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

Citation: Re Bracetek, 2023 BCSECCOM 118 Date: 20230308

Bracetek Industries Group Ltd.

Panel	Audrey T. Ho	Commissioner
	Deborah Armour, KC	Commissioner
	James Kershaw	Commissioner
Hearing dates	October 24, 2022	
Submissions completed	December 30, 2022	
Date of Findings	March 8, 2023	
Appearing		
Derek Chapman	For the Executive Director	
Beverly Ma		

Findings and Decision

I. Introduction

[1] These are the liability and sanction portions of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

[2] In a notice of hearing issued on May 26, 2021 (2021 BCSECCOM 217), the executive director alleged that Bracetek and Geoffrey Rajay Sidhu (Sidhu) committed fraud and illegally distributed securities.

[3] On September 12, 2022, Sidhu entered into a settlement agreement with the executive director (2022 BCSECCOM 359). Sidhu admitted to committing one illegal distribution of securities and the executive director discontinued the proceedings against Sidhu (2022 BCSECCOM 361).

[4] On September 27, 2022, the executive director issued an amended notice of hearing (2022 BCSECCOM 397), against Bracetek only, alleging that Bracetek contravened section 61 of the Act by distributing $1.75 million of its securities to a British Columbian investor (the Investor) without filing a prospectus when a prospectus exemption was not available. The amended notice of hearing does not allege fraud.

[5] Bracetek did not participate in these proceedings.

[6] At the start of the hearing, the panel granted the executive director's application to combine the liability and sanction portions of these proceedings and deal with both at the same time.

[7] The executive director called one witness, a Commission investigator. The executive director also tendered documentary evidence including an affidavit from the Investor, and made written submissions.

[8] Following the hearing, the panel asked the executive director to provide submissions on the following questions:

a) Does the analysis of the policy intent of section 161(g) addressed in *Re: Sand, Achs, Gulston,* 2022 BCSECCOM 473, affect the public interest analysis for any disgorgement order that could be issued against Bracetek?

b) If the panel were to issue the section 161(1)(g) order sought by the executive director against Bracetek, does the public interest require that any such order account for the section 161(1)(g) order against Sidhu under the settlement agreement? If so, how?

[9] The executive director made submissions on both questions, which we refer to below.

II. Factual Background

Bracetek and its business

[10] Bracetek is a company extra provincially registered in British Columbia. It remains registered in British Columbia as at September 20, 2022 although it has not filed annual reports since 2019.

[11] The sole director and officer of Bracetek at the relevant time was Sidhu's father (Sidhu Sr.).

[12] Sidhu Sr. died in 2021. Prior to his death, Sidhu Sr. attended interviews by Commission staff and answered their questions under oath. The executive director entered into evidence, brief excerpts from those interview transcripts.

[13] The evidence before us is that Bracetek has had no director, officer or other authorized representative since Sidhu Sr.'s death.

[14] According to its website, at the relevant time, Bracetek was in the business of manufacturing three proprietary bracing products for commercial and residential construction.

[15] Bracetek licensed the technologies for the three bracing products from three different companies controlled by Sidhu, pursuant to three licensing agreements each dated March 1, 2015. Bracetek agreed to pay licensing fees totaling $300,000 per year for the three braces. The first $300,000 was due by August 31, 2015, the second $300,000 was due in March 2016 and the last $300,000 was due in March 2017.

[16] In April 2015, Bracetek entered into an agreement with two other companies controlled by Sidhu in order to acquire rights to a fourth bracing product. Under that agreement, Bracetek's ability to acquire rights to the fourth bracing product was contingent in part on Bracetek having paid in full

the $900,000 licensing fees for the first three bracing products. Although the companies that licensed the three bracing products to Bracetek were not parties to the share purchase agreement, the agreement purported to amend the three licensing agreements with Bracetek so that the payment dates of the $900,000 licensing fees were all deferred and extended until February 2018.

The Investor

[17] In 2015, the Investor was a divorced mother of two young children.

[18] In November 2015, the Investor met Sidhu through a social networking website. They also began to meet in person at a coffee shop near her home.

[19] The Investor told Sidhu about her personal and financial circumstances. She told him that she owned a home in west side Vancouver that was mortgage-free but she was struggling financially.

[20] Sidhu advised her on improving her financial situation. He initially recommended that she borrow against her home to buy a revenue property. He introduced her to a mortgage broker and helped her with the application process. He obtained details of her income while helping her prepare information for the mortgage broker.

[21] At that time, the Investor's only asset of significant value was her home, appraised at $3.2 million during the mortgage process. Her other assets consisted of a used car and less than $10,000 in the bank. She had approximately $316,000 in debts. Her annual income was not significant. She earned self-employment income of $16,500, $10,500 and less than $2,400 in 2013 - 2015 respectively. She also received annual child support payments of $32,800 and annual rental income of $20,400 from the rental of a basement suite in her home.

