2004 BCSECCOM 699

Carl Glenn Anderson and Douglas Victor Montaldi

Section 161 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken	Vice Chair
	Neil Alexander	Commissioner
	Robert J. Milbourne	Commissioner
Date of Hearing	November 26, 2004	
Date of Decision	December 7, 2004	

Appearing

James Sasha Angus Kristine Mactaggart	For the Executive Director
Robert W. Taylor Carey D. Veinotte	For Carl Glenn Anderson and Douglas Victor Montaldi

Decision

Introduction

¶ 1 On February 14, 2003 we made Findings in this matter (see 2003 BCSECCOM 132) and on March 7, 2003 we rendered our decision, in which we made orders against Anderson & Montaldi under sections 161(1), 162 and 174 of the Act (see 2003 BCSECCOM 184). This decision should be read with our Findings and our earlier decision.

¶ 2 Anderson and Montaldi appealed our decision to the British Columbia Court of Appeal and on January 9, 2004 the Court overturned our findings of fraud and misrepresentation, set aside the penalty decision, and sent the matter back to us to reconsider the issue of sanctions.

¶ 3 On June 24, 2004 the Supreme Court of Canada dismissed the Executive Director's application for leave to appeal.

Application by Anderson and Montaldi

¶ 4 On November 22, four days before the hearing, Commission staff notified counsel for Anderson and Montaldi that it intended to call evidence at the hearing. Two witnesses, one of whom was Anderson, were summonsed to appear.

¶ 5 Commission staff advised us that they had not had an opportunity to interview the witnesses and therefore did not know what their testimony would be until they took the stand.

¶ 6 At the outset of the hearing, Anderson and Montaldi objected to the introduction of evidence at the hearing. They said that as a result of the decision of the Court of Appeal, the Commission did not have the latitude to hear new evidence and instead was limited to considering sanctions based solely on its February 2003 findings.

¶ 7 We granted Anderson and Montaldi's application and revoked the summonses. These are our reasons.

¶ 8 Anderson and Montaldi cited the following paragraphs of the Court of Appeal decision in support of this position:

> Misrepresentation
> . . .
> 42 In my opinion, the cumulative effect of these deficiencies is fatal to the Commission's conclusion on the issue of misrepresentation and I would set it aside. I think that any proper reconsideration by the Commission of this issue would require a restatement of the allegation and a rehearing of evidence for clarification. I think that it would be unfair to the appellants to embark on such a process at this stage of the proceedings
> . . . .
> . . .
> Failure to act in the public interest
> . . .
> 46 The public interest issue will have to be revisited because fraud and misrepresentation should have been excluded from the equation. I think that the proper course is to refer the issue back to the Commission for reconsideration in light of these reasons
>
> Sanctions
>
> 47 In light of the reversal of the findings of fraud and misrepresentation and the Commission's reconsideration of the appellant's failure to act in the public interest, I would set aside the sanctions imposed by the Commission and direct that the sanctions be reconsidered.
>
> Conclusion

> 48 In the result, I would allow the appeal and set aside the findings of fraud and misrepresentation. I would refer the issue of failure to act in the public interest back to the Commission for reconsideration. The sanctions imposed by the Commission should be set aside and the Commission should reconsider appropriate sanctions following its reconsideration of the public interest issue.

¶ 9 In our opinion the judgment would not have prevented us from hearing evidence in support or mitigation of any of the factors (as set out in *Eron* below, for example) relevant to the making of orders in the public interest.

¶ 10 However, in these circumstances it would not have been fair to hear the evidence. Commission staff admitted that they did not know what the evidence was going to be, so clearly it had not been disclosed to Anderson & Montaldi through an interview transcript or will-say statement.

¶ 11 Furthermore, Commission staff indicated that their intention was to question these witnesses on the current status of 439288 B.C. Ltd. (439), the company through which Anderson and Montaldi carried on their business, and Area Finance Inc., the successor to 439's business, with a view to determining how the planned reorganization (described in our Findings) was progressing. In our view, a snap-shot at this point in time of a reorganization planned to be of 7 years' duration was not relevant.

¶ 12 For these reasons, we refused to hear the evidence and revoked the summonses.

