani*, as a registrant Rahmani failed to disclose an irrelevant criminal charge on application forms, misconduct falling far short of the type of misconduct that would justify permanent prohibitions. The Commission

concluded this misconduct did not demonstrate that Rahmani represented a risk to investors or the integrity of the markets.

- [49] While the amount of the fraud in this case and Davis' enrichment were not substantial, the harm suffered by the investor was significant. She was deprived of her funds for several years and eventually forced to seek recourse to the courts for their recovery. She was also negatively impacted emotionally and testified at the liability hearing that she had not invested since. While Davis' enrichment and the harm to the investor are factors which are pertinent they are not in and of themselves determinative. Nor is the fact that Davis has no prior regulatory history.
- [50] Section 161 orders are intended to be protective and preventative. In this case, the risk Davis represents to investors and to the integrity of the capital markets is the critical consideration in assessing appropriate sanctions against him.
- [51] The executive director has submitted that the appropriate orders in the matter before us are permanent market prohibitions, even though the amount of the fraud was relatively small. The executive director cites the prior Commission decisions of *Re Dowlati*, 2015 BCSECCOM 255, *Re Basi*, 2011 BCSECCOM 573 and *Re Dhala*, 2015 BCSECCOM 336 as past examples where the amount of the fraud was relatively small and yet the Commission concluded it was in the public interest to impose permanent market prohibitions. Further, the executive director points out, the Ontario Securities Commission reciprocated the Commission's permanent market prohibitions against Dowlati, Basi and Dhala in Ontario, based on the findings made in British Columbia, finding that similar orders would also be in the public interest in that jurisdiction.
- [52] As directed by the Court of Appeal, we have considered whether it would be appropriate to issue market prohibition orders of a lesser duration. However, given the seriousness of Davis' misconduct, and the continuing risk that he poses, we do not consider it to be in the public interest to impose market prohibition orders that are anything short of permanent. Nothing arising from Davis' individual circumstances demonstrates otherwise. Rather, since Davis has displayed a significant lack of honesty and an evident lack of integrity, with no indication that this will improve over time, permanent market prohibitions are necessary and appropriate to adequately protect investors and the integrity of our capital markets.
- [53] In the Decision, the Commission granted a carve-out pursuant to Davis' request that he be permitted to trade in securities for his own account. Our current orders grant the same carve-out.
- [54] Davis did not request any further carve-outs from the market prohibition orders that we might make.
- [55] However, those who are subject to market prohibition orders may apply under section 171 of the Act for a variance of those orders. In such cases, the applicant must demonstrate why, in the specific circumstances, granting the variance requested would

not be prejudicial to the public interest. In the event of a change in his circumstances, it is open to Davis in the future to make such an application to permit him to participate in some specific market activity.

VI. Orders

- [56] At paragraph 61(2) of the Decision, we considered it in the public interest to order that Davis pay to the Commission an administrative penalty of \$15,000. That order was not set aside by the Court of Appeal and it remains extant.
- [57] Considering it to be in the public interest, and pursuant to section 161 of the Act, we order that:
- a) under section 161(1)(b)(ii), Davis cease trading in, and is permanently prohibited from purchasing, any securities or exchange contracts, except Davis may trade or purchase securities for his own account through a registrant if he gives the registrant a copy of this decision;
 - b) under section 161(1)(c), any or all of the exemptions set out in the Act, regulations or a decision do not apply to Davis;
 - c) under section 161(1)(d)(i) and (ii), Davis resign any position he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;
 - d) under section 161(1)(d)(iii), Davis is permanently prohibited from becoming or acting as a registrant or promoter;
 - e) under section 161(1)(d)(iv), Davis is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
 - f) under section 161(1)(d)(v), Davis is permanently prohibited from engaging in investor relations activities.

September 19, 2018

For the Commission

Suzanne K. Wiltshire
Commissioner

George C. Glover, Jr.
Commissioner

Don Rowlatt
Commissioner