Citation: 2014 BCSECCOM 194

Weiqing Jane Jin

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Judith Downes	Commissioner
	Brent W. Aitken	Vice Chair
	George C. Glover, Jr.	Commissioner
Dates of hearing	February 3, 4 and 7; April 25, 2014	
Submissions completed	April 25, 2014	
Date of Decision	July 22, 2014	

Appearing

Jennifer Whately	For the Executive Director
Thomas Manson, Q.C Patricia Taylor	For Weiqing Jane Jin

Findings

I Introduction

¶ 1 This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 On August 1, 2013, the executive director issued a notice of hearing (2013 BCSECCOM 187) alleging that Weiqing Jane Jin purchased shares of Hathor Exploration Limited while in a special relationship with Hathor and with knowledge of undisclosed material facts about Hathor, contrary to section 57.2(2) of the Act.

¶ 3 The notice of hearing alleges two separate contraventions of section 57.2(2). In the first, the executive director alleges that the relevant material facts were a confidentiality agreement, and an amendment to that agreement, between Hathor and a third party. The executive director alleges that the relevant trading by Jin is her purchases of Hathor shares on August 17 and 18, 2011.

¶ 4 Regarding the second alleged contravention, the executive director alleges that the relevant material fact was an unsolicited proposal from another third party to acquire all of the shares of Hathor. The executive director alleges that the relevant trading by Jin is her purchase of Hathor shares on August 22, 2011.

¶ 5 The executive director also alleges that Jin's conduct as described in the notice of hearing was contrary to the public interest.

II Background

A Confidentiality Agreement and Amendment

1 The transaction

¶ 6 At all material times Hathor was a mineral exploration company listed on the TSX. It had no revenues. Its main property was a uranium deposit located in the Athabasca Basin, Saskatchewan, known as the Roughrider Project. In the first six months of 2011, Hathor announced continued positive exploration results from the Roughrider Project as well as achievement of key milestones in its development.

¶ 7 In early summer of 2011, Hathor entered into negotiations with CGNPC Uranium Resources Co., Ltd., an affiliate of the China Guangdong Nuclear Power Group, a Chinese state- owned enterprise.

¶ 8 A Vancouver law firm that was Hathor's usual legal counsel acted for Hathor in connection with the negotiations with CGNPC. We will refer to the lawyer at the firm who was in charge of Hathor matters as CL. Jin is a Chinese lawyer who was then an associate consultant at the firm. On Hathor matters, Jin acted under the supervision of CL. Both CL and Jin testified at the hearing.

¶ 9 Hathor and CGNPC entered into a confidentiality agreement effective June 2, 2011, in connection with a site visit CGNPC wanted to make to the Roughrider Project in the summer of 2011.

¶ 10 The purpose of the confidentiality agreement was to provide CGNPC with information regarding Hathor's properties and business to assist CGNPC in determining whether it wanted to acquire Hathor or the Roughrider Project. The agreement dealt principally with the disclosure, use and return of confidential information to be provided by Hathor to CGNPC. There was a "standstill" provision which, for one year, restricted the acquisition by CGNPC of the shares or properties of Hathor and certain other activities. Neither Hathor nor CGNPC was under any obligation to negotiate or enter into an agreement relating to a subsequent transaction. Hathor was free to negotiate and consummate transactions with third parties.

¶ 11 CL testified that entering into confidentiality agreements in these circumstances is a very "normal course" event for mining exploration companies such as Hathor. She described the confidentiality agreement with CGNPC as a standard confidentiality agreement.

¶ 12 The site visit did not take place as originally planned.

¶ 13 During the first week of August 2011, three Hathor executives, accompanied by Jin, travelled to Beijing to meet representatives of CGNPC. The Hathor executives were Michael Gunning, president and CEO, Jay Fredericks, VP Project Development, and Jim Malone, chair of the board. Among those representing CGNPC at the meeting was Colin Yang, Senior Manager, Resources Development Department.

¶ 14 The principal subject of the Beijing meeting was negotiation of an amendment to the confidentiality agreement. The amendment provided for a 30-day exclusivity period in favour of CGNPC during which Hathor could not solicit proposals to acquire Hathor or the Roughrider Project. Hathor retained the right during the exclusivity period to provide information to other persons and to consider, negotiate and enter into unsolicited transactions.

¶ 15 The amendment required Hathor to notify CGNPC of "its acceptance of any binding third party offer". CGNPC would then have 30 days from receipt of the notification to make a competing offer. CL testified that to the extent this requirement provided CGNPC an opportunity to make a competing offer, it gave CGNPC no more rights to do so than it already had.

¶ 16 Following the Beijing meeting there was extensive email correspondence regarding settlement of the final terms of the amendment and CGNPC's proposed due diligence visit to the Roughrider Project.

