

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

Citation: Re Gozdek, 2022 BCSECCOM 10

Date: 20220119

Order under section 161(6)

Richard Francis Gozdek

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

Introduction

- [1] This is an order under sections 161(1) and 161(6)(b) of the *Securities Act*, RSBC 1996, c. 418 (the Act).
- [2] The Executive Director of the Commission applied on February 16, 2021 for an order against Richard Francis Gozdek (Gozdek) based on his criminal conviction in the provincial court of British Columbia, in *R. v. Gozdek*, Abbotsford Registry, File No. 89121-1 (Reasons for Sentence).
- [3] Gozdek responded to the Executive Director's application, providing written submissions.

Background

- [4] On June 18, 2013, Gozdek entered into a settlement agreement, *Gozdek (Re)*, 2013 BCSECCOM 224, with the Executive Director (Settlement Agreement) admitting he had traded and distributed securities without being registered and without having filed a prospectus, contrary to sections 34 and 61 of the Act.
- [5] Gozdek's contraventions of sections 34 and 61 arose from his role as a sales associate for a company. Gozdek raised \$550,778 from investors, without a prospectus and without being registered.
- [6] The terms of the Settlement Agreement included Gozdek's undertaking to pay \$65,062.30 to the Commission, and his consent to the Executive Director issuing an order including provisions under section 161(1) of the Act.
- [7] On June 18, 2013, the Executive Director also issued the order *Gozdek (Re)*, 2013 BCSECCOM 223 against Gozdek (Order). The Order included the following terms:
 - i. under section 161(1)(a) of the Act, Gozdek comply fully with the Act, the Securities Rules, and any applicable regulations;

- ii. under section 161(1)(b) of the Act, Gozdek cease trading, and is prohibited from purchasing securities or exchange contracts except that Gozdek may trade securities through one account in his own name with a person who is registered to trade securities under the Act;
- iii. under section 161(1)(d)(i) and (ii), Gozdek resign any position he holds as, and Gozdek is prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;
- iv. under section 161(1)(d)(iii), Gozdek is prohibited from becoming or acting as a registrant, investment fund manager or promoter;
- v. under section 161(1)(d)(iv), Gozdek is prohibited from acting in a management or consultative capacity in connection with activities in the securities markets; and
- vi. under section 161(1)(d)(v), Gozdek is prohibited from engaging in investor relations activities.

[8] The Order remained in force until the later of 5 years from June 18, 2013 and the date that Gozdek paid the amount in his undertaking to the Commission. Gozdek paid the amount in his undertaking on June 15, 2017. The terms of the Order expired on June 18, 2018.

[9] The provincial Crown subsequently laid charges against Gozdek under section 155(c) of the Act for breaching the terms of the Order. On December 11, 2019, Gozdek pled guilty, partway through his trial in provincial court, to one charge. In particular, Gozdek pled guilty to:

between January 1, 2015 and January 31, 2015, at or near Abbotsford BC, Surrey BC, and Vancouver BC, did commit an offence of contravention of Securities Act, contrary to section 155(1)(c) Securities Act.

[10] In its Reasons for Sentence dated December 23, 2019, the provincial court of British Columbia made the following findings of fact:

- (a) Gozdek was contacted by SC about the possibility of finding investors to help her buy a business. During a conversation with SC, Gozdek suggested to her that she might be able to make some money by investing in Worldwide Marihuana Inc.
- (b) SC forwarded \$10,000 to Worldwide Marihuana Inc.
- (c) Gozdek had sent SC emails which persuaded her to get her husband to cash in money from a registered savings plan. SC used that money to invest the \$10,000. SC did not receive her money back, nor did she receive any return on her investment.

[11] The court accepted Gozdek's assertion that he did not understand the extent of the Settlement Agreement, or that the Order prohibited him from involvement in trading. The

court described it as “more of a technical breach as opposed to an intentional breach”. A joint submission for a fine and probation was made to the court. It was made on the basis that Gozdek would return SC’s investment of \$10,000.

[12] On December 23, 2019, the Honourable Judge Gunnell of the provincial court of British Columbia sentenced Gozdek to the following:

- (a) Restitution order in the amount of \$10,000;
- (b) Fine in the amount of \$5,000, payable by December 21, 2020; and
- (c) One year probation.

Submissions from the Parties

[13] Section 161(6) facilitates cooperation between the Commission, other securities regulatory authorities, self-regulatory bodies, exchanges and the courts. If the requirements of the section are met and it is in the public interest, the Commission may issue orders without the need for inefficient parallel and duplicative proceedings in British Columbia (*McLean v. British Columbia (Securities Commission)* [2013] 3 S.C.R. 895 at para. 54) or before the Commission.

[14] The Commission makes orders under section 161(6) when such an order will, in the public interest, protect investors and the capital markets in British Columbia.

[15] The Executive Director submits that Gozdek, in admittedly breaching the Order less than two years after he consented to its terms, shows a pattern of behavior that ignores or fails to treat seriously the importance of securities laws. The Executive Director also argues that the integrity of the capital markets in British Columbia suffers damage if people who are subject to Commission orders ignore them with impunity. As a result, the Executive Director submits that Gozdek poses a risk to the capital markets in this province, and his participation should be significantly restricted. The Executive Director is seeking broad market prohibitions against Gozdek for a period of seven years.