Findings as modified by the Court of Appeal

¶ 13 The respondents Anderson and Montaldi were the principals of a business operated by 439 from January 1, 1996 to April 30, 2002. 439's principal business was represented to investors as the making of loans to individuals and small businesses in and around Burns Lake, British Columbia. To raise the necessary capital for its lending activities, it sold promissory notes to investors. 439's operations came to an end when the British Columbia Financial Institutions Commission (FICOM) froze its bank accounts and ordered it to cease carrying on business at the end of April 2002. By then, 439 had raised $41 million from approximately 450 investors, nearly all of whom are residents of the Burns Lake area.

¶ 14 Anderson and Montaldi admitted to trading and distributing securities without being registered and without filing a prospectus, contrary to sections 34 and 61 of the *Securities Act*, RSBC 1996, c. 418. In our original Findings, we found that Anderson and Montaldi:

- made misrepresentations, contrary to section 50(1)(d) of the Act;
- perpetrated a fraud on persons in British Columbia, contrary to section 57(b) of the Act; and
- acted contrary to the public interest.

¶ 15 The first two findings were the findings overturned by the Court of Appeal.

¶ 16 Our finding that Anderson and Montaldi acted contrary to the public interest was based in part on our findings that they made misrepresentations and perpetrated a fraud. We must now consider our finding of conduct contrary to the public interest without including these factors.

¶ 17 Anderson's and Montaldi's contravention of sections 34 and 61 was one of the bases for our finding that they acted contrary to the public interest. The remaining factors were their failure to:

- keep adequate records to allow 439 to keep track of payments due to it by borrowers,
- adequately supervise the collection of loans, and
- prepare financial statements on a timely basis, or to rely on them in running the business.

¶ 18 As a result of these failures, Anderson and Montaldi were unable to monitor the performance of the business and its profitability, a major contributor to the investors' losses. This conduct, we found, was in breach of their duties as directors and officers of 439 under the *Company Act*, RSBC 1996, c. 62.

Positions of the parties

¶ 19 The parties agree that the basic structure of the orders should remain unchanged. They differ on what the appropriate sanctions should be, given the reconsideration ordered by the Court of Appeal.

¶ 20 The Executive Director says the time periods in the original hearing (12 years) should fall to 7 years (to run from the date of this decision) and the administrative penalties should stay at $200,000 for each of Anderson and Montaldi.

¶ 21 Anderson and Montaldi say that the time periods should fall to 2 years, because the appropriate total time period is 4 years, and they have voluntarily complied with the earlier decision in this respect for nearly two years. They say the administrative penalties should fall to $25,000 each.

¶ 22 Since our earlier decision, Commission staff has prepared a bill of costs totalling $50,092. Commission staff estimated that about 66% of the hearing preparation was associated with the allegations of misrepresentation and fraud, so the legal and investigative costs were discounted by this amount. However, the administrative costs and disbursements have not been similarly discounted. Anderson and Montaldi argue that they should be. If they were, the bill of costs would fall to $31,134.

Discussion

¶ 23 Misrepresentation and fraud are the most serious contraventions of the Act, so having found that conduct in our Findings, we focused on those findings in our earlier decision. Having found misrepresentation and fraud, there was less need to focus on the consequences of Anderson's and Montaldi's contravention of sections 34 and 61. A contravention of these sections is, nevertheless, serious.

¶ 24 Sections 34 and 61 are the foundation investor protection provisions of the Act. Indeed, they are designed to prevent situations just like the one that exists as a result of Anderson's and Montaldi's conduct.

¶ 25 Section 34 of the Act requires that those who trade in securities be registered. It is the means by which the Act intends to ensure that purchasers of securities are offered only securities that are suitable. Anderson's and Montaldi's failure to operate through a person registered under the Act meant that their investors were denied the protections that this section affords. There was no qualified person available to review the suitability of the investments in light of the investors' circumstances.

¶ 26 Section 61 of the Act requires that those who wish to distribute securities file a prospectus with the Commission. It ensures that investors and their advisers get the information they need to make an informed investment decision. Had Anderson and Montaldi caused 439 to file a prospectus with the Commission, all material facts about 439 and the securities it was offering would have been disclosed. 439 would also have had to file audited financial statements with its prospectus.

¶ 27 Had Anderson and Montaldi complied with the registration and prospectus requirements, the investors' losses in all likelihood would have been averted.

