

Rudolf Walter Brenner

Securities Act, RSBC 1996, c. 418

Hearing

Panel	George C. Glover, Jr. Nigel P. Cave Gordon L. Holloway Suzanne K. Wiltshire	Commissioner Vice Chair Commissioner Commissioner
Hearing date	March 3, 2014	
Submissions completed	March 24, 2014	
Date of Decision	July 17, 2014	
Appearing		
Veda Kenda	For the Executive Director	

Decision

I Introduction

- ¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- ¶ 2 On August 12, 2013, the executive director issued a Notice of Hearing (2013 BCSECCOM 94) alleging that Rudolph Walter Brenner contravened the Act
- by submitting or giving information to persons appointed under the Act that was false or misleading in a material respect, or omitting facts from the statement or information necessary to make that statement or information not false or misleading, contrary to section 168.1(1)(a) of the Act, and
 - by failing to file insider reports within the prescribed time with respect to a sale of shares of Hellix Ventures Inc. contrary to section 87(2) of the Act and section 3.3 of National Instrument 55-104.
- ¶ 3 The Notice of Hearing seeks orders against Brenner under sections 161 and 162 of the Act.
- ¶ 4 Although served with the Notice of Hearing, Brenner did not appear at the set date hearing or at the hearing nor was he represented by counsel at either hearing. We granted the executive director's request to have questions of liability and sanction heard at the same time.

¶ 5 At the hearing, we granted the application of the executive director to amend paragraph 16 of the Notice of Hearing in a non-material manner to reflect the exact wording of section 168.1(1)(a) by adding the words “to the commission, the executive director or any person” before the words “appointed under the Act...”

¶ 6 At the hearing, documentary evidence tendered by the executive director was admitted as exhibits. The executive director called one witness, a Commission Investigator.

II Applicable Law

¶ 7 Regarding the allegations that Brenner provided false or misleading information, section 168.1(1)(a) of the Act is the primary applicable provision and reads:

168.1(1) A person must not

- (a) make a statement in evidence or submit or give information under this Act to the commission, the executive director or any person appointed under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omits facts from the statement or information necessary to make that statement or information not false or misleading....

¶ 8 Regarding the allegations that Brenner made late filing of insider reports, section 87(2) of the Act and section 3.3 of NI 55-104 are the primary applicable provisions and read:

Act- s. 87(2) An insider of a reporting issuer must, in accordance with the regulations,

- (a) file reports disclosing the insider’s
 - (i) beneficial ownership of, or control or direction over, directly or indirectly, securities of the issuer, and
 - (ii) interest in, or right or obligation associated with, a related financial instrument of a security of the issuer, and
- (b) make other prescribed disclosure.

NI 55- 104- s.3.3 Subsequent report- A reporting insider must within five days of any of the following changes file an insider report in respect of a reporting issuer disclosing a change in the reporting insider’s

- (a) beneficial ownership of, or control or direction over, whether direct or indirect, securities of the reporting issuer, or
- (b) interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer.

III Findings

Background

- ¶ 9 Brenner was a resident of British Columbia at all material times. He was a director of Hellix from approximately October, 2000 to April, 2012. Hellix was a reporting issuer in British Columbia at all material times.
- ¶ 10 The Brenner Family Trust established and controlled a brokerage account (the Muscatine Account) in the name of Muscatine Financial Corporation (Muscatine).
- ¶ 11 The Trust, governed by the laws of Lichtenstein, opened the Muscatine Account for the purpose of trading securities for the benefit of the Trust. Brenner was a beneficiary under the Trust and was an “Authorized Beneficiary and account holder” [translation] for the Muscatine Account.
- ¶ 12 On March 8, 2011, 1,006,891 shares of Hellix were acquired in the Muscatine Account through a private placement.
- ¶ 13 Brenner filed insider reports under section 87(2) of the Act with respect to the acquisition of Hellix shares in the Muscatine Account stating that he had indirect ownership of the Hellix shares through the Trust. These insider reports acknowledged that Brenner was a director of Hellix and, thus, an insider.
- ¶ 14 Between September 8, 2011 and September 12, 2011, the Trust sold 104,500 Hellix shares from the Muscatine Account.
- ¶ 15 Brenner did not file insider reports within five days following these September, 2011 sales of Hellix shares by the Trust through the Muscatine Account as he was required to do under section 3.3 of NI 55-104.
- ¶ 16 The Commission received information from the Austrian Financial Markets Authority that there had been suspicious trading in Hellix shares.
- ¶ 17 On March 21, 2012, the Investigator sent a production order under section 141 of the Act to Brenner requiring him to provide the Commission with copies of:
 - “1. account opening documentation, including trading authorization and powers of attorney, for all Canadian and foreign securities trading accounts in his name or under his control or direction, or in which he has a direct or indirect beneficial interest (collectively, the Brenner Accounts); and
 - 2. monthly statements for the Brenner Accounts for the period from January 1, 2011 through to December 31, 2011.”