[16] In his submissions, Gozdek argues that section 161(6)(b) of the Act is intended to be applied to orders issued in other jurisdictions, and not to conduct that took place in the province of British Columbia. Further, Gozdek asserts that this section 161(6) application involves the exact same facts, same allegations being initiated by the same party, within the same jurisdiction, and involved a breach of the same Act to which he had already pled guilty and been sentenced. Therefore, Gozdek concludes that as the subject of an application under section 161(6) of the Act based on his conviction here in British Columbia, he faces a form of impermissible double jeopardy.

[17] Gozdek also submits that, given the timing of the application, and the fact that the underlying conduct relating to the proceedings in provincial court dates back to 2015, he is not a risk to the capital markets of British Columbia and no further sanction is

necessary. Lastly, he submits that he has suffered significant and sufficient reputational and financial damage because of the criminal proceedings and they are sufficient to deter him from future misconduct.

Analysis

- [18] The Commission is the independent agency established under the Act to regulate the capital markets in British Columbia. Central to the Commission's mandate is to protect the investing public from those who would take advantage of them, and to preserve investor confidence in the regulated capital markets.
- [19] Section 161(6)(b) of the Act states:
- (6) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person
- (b) has been found by a court in Canada or elsewhere to have contravened the laws of the jurisdiction respecting trading in securities or derivatives,
- [emphasis added]
- [20] The jurisdiction and discretion of the Crown to proceed with laying charges under section 155(c) of the Act is distinct from, and involves different parties than, proceedings brought by the Executive Director under section 161(6)(b) of the Act. The former may attract penal consequences, while proceedings in the latter are regulatory in nature, and any sanctions imposed are based on considerations that are distinct from criminal sentencing principles.
- [21] A plain reading of the legislation does not support Gozdek's submission that this section of the Act is only intended to apply to situations that arose in "other jurisdictions," excluding this province. British Columbia is part of Canada. If there were any ambiguity in the Act, we would resolve that ambiguity primarily by examining the legislative objective in the context of the Act as a whole. In this instance the legislative objective is easy to identify. It is stated in *McLean* as referenced above. We find no reason why that objective would not be equally applicable to proceedings originating in British Columbia. It does not make sense that the Commission may use section 161(6) to avoid inefficient parallel and duplicative proceedings if a respondent has been found to have contravened securities law anywhere in Canada except British Columbia. On the contrary, the public interest objectives would be at least partially thwarted if the only court proceedings which are not applicable under section 161(6) are the court proceedings in British Columbia.
- [22] Further, a criminal proceeding brought by the Crown under section 155(c) of the Act does not preclude the Executive Director from commencing parallel regulatory

proceedings under section 161 of the Act, or vice versa (see *R v. Samji* 2017 BCCA 415).

- [23] Given the plain language of the Act, and the separate and distinct jurisdictions and mandates of the courts and the Commission, we reject Gozdek’s submission that this proceeding constitutes a form of “impermissible double jeopardy”. In its Reasons for Sentence, the provincial court of British Columbia found that Gozdek committed the offence of one count of a breach of the Act. As a result, we find that we have the jurisdiction to issue an order under section 161(6)(b) of the Act.
- [24] Another consideration raised by Gozdek in this matter is the timing of these proceedings. While the Executive Director applied for an order in February 2021, the underlying conduct dates back to 2015. While there is no doubt that these proceedings were commenced well within the limitation period outlined in the Act, we agree with Gozdek that the passage of time between the underlying conduct, the Reasons for Sentence, and the conclusion of these proceedings, without further misconduct, is a factor to consider in the context of the risk Gozdek poses to the capital markets.
- [25] Having found that we are authorized by section 161(6) to consider the imposition of an order against Gozdek, the question arises as to whether it is in the public interest to do so.
- [26] In this case it is appropriate to consider what are commonly referred to as the Eron factors.
- [27] 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:

- the seriousness of the 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.

[28] We have turned our mind to all of the *Eron* factors but we will focus on those which are most relevant in this proceeding.

Seriousness of the conduct

[29] Orders made following enforcement proceedings are an integral part of the Commission's regulatory function. If those who are subject to these orders can simply ignore them with impunity, then the enforcement role of the Commission would be greatly impaired. [See: *Malone (Re)*, 2016 BCSECCOM 334, para. 7]

[30] Given the prohibitions in the Order, Gozdek should not have engaged with SC as he did. The circumstances and misconduct that led to the Order are, in part, similar to the misconduct that led to the breach of the Order. The fact that he had so recently admitted to similar misconduct and agreed to, among other things, comply with the Act and its regulations, shows that Gozdek should have been particularly careful to ensure that he complied with the Order. Having said that, as the provincial court judge found, this was a technical breach given that Gozdek did not know his actions were in violation of the Order. Gozdek's conduct is distinguished from other cases involving deliberate, intentional breaches and is therefore toward the less serious end of the spectrum.