¶ 28 In our earlier decision we commented on Anderson's and Montaldi's failure to manage the business properly, and to discharge their duties as directors under the *Company Act.* Those comments still apply.

¶ 29 The Court of Appeal also commented on this aspect of Anderson's and Montaldi's conduct:

> 31 . . . The appellants [Anderson and Montaldi] can be properly criticized for incompetence in the management of a business that had evolved into a small unregulated private bank and the government intervention was clearly justified.
>
> 32 In one sense, the appellants became victims of their own success as the business expanded beyond the limits of their competence. A small lending business critically dependent on personal relationships grew rapidly into a private banking business beyond the appellants' effective control. They did not have the information systems and other management procedures to run the business properly . . . . Clearly they were in way over their heads . . . the appellants' negligence is obvious . . . .

¶ 30 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission discussed the factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

¶ 31 In our previous decision, we noted that this list of factors had to be read in light of *Re Cartaway Resources Corp*. 2002 BCCA 461, where the court held that the Commission cannot consider general market deterrence in issuing sanctions (at paragraph 98):

> . . . past misconduct is relevant only to the extent that it may lead the Commission to conclude that future misconduct by the respondent, not by any and all other market participants, is likely.

¶ 32 However, the Supreme Court of Canada has since overruled the Court of Appeal on that point (see *Re Cartaway Resources Corp.* [2004] 1 SCR 672) so we are now entitled consider general deterrence.

¶ 33 Applying these factors to this case:

- Anderson's and Montaldi's conduct was serious. By the time 439 was shutdown by FICOM, Anderson and Montaldi had raised $41 million from over 450 investors. Although it can no longer be said that misrepresentation and fraud were involved in the raising of these funds, the fact remains that Anderson and Montaldi were incompetent managers and, once in possession of investors' funds, they managed the funds negligently. The result was that 439 became insolvent.

- Anderson's and Montaldi's contravention of sections 34 and 61 led directly to the investors' deprivation. The full extent of the deprivation suffered by investors is as yet unknown, but some degree of deprivation is certain: the investors' funds, originally invested on a short-term basis, are still inaccessible to them and will be for another 5 years. In the meantime, their return is only one-quarter of what they were originally promised. For some investors, this resulted in significant inconvenience and suffering.

- This sort of conduct, with these kinds of consequences, damages the integrity of British Columbia's capital markets.

- It is important that the orders we make provide appropriate deterrence to others who contemplate trading and distributing securities without complying with sections 34 and 61 of the Act.

- Anderson and Montaldi also benefited substantially by loaning investors' funds to themselves, not repaying the principal, not paying interest on it, and causing 439 to forgive some interest altogether.

- In mitigation, both Anderson and Montaldi have guaranteed repayment of all the investors' funds and have pledged all of their current and after-acquired assets as security for those guarantees. They have admitted throughout that they contravened sections 34 and 61. An additional mitigating factor in Anderson's case is his acceptance of the criticisms in the Pricewaterhouse report of his and Montaldi's conduct.

¶ 34 The rationale we stated in our earlier decision for allowing Anderson to continue as a director and office of 439 and Area Finance still holds. So does our belief that Anderson and Montaldi, described by the Court of Appeal as incompetent and negligent, are not fit to be directors or officers of an issuer raising money from the public, and that there would be considerable risk to investors and British Columbia's capital markets by allowing them to do so. We also continue to believe that Montaldi's participation in Area Finance and 439 is not necessary.

¶ 35 We also continue to have the concerns that we expressed in our earlier decision about the governance arrangements in place at Area Finance.

¶ 36 In our opinion, had the findings as they now stand been in place at the time of our earlier decision, the appropriate time periods would have been 8 years. We also recognize that Anderson and Montaldi have been in voluntary compliance with the section 161 orders in our earlier decision for nearly 2 years.