Investment in Bracetek

[22] On November 30, 2015, the Investor was approved for a one year mortgage of $2.07 million against her home.

[23] On or about December 9, 2015, Sidhu and the Investor met at their usual coffee shop and he introduced her to Bracetek. The Investor had never heard of Bracetek before then.

[24] He showed her the Bracetek website on his iPad and told her the following:

a) his father owned the company;

b) Bracetek made three types of braces for use in home construction: floor joints, shear walls and roof trusses;

c) Sidhu designed the braces used by Bracetek and owned the patents for them;

d) Sidhu licensed the technology for the braces to Bracetek;

e) there was a lot of excitement about Bracetek;

f) his father was planning to take the company public within six months to a year; and

g) if she invested in Bracetek, she would triple her investment when it went public.

[25] Sidhu recommended that she use $1.75 million of the mortgage proceeds to invest in Bracetek, and use the balance to pay the monthly mortgage payments.

[26] On December 12, 2015, Sidhu texted the Investor that he would be speaking to Sidhu Sr. about her investing in Bracetek. He later texted her that Sidhu Sr. had given his approval.

[27] On December 16, 2015, the Investor paid $1.75 million to Bracetek to purchase common shares in Bracetek, and signed a subscription agreement.

[28] In the subscription agreement and accompanying schedules (the Accredited Investor Certificate and the Risk Acknowledgement for Individual Accredited Investors Form), the Investor initialed or checked off boxes to indicate that:

a) she qualified as an accredited investor by virtue of three different categories (owning financial assets having an aggregate net realizable value of more than $1 million and more than $5 million, and owning at least $5 million in net assets);

b) she was aware that Bracetek was at an early development stage of its existence, there was no market for the shares she bought and she may never be able to sell them, and Bracetek had no substantial assets, and

c) she was aware that:

> the Issuer has licensed the exclusive right to pursue commercial applications, namely the development, manufacture and sale of proprietary roof truss braces, which are described in International Patent Application No. …, United States Patent No. … and Canadian Patent Application No. … within Canada and the United States of America (and its territories). The Subscriber is aware that the Issuer has also licensed the exclusive right to pursue commercial applications, namely the development, manufacture and sale of proprietary shear wall braces as described in International Patent Application No. …and Canadian Patent Application No. … within Canada and the United States of America (and its territories). The Subscriber is aware that the Issuer has licensed the non-exclusive right to pursue commercial applications, namely the development, manufacture and sale of proprietary block and bridging braces, which are described in International Patent Application No. …and United States Patent Application Publication No. … within Canada and the United States of America (and its territories). <u>The Subscriber acknowledges that the foregoing patents and patent applications are owned by companies controlled by a close relative of a director of the Issuer and are licensed to the Issuer for a fee and royalties. The Subscriber further acknowledges that the Issuer's primary business objective will be the direct and/or indirect distribution of products based on the foregoing inventions within Canada and the United States (and its territories);</u>
>
> [emphasis added]

[29] The Investor deposed that she met Sidhu at their usual coffee shop on December 16, 2015 and he walked her through the Bracetek subscription agreement and told her how to complete it. She asked him if she was an accredited investor. He told her that she was and where to initial and check off specific boxes in the document. She trusted that he knew what he was doing and accepted his explanation. Similarly, she followed his directions on completing the Accredited Investor Certificate and the Risk Acknowledgement for Individual Accredited Investors Form without reading them.

[30] In his settlement agreement, Sidhu admitted to acting in furtherance of Bracetek's trade to the Investor and therefore he illegally distributed securities to the Investor contrary to section 61 of the Act.

[31] As at May 14, 2021, Bracetek had not filed a preliminary prospectus or a prospectus, an offering memorandum or a report of exempt distribution.

[32] At the time of the investment, Bracetek:

a) had less than $100 in its bank account;

b) had no revenue; and

c) had not paid any licensing fees for the three bracing products.

First meeting between the Investor and Sidhu Sr.

[33] The Investor deposed that she never met Sidhu Sr. until January 4, 2016 when he gave her the share certificate for her Bracetek shares.

[34] In his interviews with Commission staff, Sidhu Sr. said he met the Investor on December 16, 2015, in a roadside meeting near her bank, and he checked her eligibility as an accredited investor before she invested. Sidhu was also present.

[35] In support, Sidhu Sr. provided Commission staff with his handwritten notes dated December 17, 2015 and titled "Accredited Investor Due Diligence – [name of the Investor] subscription agreement". Sidhu Sr. said he made those notes, documenting the meeting on December 17, 2015, after speaking with Bracetek's company lawyer. He also provided Commission staff with a typed version of the handwritten notes (Due Diligence Notes) that he said he personally transcribed to help Commission staff read his handwriting.