¶ 17 On August 11, Fredericks sent an email to Yang with the amendment signed by Hathor.

¶ 18 On the same day, a dispute arose between CGNPC and Hathor regarding who would pay for the cost of CGNPC's due diligence visit. In an email to Jin, Fredericks stated that he had received a call from Yang who said that if Hathor did not share due diligence costs, it would affect CGNPC's interest in doing due diligence and the commercial negotiations. Jin replied the next day, telling Fredericks not to take the call as a threat. She speculated that CGNPC had underestimated due diligence costs and was hoping someone else would take responsibility for its mistake.

¶ 19 The dispute was resolved on August 15. Yang sent an email to Fredericks which said in part:

> "On the other side, I believe, Roughrider would be a good acquisition target for [CGNPC] and [CGNPC] was doing its efforts to find a practical way to cooperate with Hathor. I think [CGNPC's]offer will also be a much interesting and attractive one to the shareholder [sic] of Hathor. Under the present situation of mineral policy (that is foreign investors are allowed to hold a maximum of 49% interest when a project is on its mining phase), [CGNPC] still chose to acquire 100% interest of Roughrider other than 49% with the payment of cash.
>
> [CGNPC] was and is honest on the cooperation with Hathor, anticipate that we can exchange on the issue of costs and find a way to overcome by satisfying both. I am looking forward to your reply."

¶ 20 Jin was copied on the email and on the same day she sent an email to Gunning:

> "It's been a 'long weekend'. Glad to see that they've realized/admitted that it's merely a matter of costs, unexpected though nothing material to the deal itself. I believe this issue has been escalated to Mr. Zhou, the Chairman and their board level as well."

¶ 21 CGNPC sent Hathor a signed copy of the amendment on August 24.

2 Jin's trades

¶ 22 On August 15, 2011 (the day the dispute over due diligence costs was resolved), Jin transferred $50,622 into her self-directed cash trading account. On August 17, she purchased 4,400 Hathor shares at prices between $2.76 and $2.88. On August 18, she purchased an additional 2,500 Hathor shares at $2.79 per share and 500 Hathor shares at $2.80 per share.

B Cameco Offer

1 The transaction

¶ 23 Cameco is a uranium company, based in Saskatchewan, which describes itself as one of the world's largest uranium producers. Its shares are listed on the TSX and the NYSE.

¶ 24 On August 19, 2011, the president of Cameco, Tim Gitzel, wrote to Gunning about a proposal to acquire to Hathor. "We are pleased to submit this letter setting out the basis (the "Proposal") on which Cameco . . . offers to acquire all of the outstanding common shares . . . of Hathor . . . ." In these findings we refer to the Proposal as the Cameco offer.

¶ 25 Jin made much of the fact that Gitzel chose to describe the basis of his offer as a "proposal", and that, as a legal matter, the letter was not an "offer". In our opinion, in commercial terms, the letter was tantamount to an offer.

¶ 26 The Cameco offer set out:

- a price per share of $3.75 in cash;
- confirmation that the offer was not conditional on securing financing;
- advice that confirmatory due diligence was not required (but would be useful) as Cameco, working with its financial and legal advisors, had already conducted an extensive review of Hathor's publicly-available information;
- the proposed transaction structure; and
- conditions typical of acquisition transactions of this kind.

¶ 27 Cameco stated that it was prepared to invest considerable resources in any negotiations and analysis necessary to confirm the offer terms and complete a transaction as soon as possible.

¶ 28 The Cameco offer remained open until 5:00pm (Vancouver time) on August 21, 2011. Cameco stated that if Hathor did not respond by that time, Cameco would assume Hathor was not interested and Cameco would proceed accordingly.

¶ 29 Hathor sent the Cameco offer to CL for review and comment. In her August 19 email response, CL summarized some of the key terms of the Cameco offer and said:

> "You will note below that [Gitzel] indicates that if Cameco has not heard from [Gunning] by that time, they will assume Hathor is not interested in the proposal and they will proceed accordingly. I read into that that there is the potential they will go hostile."

¶ 30 CL copied Jin on that email. CL said that she thought it was appropriate to keep Jin "in the loop" given the ongoing negotiations with CGNPC. Jin replied the same day:

> "I agree with your assessment that Cameco could be ready to go for hostile."

¶ 31 When Jin was asked at the hearing what she meant by her reply email, she stated it wasn't her intention to agree that it looked like a hostile takeover was in the works but to simply echo CL's comments. She testified:

> "Yeah, typically that's the way you respond to our colleagues. I agree with you blah blah blah, something like that."

¶ 32 We do not find this answer credible, particularly given the potential impact of the Cameco offer on CGNPC negotiations. Jin's email reply at the time was reasonable, appeared to be considered, and was consistent with her role on the CGNPC file.