- ¶ 18 Pursuant to the production order, on March 27, 2012 Brenner responded to the Investigator with information about his Canadian accounts but did not mention the Muscatine Account or provide any documentation relating to it.
- ¶ 19 Despite several follow-up emails from the Investigator to Brenner with very specific inquiries about his foreign accounts and the Muscatine Account in particular, Brenner through several emails to the Investigator continued to deny any interest in or control over the Muscatine Account or any access to its records.
- ¶ 20 The Investigator received a letter dated April 19, 2012 from the counsel retained by Brenner. This letter acknowledged that Brenner was a beneficiary of the Trust and that Brenner had recommended to the Muscatine account manager that Muscatine participate in the Hellix private placement on behalf of the Trust.
- ¶ 21 However, the letter also stated that:

“[Brenner] did not recommend that the [T]rust, through Muscatine, sell Hellix shares, nor was he asked whether such shares should be sold. He did not know that the shares were sold until some time afterwards. I am instructed that the [T]rustee does not accept, and [Brenner] does not seek to provide, instructions to the [T]rustee to buy or sell securities on the secondary market. All such investments decisions are made by the [T]rustee.”

- ¶ 22 On May 4, 2012, Brenner’s counsel sent an email to the Investigator which confirmed that Brenner had filed insider reports on the Hellix private placement showing his interest as “Indirect Ownership: Brenner family Trust”. He reiterated that Brenner had not recommended or been asked to recommend sales of Hellix shares in the Muscatine Account. He again stated that Brenner was not aware of sales of Hellix shares from the Muscatine Account.
- ¶ 23 On May 7, 2012, Brenner filed an insider report relating to the September, 2011 sale of the Hellix shares by the Trust through the Muscatine Account.
- ¶ 24 In an undated letter from Brenner to the Investigator received May 8, 2012, Brenner advised the Investigator that he had terminated his counsel’s retainer but reaffirmed counsel’s statements that Brenner had no role in decisions regarding sales of Hellix shares from the Muscatine Account.

IV Analysis

False and Misleading Statements

- ¶ 25 In order to establish that Brenner contravened section 168.1(1)(a) of the Act, the executive director must establish on the balance of probabilities that:
- (i) Brenner made statements to the Commission, the executive director or a person appointed under the Act;

- (ii) the statements made by Brenner included one or more statements that were false or misleading or omitted facts necessary to make the statements not false or misleading; and
- (iii) the statements were false or misleading in a material respect or omitted facts from the statements necessary to make those statements not false or misleading in a material respect, at the time and in light of the circumstances under which the statements were made.

¶ 26 We find that Brenner was resident in British Columbia; that the production order was issued by the Commission under section 141 of the Act to Brenner; that Brenner received the production order; that Brenner responded to it and made statements in an exchange of emails and correspondence with the Investigator including correspondence between the counsel retained by Brenner on his behalf and the Investigator.

(i) *Person Appointed under the Act*

¶ 27 The executive director has the authority under the Act to “delegate the executive director’s powers and duties under [the] Act to any person employed under section 9” [of the Act]¹. The Investigator was an employee of the Commission appointed under the Act “to enable the commission and the executive director to perform their duties under [the] Act...”² Thus, the statements that Brenner made, and his counsel made on his behalf, to the Investigator were statements to the Commission, the executive director or to a person appointed under the Act.

(ii) *False and Misleading Statements*

¶ 28 The Notice of Hearing contains the allegation that Brenner “by submitting or giving information to persons appointed under the Act that was false or misleading in a material respect, or omitting facts from the statement or information necessary to make the statement or information not false or misleading, contravened section 168.1(1)(a)”.