[36] The Due Diligence Notes included the following exchange that Sidhu Sr. said took place between he and the Investor regarding her financial circumstances:

> I then said needed to have her confirm what [Sidhu] had told me that she told him.
>
> - she confirmed to me that she had received $800.000. + house and other assets that she couldn't talk about.
> - confirmed her Father and her had owned a store on Broadway [store name redacted] and that they still receive money from that investment.

- confirmed she had invested in Oyster bar [restaurant name redacted] in Tofino (Land, buildings, and business)
- Invested $300,000. in computer co.
- invested $200,000. With guy who lived in her bsmt suite. (web-app development co.)
- said her husband and her had [business name redacted] (fibre optic Co.) and had sold for $10 Million.
- confirmed her husband and [the Investor] had construction co. and had been very involved in the actual work with hubby.
- she was member of prestigious Arbutus Club

- I asked she had ticked 2 different boxes and if she qualified on both. She said ("I wouldn't have ticked the boxes if I didn't")

…

- I asked if she fully understood the subscription agreement and that her size of investment is very unusual for a startup to receive. She said she understood all of that.

[37] Sidhu Sr. also told Commission staff that he learned that the Investor borrowed money against her home and used it to invest in Bracetek at a meeting he had with her on January 26, 2016.

[38] According to the Due Diligence Notes, Sidhu Sr. told the Investor that about half of her investment would be used to pay Sidhu the three-year $900,000 licensing fees, and she replied that "she was good with that." He also told her that her money would be used "for salary, legal fees and other expenses".

Bracetek's use of the Investor's funds and the Investor's expectations

[39] Bracetek used most of the Investor's funds in December 2015, in the following ways:

a) $900,000 to Sidhu's three companies for the licensing fees;

b) $185,000 to a company of Sidhu Sr. for consulting fees owed for 2015;

c) a further $185,000 to a company of Sidhu Sr. for consulting fees;

d) $43,000 to Sidhu Sr. for expense reimbursements. Sidhu Sr. gave Commission staff an itemized list of the expenses. They were mostly for office furnishings, equipment and supplies. Sidhu Sr. told Commission staff that he paid for these items, they were being used by Bracetek and it was always his intention to transfer ownership to Bracetek "when the company had cashflow to do it";

e) over $45,000 in credit card debt. Sidhu Sr. claimed these expenses were incurred for Bracetek;

f) $31,500 to Sidhu Sr.'s daughter for unpaid office rent. Sidhu Sr. claimed Bracetek had an office at his daughter's house; and

g) $150,000 to a founding shareholder of Bracetek to repurchase her Bracetek shares. The Commission investigator testified that this shareholder was Sidhu Sr.'s girlfriend. According to Bracetek's share register, the shareholder had acquired those shares for a total of $25 ten months earlier.

[40] By January 31, 2017, approximately $2,100 remained in Bracetek's bank account.

[41] In his settlement agreement, Sidhu admitted to receiving the $900,000 from Bracetek. He agreed to pay to the Commission $900,000 pursuant to an order under section 161(1)(g) of the Act, within six months of the date of the order. The order would be secured by a charge on real estate owned by Sidhu. The order was issued on September 12, 2022 (2022 BCSECCOM 358).

[42] The Investor deposed that she did not expect Bracetek to use her money for the above payments.

[43] She deposed that Sidhu did not tell her that Bracetek owed hundreds of thousands in unpaid consulting fees and expenses or that it planned to repurchase a founding shareholder's shares. Although she knew that Bracetek licensed its technologies from Sidhu, she deposed that she was not told that Bracetek had never paid any licensing fees to him.

Impact on the Investor

[44] The Investor lost her entire investment. She has sued Bracetek, Sidhu Sr. and Sidhu in civil court but the matter has not yet gone to trial.

[45] The amount invested represented more than 50% of the Investor's net worth. The Investor sold her home to pay off the mortgage, and is now renting. She spends thousands of dollars a month on rent. She fears that she could never afford owning a home again. The financial harm to her is manifest. In her affidavit, the Investor also described the emotional trauma and physical harm she suffered from this experience.

III. Liability - Applicable Law

A. Standard of proof

[46] The onus of proof lies with the executive director who must prove the allegations in the amended 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. Prospectus requirements

[47] The relevant provisions of the Act, at the relevant time, were as follows:

a) section 1(1) defines "trade" to include "(a) a disposition of a security for valuable consideration…" and "(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)";

b) section 1(1) defines "distribution", if used in relation to trading in securities, as "a trade in a security of an issuer that has not been previously issued…";

c) section 1(1) defines "issuer" as a person who (a) has a security outstanding, or (b) is issuing a security, or (c) proposes to issue a security;

d) "section 1(1) defines "security" to include "(a) a document, instrument or writing commonly known as a security", and (d) "… a… share, stock, unit, … certificate of share or interest, …"; and

e) section 61(1) states "[u]nless exempted under this Act, a person must not distribute a security unless (a) a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and (b) the executive director has issued receipts for [them]."