Harm to investors

[31] The finding of the court was that all of the \$10,000 invested was lost. SC and her husband suffered financial harm for almost four years prior to the order of restitution from the courts. We understand from the Reasons for Sentence that SC ultimately received a return of the \$10,000. However, the restitution order would not have compensated SC and her husband for any return they might have generated on the \$10,000 during those four years.

Damage to capital markets

[32] When a party admits to breaches of the Act, accepts settlement terms which put certain restrictions in place and then violates those terms, that can demonstrate to the capital markets that enforcement may not be effective. As a result, the public's trust in the capital markets is eroded.

Extent of enrichment

[33] There is no evidence that Gozdek was enriched by his conduct.

Risk to investors and the capital markets

[34] Gozdek's conduct demonstrates a carelessness for securities regulation and Commission orders. Even if his breach of the Order was unintentional, it demonstrates an indifference in ensuring he fully understood the scope of the Order and the restrictions he agreed to. This conduct suggests that Gozdek poses a continuing risk to investors.

Fitness to be a registrant or to be director, officer or advisor

- [35] For the same reasons that Gozdek is a risk to investors, he has demonstrated a lack of fitness to be a registrant or a director, officer or advisor to public companies.

Mitigating and aggravating factors

- [36] The fact that Gozdek's conduct was not as serious as other cases we see does not make it a mitigating factor. The time that has passed since the underlying conduct with no evidence of further breaches is also not a mitigating factor. However, as discussed below, both are relevant circumstances that we have taken into consideration.

- [37] There are no aggravating factors.

Deterrence

- [38] Deterrence is typically a less important consideration in section 161(6) applications where sanctioning of the underlying conduct had already been taken into account in the originating proceedings. Our primary objective is to protect the public from future risk of harm and not sanctioning the underlying conduct.

Previous orders

- [39] The Executive Director has cited the *Malone* case as well as *Re Jardine*, 2016 BCSECOM 82 in support of his position that a seven year market ban is appropriate. *Malone* and *Jardine* are significantly more serious than the facts in this case. In both of those cases, the respondents had previously reached settlement agreements with the Executive Director where they agreed, among other things, to cease acting as directors or officers of public companies. Yet they both, in deliberate steps to circumvent those orders, acted as *de facto* directors and officers performing numerous functions typical of directors and officers. Accordingly, we do not find those cases helpful, except to note that a seven year ban in this instance would be excessive.

Appropriate sanctions

- [40] The Executive Director seeks an order that Gozdek be prohibited from "trading in or purchasing any securities or derivatives". The Settlement Agreement included a term which restricted Gozdek's ability to trade except "through an account in his own name with a person who is registered to trade securities under the Act". That exception would provide some protection to the public because individuals registered to trade securities under the Act are required to know their clients and to provide suitable advice. This would provide a reasonable degree of protection against Gozdek trading through an investment account on behalf of others or otherwise putting members of the public at risk. We have not seen evidence that Gozdek's past misconduct was connected to trading for his own account. We do not see any risk to the public in allowing a similar exception to the trading prohibition now. It is not contrary to the public interest to allow Gozdek to save and invest in that limited way.

[41] We turn to the question of the duration of our order. Although Gozdek's misconduct as found by the court does establish a continuing risk to the public, it was not as serious as much of the misconduct that comes before us. Also we recognize that the underlying conduct was almost 6 years ago and there is no evidence of other misconduct since then. Although this is not a specific mitigating factor, it is part of our overall assessment of the risk to the public and the public interest. However, Gozdek's period of good conduct since the provincial court process has not been sufficiently long to persuade us that he no longer poses any risk. In all the circumstances, we consider that imposing the restrictions for two years from the date of our order is appropriate.

Order

[42] Given the foregoing, we find that it is in the public interest to order that:

- a) under section 161(1)(d)(i), Gozdek resign any position he holds as a director or officer of an issuer or registrant;
- b) Gozdek is prohibited for a period of two (2) years from the date of this order:
 - i. under section 161(1)(b)(ii), from trading in or purchasing any securities or derivatives, except that he may trade and purchase securities or derivatives for his own account through one account (including one RRSP account, one TFSA account and one RESP account) in his own name through a registered dealer, if he gives the registered dealer or registrant a copy of this decision;
 - ii. under section 161(1)(c), from relying on any exemptions set out in this Act, the regulations or a decision;
 - iii. under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;
 - iv. under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;
 - v. under section 161(1)(d)(iv), from advising or otherwise acting in a management or consultative capacity in connection with activities in the securities or derivatives markets;
 - vi. under section 161(1)(d)(v) from engaging in promotional activities by or on behalf of
 - a. an issuer, security holder or party to a derivative, or
 - b. another person that is reasonably expected to benefit from the promotional activity; and

- vii. under section 161(1)(d)(vi) from engaging in promotional activities on Gozdek's own behalf in respect of circumstances that would reasonably be expected to benefit Gozdek.

January 19, 2022

For the Commission

Gordon Johnson
Vice Chair

Deborah Armour, QC
Commissioner

Audrey T. Ho
Commissioner