¶ 29 In addition to this general allegation regarding Brenner’s false and misleading statements, the Notice of Hearing also contains specific allegations that Brenner provided false information to the Investigator in a letter which stated that “he did not recommend that the Trust, through the Muscatine Account, sell the Hellix shares in September 2011 and did not know the Hellix shares were sold until he asked the trustee of the Trust who let him know, on or about April 10, 2012, the trades, dates and prices for the Hellix shares sold in September 2011”.

¶ 30 Brenner was asked multiple times by the Investigator to provide information about his connections with the Muscatine Account and his involvement in directing trades in that account. Multiple times Brenner responded by omitting to disclose that he had a beneficial interest in the Muscatine Account and by denying that he controlled the Muscatine Account and that he had access to records relating to the Muscatine Account.

¹ Section 8(4) of the Act.

² Section 9 of the Act.

- ¶ 31 In fact, Brenner recommended that the Trust acquire Hellix shares in a private placement and knew that the Trust had acquired Hellix shares in the Muscatine Account in this manner. Indeed, he later filed insider reports regarding these acquisitions stating his interest as “Indirect Ownership: Brenner family Trust”.
- ¶ 32 Eventually, Brenner, directly and through his counsel, disclosed to the Investigator his interest in and involvement with the Muscatine Account thereby proving his false and misleading statements in his initial responses to the Investigator.
- ¶ 33 In addition, despite specific inquiries from the Investigator regarding sales of Hellix shares from the Muscatine Account during a specific time period, Brenner initially denied and then continued to deny that he had a role in those sales or that he knew about them at the time.
- ¶ 34 The proof of contraventions of the Act may be established by direct evidence or by circumstantial evidence. A fact is established by circumstantial evidence when the trier of fact infers a fact in issue the existence of which is a deduction that is logically and reasonably drawn from a proved fact or group of facts.³ Inferences of fact may be drawn from the totality of the evidence.⁴
- ¶ 35 In an email dated September 7, 2011, sent from Brenner’s email address, instructions were received by the account manager for the Muscatine Account to sell specified numbers of Hellix shares at specified prices on specified dates from the Muscatine Account. These instructions were carried out exactly as specified.
- ¶ 36 We infer and find that Brenner, through the email account used by him and identified by him as his email address for all of his relevant email communications, was the person who instructed the account manager for the Muscatine Account to sell specified numbers of Hellix shares at specified prices on specified dates from the Muscatine Account. The signature of Brenner on this email appears to be the same as every other email and every account document signed by Brenner and entered into evidence. In light of all of this evidence, we infer and find that Brenner initiated the sale of Hellix shares by the Trust through the Muscatine Account between September 8 and September 12, 2011 and knew of the completion of the sale.

(iii) False or Misleading in a Material Respect

- ¶ 37 Given that the subject matter of the investigation was trades in shares of Hellix and Brenner’s role in those trades, we find that Brenner’s false statements and omissions regarding the Trust, the Muscatine Account and the acquisition and sales of the Hellix shares were material at the time and in the light of the circumstances under which he made the false and misleading statements to the Investigator. In essence, Brenner’s false and misleading statements and omissions were critical to the requests of the Investigator and were central to the matter at hand.

³ *De Gouveia (Re)*, 2013 ABASC 106, at para. 95 (De Gouveia)

⁴ *De Gouveia*, para. 95

¶ 38 Accordingly, we find that Brenner submitted and gave information to the Investigator, a person appointed under the Act, that, in material respects at the time and in light of the circumstances under which the information was submitted and given, was false and misleading and omitted facts necessary to make the information not false or misleading contrary to section 168.1(1)(a) of the Act.

Failure to make Timely Filing of Insider Reports

¶ 39 We now turn to the allegation that Brenner failed to make timely filing of insider reports with respect to sales of Hellix shares through the Muscatine Account on behalf of the Trust.

¶ 40 As a director and, therefore, an insider of Hellix, a reporting issuer, Brenner filed under section 87(2) of the Act an insider report when he acquired a beneficial interest in Hellix shares through the acquisition of Hellix shares on the private placement by the Trust through the Muscatine Account.