¶ 33 Jin said at the hearing that she suggested to CL that Jin should call a CGNPC department head to give him a "head's up" regarding the Cameco offer. It was subsequently determined that Gunning would contact CGNPC. CL testified that to her recollection she had no further discussions with Jin about the Cameco offer before it expired on August 21.

¶ 34 The Hathor board met on August 20 to discuss the Cameco offer. Jin was not aware of the meeting.

¶ 35 The Cameco offer expired on August 21 without acceptance by Hathor. Jin testified she did not make inquiries as to whether the offer had been accepted or expired.

¶ 36 On August 26, Cameco announced its intention to make an offer for all of the outstanding Hathor shares at $3.75 per share.

¶ 37 On September 13, the directors of Hathor unanimously recommended that the Hathor shareholders reject Cameco's offer. Hathor was subsequently acquired in the late fall of 2011 in a transaction with an affiliate of the Rio Tinto Group.

2 Jin's trades

¶ 38 On August 22, 2011, Jin purchased an additional 3,000 Hathor shares at $2.76 each.

¶ 39 On September 7, Jin sold 12,000 Hathor shares at $4.19 per share.

III Analysis and Findings

A Standard of Proof

¶ 40 The onus of proof lies on the executive director, who must prove the allegations in the notice of hearing on a balance of probabilities, meaning that "it is more likely than not that an alleged event occurred". The evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test." (*F. H. v. McDougall,* 2008 SCC 53, at paragraphs 49 and 46).

B Law Relating to Insider Trading

¶ 41 Section 57.2(2) says:

> "A person must not enter into a transaction involving a security of an issuer… if the person
>
> (a) is in a special relationship with the issuer, and
>
> (b) knows of a material fact . . . with respect to the issuer, which material fact . . . has not been generally disclosed."

¶ 42 Section 1(1) defines "material fact" as a fact that would reasonably be expected to have a significant effect on the market price or value of the securities", the securities here being the Hathor shares.

¶ 43 Section 3(b) says that a person is in a special relationship with an issuer if the person is "engaging in…any business or professional activity with or on behalf of the issuer…"

¶ 44 In *Canaco Resources Inc.,* 2013 BCSC 310, the Commission set out the principles for determinations of material fact based on the summary of current case law provided in *Cornish v. Ontario (Securities Commission)* 2013 NSC 310. The principles cited in *Canaco* relevant to the issues at hand are :

> "1. The test for materiality is objective – would the fact or event reasonably be expected to significantly affect the market price or value of the securities?
>
> 2. The test for materiality is a market impact test. As stated in *YBM*, "The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities."
>
> 3. The reasonableness of market impact is assessed from the point of view of the reasonable investor, that is, would a reasonable investor expect that the market price or value of the securities would be affected by the fact or event? (*Cornish*)."

C Issues Relating to Insider Trading Allegations

¶ 45 The notice of hearing alleges that Jin breached section 57.2(2) on two separate occasions by purchasing shares of Hathor while in a special relationship with Hathor and with knowledge of undisclosed material facts about Hathor:

- on August 17 and 18, 2011, with knowledge of the confidentiality agreement and the amendment; and
- on August 22, 2011 with knowledge of the Cameco offer.

¶ 46 Jin acknowledged that as a result of her role with the Vancouver law firm she was in a special relationship with Hathor and that she made the trades in Hathor shares on the dates and with knowledge of the documents specified above.

¶ 47 Jin does not dispute that the confidentiality agreement and the amendment had not been generally disclosed before her trades on August 17 and 18, or that the Cameco offer had not been generally disclosed before her trades on August 22.

¶ 48 Therefore, the only issues left to be determined are whether the following were material facts with respect to Hathor:

- the confidentiality agreement and amendment; and
- the Cameco offer.

D Findings Relating to Insider Trading Allegations

1 Confidentiality agreement and amendment

¶ 49 The first question to consider is whether the confidentiality agreement was a material fact. We accept CL's testimony that entering into confidentiality agreements is a very "normal course" event in these circumstances for exploration companies such as Hathor. The confidentiality agreement simply provided CGNPC with access to information regarding Hathor's business and properties. It did not bind either party to proceed with a deal. It explicitly stated that neither CGNPC nor Hathor was obligated to negotiate or enter into a transaction and that Hathor was free to negotiate or consummate transactions with third parties. The "standstill" terms did not have any effect on these provisions.

¶ 50 In our opinion, the confidentiality agreement was not a fact that a reasonable investor would expect to have a significant effect on the market price or value of Hathor shares. We find that the confidentiality agreement was not a material fact.