Orders – Anderson

¶ 37 Considering it to be in the public interest, we order:

1. under section 161(1)(c) of the Act, that the exemptions described in sections 44 to 47, 74, 75 , 98 and 99 of the Act do not apply to Anderson for 6 years expiring on December 6, 2010, except that he may trade in securities for his own account through one RRSP and one unregistered account with a person registered to trade securities under the Act;

2. under section 161(1)(d)(i) of the Act, that Anderson resign any position he holds as a director or officer of any issuer, other than: (a) 439, on condition that 439 does not issue any securities; (b) Area Finance, on condition that Area Finance does not issue any securities to any person that was not a securityholder of Area Finance as of March 7, 2003; (c) an issuer, all of the securities are owned directly and beneficially by him, his wife or his children; (d) the issuers listed in Appendix A to this decision, on condition, with respect to each issuer, that the issuer not issue any securities;

3. under section 161(1)(d)(ii) of the Act, that Anderson is prohibited from becoming or acting as a director or officer of any issuer, other than the issuers described in paragraph 2, for 6 years expiring on December 6, 2010;

4. under section 161(1)(d)(iii) of the Act, that Anderson is prohibited from engaging in investor relations activities for 6 years expiring on December 6, 2010, except to the extent necessary to facilitate the operations of loans for Area Finance, on condition that Area Finance does not issue any securities to any person that was not a securityholder of Area Finance as of March 7, 2003;

5. under section 162 of the Act, that Anderson pay an administrative penalty of $100,000; and

6. under section 174 of the Act, that Anderson pay, jointly and severally with Montaldi, costs of or related to the hearing incurred by the Commission and the Executive Director, in the amount of $31,134.

Orders – Montaldi

¶ 38 Considering it to be in the public interest, we order:

1. under section 161(1)(c) of the Act, that the exemptions described in sections 44 to 47, 74, 75 , 98 and 99 of the Act do not apply to Montaldi for 6 years expiring on December 6, 2010, except that he may trade in securities for his own account through on RRSP account and on unregistered account with a person registered to trade securities under the Act;

2. under section 161(1)(d)(i) of the Act, that Montaldi resign any position he holds as a director or officer of any issuer, other than: (a) an issuer, all of the securities are owned directly and beneficially by him, his wife or his children; (b) the issuers listed in Appendix B to this decision, on condition, with respect to each issuer, that the issuer not issue any securities;

3. under section 161(1)(d)(ii) of the Act, that Montaldi is prohibited from becoming or acting as a director or officer of any issuer, other than the issuers described in paragraph 2, for 6 years expiring on December 6, 2010;

4. under section 161(1)(d)(iii) of the Act, that Montaldi be prohibited from engaging in investor relations activities for 6 years expiring on December 6, 2010;

5. under section 162 of the Act, that Montaldi pay an administrative penalty of $100,000; and

6. under section 174 of the Act, that Montaldi pay, jointly and severally with Anderson, the costs of or related to the hearing incurred by the Commission and the Executive Director, in the amount of $31,134.

¶ 39 We have included orders under sections 162 and 174 because they are appropriate in the circumstances. Anderson & Montaldi proposed that we hold these orders in abeyance until the investors are paid out. We leave collection to the discretion of the Executive Director.

¶ 40 In their submissions, Anderson and Montaldi made mention of the fact that the Commission website has yet to reflect the fact that the Court of Appeal overturned our findings of misrepresentation and fraud. They have a point. It would have been much better had the Commission issued news releases announcing the Court of Appeal's decision, and the rejection of the Executive Director's leave to appeal to the Supreme Court of Canada, contemporaneously with those events. It will now become the Commission's practice to publicize court judgments and rulings related to Commission decisions in the same way it does its own decisions.

¶ 41 December 7, 2004

¶ 42 **For the Commission**

Brent W. Aitken
Vice Chair

Neil Alexander
Commissioner

Robert J. Milbourne
Commissioner

Appendix A

J & B Services Ltd.

Key-Oh Logging Ltd.
Lakes District Envirowood Ltd.
Gerobeco Holdings Ltd.
Anderson Lindaas Logging Ltd.
376688 B.C. Ltd
489876 B.C. Ltd.
346280 B.C. Ltd.
Nordic Ford Ltd.
Glenn Anderson Insurance Ltd.
Maronnette Holdings Ltd.
O'Sullivan's Fine Clothing Ltd.
610022 B.C. Ltd.

Appendix B

J & B Services Ltd.
Key-Oh Logging Ltd.
Lakes District Envirowood Ltd.
DVM Holdings Ltd.
Omineca Lama Ranch Inc.
Raymark Enterprises Ltd.
Beartoe Resorts Ltd.
Frame Realty (1984) Ltd.
346280 B.C. Ltd.
573796 B.C. Ltd.
476284 B.C. Ltd.
497868 B.C. Ltd.