¶ 41 Section 3.3 of NI 55-104 required Brenner as a reporting insider of Hellix to file a report within five days of any change in the beneficial ownership of, or control or direction over, securities of Hellix. The sale of Hellix shares by the Trust between September 8 and September 12, 2011 required that such a report be filed by Brenner within five days of the sale.

¶ 42 Brenner did not file an insider report within five days following the September, 2011 sales of Hellix shares by the Trust through the Muscatine Account.

¶ 43 On May 7, 2012, Brenner finally filed an insider report relating to the September, 2011 sale of the Hellix shares by the Trust through the Muscatine Account.

¶ 44 By failing to file an insider report on these sales until May 7, 2012, we find that Brenner contravened section 3.3 of NI 55-104 and, thereby, section 87(2) of the Act.

IV Sanctions

¶ 45 The executive director seeks the following sanctions against Brenner for his contraventions of the Act:

1. prohibitions for six years from market participation under sections 161(1)(a), (b) and (d) (i-vi) of the Act; and
2. an administrative penalty of at least \$50,000 under section 162 of the Act.

¶ 46 In *Re Eron Mortgage Corp.*⁵, the Commission panel cited a non-exhaustive list of factors that are usually relevant in making orders under sections 161(1) and 162 of the Act:

- (a) the seriousness of the person's conduct;
- (b) the harm suffered by investors as a result of the person's conduct;

⁵ *Re Eron Mortgage Corp.*, [2000] 7 BCSCWS 22 (BCSCCOM)

- (c) the damage done to the integrity of the capital markets in British Columbia by the person's conduct;
- (d) the extent to which the person was enriched;
- (e) factors that mitigate the person's conduct;
- (f) the person's past conduct;
- (g) the risk to investors and the capital markets posed by the person's continued participation in the capital markets of British Columbia;
- (h) the person's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers;
- (i) the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets;
- (j) the need to deter those who participate in the capital markets from engaging in inappropriate conduct; and
- (k) orders made by the Commission in similar circumstances in the past.

¶ 47 We have considered all of the *Eron* factors and find that the following are the factors that are relevant to the appropriate sanctions against Brenner in this matter:

(a) *Seriousness of Brenner's conduct*

Making false or misleading statements to a Commission Investigator cuts to the core of the investigative process and, at the least, wastes time and effort in detecting the false or misleading statements and determining the truth. At the worst, making false or misleading statements may frustrate an investigation and lead to failure to detect and take action against misconduct. In this case, Brenner's false and misleading statements regarding his knowledge of trading in Hellix shares was at the heart of the investigation and the production order. Brenner's failure to file insider reports of the sales of Hellix shares by the Trust through the Muscatine Account also impeded the investigation.

(b) *Brenner's past conduct*

The evidence established that Brenner was assessed late filing fees for failure to make timely filings of required insider reports in the early 2000s with respect to Hellix and another issuer of which he was a director. Accordingly, Brenner was clearly aware of insider reporting obligations as a result of his past misconduct. Normally, late filing fees would be the only consequence of an inadvertent late filing of an insider trading report. In this case, the Notice of Hearing included an allegation that Brenner's late filing was a contravention of the Act. We infer that Brenner's late filing of an insider report of the change in his beneficial ownership of the Hellix shares in September 2011 was intentional and part of his plan to hide his involvement in the purchase and sale of Hellix shares by the Trust through the Muscatine Account. This failure to file the required insider report in a timely manner exacerbates his misconduct in this case.

(c) *Risk to investors and public markets*

Brenner's record of misconduct and failure to comply with the obligations of an insider and a director of reporting issuers together with evidence of his active participation in the public markets calls into question his fitness to serve as a director or officer or to act as a consultant in market activities.

(d) *Deterrence*

Commission orders in cases such as this are not punitive in nature but prospective and preventative and focus on specific and general deterrence as part of the Commission's public interest mandate.⁶ Both making false and misleading statements to Commission staff and late filing of insider reports are serious breaches of the Act and call for strong sanctions to deter Brenner and others from similar misconduct in the future.

(e) *Mitigating factors*

We find no mitigating factors present in this case.