¶ 51 The next question to consider is whether the amendment was a material fact. The exclusivity rights granted to CGNPC under the amendment were very limited. Hathor remained free to consider, negotiate, and enter into transactions relating to unsolicited offers. The right granted to CGNPC to provide a competing offer to an accepted bid did not give CGNPC any rights they did not already have.

¶ 52 In our opinion, the amendment was not a fact that a reasonable investor would expect to have a significant effect on the market price or value of Hathor shares. We find that the amendment was not a material fact.

¶ 53 Notwithstanding the allegations in the notice of hearing were that the confidentiality agreement and the amendment were material facts, the executive director did not make this argument. Instead, in his submissions he put forward a new theory as to how Jin contravened section 57.2(2) by alleging the negotiations of the amendment were a material fact. Jin pointed out that this allegation was not set out in the notice of hearing. She argued that she was entitled to notice of the allegations against her and that this allegation must fail. We agree.

¶ 54 We dismiss the allegation that Jin contravened section 57.2(2) when she purchased shares of Hathor on August 17 and 18 with knowledge of the confidentiality agreement and the amendment.

2 The Cameco offer

¶ 55 The next question to consider is whether the Cameco offer was a material fact.

¶ 56 Jin says that the Cameco offer was not a material fact because it was not binding and had expired by the time she made her trades in Hathor shares on August 22, 2011.

¶ 57 We disagree. Although the Cameco offer was non-binding, it was clear from its content that Cameco was ready, willing, and able to acquire Hathor:

- Pricing and transaction structure were specified.
- The offer was not conditional on securing financing.
- Confirmatory due diligence was not required.
- Cameco was prepared to invest considerable resources in any negotiations and analysis required to complete a transaction as soon as possible.

¶ 58 The offer was also highly indicative of Cameco's ultimate intentions. It said it would "proceed accordingly" if Hathor did not respond by the expiry date of the Cameco offer. That was perceived by CL (correctly, as it turned out) as an indication that Cameco's next step was likely to be a hostile takeover bid. Jin concurred with this assessment. For this reason the Cameco offer did not cease being a material fact on its expiry.

¶ 59 In our opinion, the Cameco offer was a fact that a reasonable investor would expect to have a significant effect on the market price or value of Hathor shares. We find that the Cameco offer was a material fact.

¶ 60 We find that Jin contravened section 57.2(2) of the Act when she purchased 3,000 Hathor shares on August 22, 2011, while in a special relationship with Hathor and with knowledge of the Cameco offer, a material fact in relation to Hathor that had not been generally disclosed.

E Conduct Contrary to Public Interest

¶ 61 The notice of hearing alleges that Jin's conduct as described in the notice of hearing was contrary to the public interest.

¶ 62 The executive director argued that if we were not to find that Jin contravened section 57.2(2), we could still find that her conduct was contrary to the public interest. We have found that Jin contravened that section with respect to trades made with knowledge of the Cameco offer, so this argument is relevant only to our finding that the executive director failed to prove his case with respect to trades made with knowledge of the confidentiality agreement and the amendment.

¶ 63 The paragraph in the notice of hearing alleging that Jin's conduct was contrary to the public interest is problematic.

¶ 64 In *Blackmont Capital Inc*., 2011 BCSECCOM 490, the Commission said:

> "24 A notice of hearing is the foundation of hearings before . . . this Commission. It identifies the alleged misconduct that the respondent has to meet. It establishes the issues to be determined at the hearing. It follows that a panel does not have jurisdiction to determine matters not alleged in the notice of hearing. (Particulars need not be in the notice of hearing, but must relate to an allegation that is in the notice.)"

¶ 65 Here, the language is far too broad to give notice to anyone about what conduct of Jin's described in the notice of hearing is the conduct that the executive director alleges is contrary to the public interest. Is it that she was involved in the Hathor-CGNPC negotiations? Is it that she authored emails? These questions are, of course, frivolous. Clearly none of those things is, we assume, the conduct that the executive director alleges is contrary to the public interest. The point, however, is the actual conduct that the executive director considers to be conduct contrary to the public interest is not specified in the notice of hearing, and it needs to be, if the panel is meant to make a finding about the conduct in question.

¶ 66 We dismiss the allegation.

IV Submissions on Sanctions

¶ 67 We direct the parties to make their submissions on sanctions as follows:

By August 13	The executive director delivers submissions to Jin and to the secretary to the Commission
By August 27	Jin delivers response submissions to the executive director and to the secretary to the Commission
	Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission

	By September 3	The executive director delivers reply submissions (if any) to Jin and to the secretary to the Commission.

¶ 68 July 22, 2014

¶ 69 **For the Commission**

Judith Downes
Commissioner

Brent Aitken
Vice Chair

George C. Glover, Jr.
Commissioner