(f) *Other Commission orders*

The executive director submitted that the panel should consider two previous decisions of the Commission as guidance in determining the appropriate sanctions against Brenner for his misconduct in this case. The executive director also suggested that a settlement reached in another matter⁷ might be instructive. The panel did not consider this settlement in setting the sanctions in this case. In the *Nuttall* case, the Commission panel stated that:

“...settlements are generally of limited use to hearing panels because they represent a negotiated outcome arising from a certain set of facts. The facts are generally stated as part of the settlement, but the other circumstances relevant to the parties' respective motivations to settle are not known”⁸.

In the two decisions referred to the panel by the executive director involving sanctions imposed on respondents who made false or misleading statements to Commission investigators, the sanctions ranged from prohibitions from trading for six months and a \$15,000 fine⁹ to a \$1,500,000 payment order of which \$500,000 was a fine and permanent prohibition orders under section 161 of the Act.¹⁰ Neither of these cases bore close similarity to the circumstances in the present case and the panel was not provided with useful guidance from the executive director's submissions as to how we should interpret these decisions relative to these circumstances.

⁶ *Cartaway Resources Corp. (Re)*, 2004 SCC 26, paras. 52-62.

⁷ *Parvin Kaur Dhudwal et al.*, 2010 BCSECCOM 620

⁸ *Jo-Ann Nuttall*, 2012 BCSECCOM 97 at para. 31 (*Nuttall*)

⁹ *Nuttall*, para. 46

¹⁰ *Michael Kyaw Myint Hua Hu*, 2011 BCSECCOM 514

In the *Nuttall* case that resulted in the lesser sanctions imposed by the Commission, she was found to have intentionally lied under oath in a compelled interview but there was no evidence that anything turned on the lies told by Nuttall or that her lies hindered or frustrated the investigation. There was no evidence of enrichment or other benefit to Nuttall or of harm to investors.

In the *Hu* case that resulted in greater sanctions, Hu intentionally misled Commission staff to hide his illegal insider trading activities which took advantage of undisclosed material information. Hu's intention was to frustrate the investigation. Investors lost substantial sums from Hu's trades, although there was no evidence that Hu himself had been enriched.

¶ 48 In this case, although, there was no evidence that the sales in Hellix shares in and of themselves were illegal or that any innocent parties suffered losses. Brenner repeatedly gave false and misleading information to the Investigator with the intent of hindering or frustrating the investigation. Brenner's misconduct was serious, went to the heart of the Commission's investigation and involved a repetition of prior misconduct. Although we find that Brenner committed serious misconduct, the Notice of Hearing did not allege fraud or obstruction of justice against Brenner. There was no evidence that the trades by the Trust initiated by Brenner were based on undisclosed material information or that Brenner's conduct resulted in enrichment or other benefit to Brenner or harm to investors.

¶ 49 Accordingly, the panel determined that sanctions more severe than those meted out against Nuttall but less severe than those Hu received were appropriate. Aggravating factors that suggested more severe sanctions in this case than in *Nuttall* included Brenner's repeated lies, previous misconduct and his role as a director in the company that was the subject matter of the investigation into unusual trading.

¶ 50 Having regard to all of the *Eron* factors, we find that the following sanctions are appropriate in the public interest to deter future misconduct by Brenner and others.

V Orders

¶ 51 Considering it to be in the public interest, we make the following orders under sections 161 and 162 of the Act:

1. under section 161(1)(a), Brenner comply fully with the Act, the *Securities Rules* and all applicable regulations;
2. under section 161(1)(b), Brenner cease trading in and be prohibited from purchasing securities or exchange contracts for a period of two years;
3. under section 161(1)(d)(i) and (ii), Brenner resign from any position as a director or officer of any issuer and is prohibited from becoming or acting as an officer or director of any issuer for a period of two years;

4. under section 161(1)(d)(iii), Brenner is prohibited from becoming or acting as a registrant, investment fund manager or promoter for a period of two years;
5. under section 161 (1)(d)(iv), Brenner is prohibited from acting in a management or consultative capacity in connection with activities in the securities market for a period of two years;
6. under section 161 (1)(d)(v), Brenner is prohibited from engaging in investor relations activities for a period of two years; and
7. under section 162, Brenner pay an administrative penalty of \$30,000.

¶ 52 July 17, 2014

¶ 53 **For the Commission**

George C. Glover, Jr.
Commissioner

Nigel P. Cave
Vice Chair

Gordon L. Holloway
Commissioner

Suzanne K. Wiltshire
Commissioner