C. Prospectus exemptions

[48] *National Instrument 45-106 – Prospectus and Registration Exemptions* (NI 45-106) sets out a series of specific prospectus exemptions. Section 2.3 removes the prospectus requirement when the purchaser purchases as principal and is an "accredited investor".

[49] At the relevant time, section 1.1 defines "accredited investor", with respect to an individual, to include an individual who meets one of the following income or asset tests:

> (j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $1,000,000;
>
> (j.1) an individual who beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $5,000,000;
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> (k) an individual whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year; or
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000.

[50] Section 1.1 defines "financial assets" to mean: (a) cash, (b) securities, or (c) a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation.

[51] The Commission has consistently held that the onus is on the respondent to meet the evidentiary burden of establishing the factual basis for the existence of an exemption from the prospectus requirements of section 61. See: *Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 163, *Re SBC Financial Group Inc.*, 2018 BCSECCOM 113, at paragraph 53, *Re Pegasus Pharmaceuticals*, 2021 BCSECCOM 374, at paragraph 108.

[52] In *Solara Technologies Inc. and William Dorn Beattie*, the Commission confirmed that it is the responsibility of a person trading in securities to ensure that the trade complies with the Act, and a person relying on an exemption has the onus of proving that the exemption is available. On the enquiry that such person must make to reasonably verify that a particular exemption is available, the Commission concluded:

> 37. The determination of whether an exemption applies is a mixed question of law and fact. Many exemptions are not available unless certain facts exist, often known only to the investor. To rely on those facts to ensure the exemption is available, the issuer must have a reasonable belief the facts are true.
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> 38. To form that reasonable belief, the issuer must have evidence. For example, if the issuer wishes to rely on the friends exemption, it will need representations from the investor about the nature of the relationship…
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> 39. Accordingly, a representation that merely asserts, with nothing else, that the investor is a close personal friend, or an accredited investor, is not sufficient to determine whether the exemption is available.

[53] Companion Policy to NI 45-106 gives guidance on the steps a person relying on a prospectus exemption can take to determine whether an exemption is available. Companion policies do not have the force of law. Their function is to inform market participants of the regulators' interpretation of certain aspects of securities law.

[54] Consistent with the principles set out in *Solara*, Companion Policy to NI 45-106 stated, at the relevant time:

a) That the person relying on a prospectus exemption (the issuer) is responsible for determining whether the terms and conditions of the prospectus exemption are met. (s. 1.9(1)).

b) It will not be sufficient for the issuer to accept standard representations in a subscription agreement or an initial beside a category on the Individual Accredited Investors Form unless the issuer has taken reasonable steps to verify the representation made by the purchaser. (s. 1.9(3)).

c) It is the issuer that is relying on the prospectus exemption and it is the issuer that is responsible to ensure the terms of the exemption are met. (s. 1.9(4)).

d) To assess whether a purchaser is an accredited investor, the issuer is expected to ask questions about the purchaser's net income, financial assets or net assets, or to ask other questions designed to elicit details about the purchaser's financial circumstances. If the issuer has concerns about the purchaser's responses, it should make further inquiries about the purchaser's financial circumstances. If the issuer still questions the purchaser's eligibility, the issuer could ask to see documentation that independently confirms the purchaser's claims. (s. 1.9(4)(c)).

[55] We agree with the conclusions reached by the Commission in *Solara* set out above. We also find the statements in Companion Policy to NI 45-106 set out above to be appropriate.

IV. Positions of the parties on liability

A. Executive director's position

[56] The executive director submitted that the sale of Bracetek shares to the Investor was a distribution of securities, that it was done without a prospectus and without qualifying for a valid prospectus exemption.

[57] As for a due diligence defence, the executive director submitted that the roadside meeting between Sidhu Sr. and the Investor on December 16, 2015 never took place, and the Due Diligence Notes were self-serving and lacked a ring of truth. He also submitted that, even if that meeting took place, the questions asked were inadequate for the purpose of establishing proper due diligence.

B. Bracetek's position

[58] Although Bracetek did not participate in these proceedings, Sidhu Sr., in his Commission interviews, appeared to take the position that Bracetek did not contravene section 61 because it conducted appropriate due diligence to satisfy itself that the Investor was an accredited investor.

V. Analysis and findings on liability

[59] There is no dispute and we find that:

a) the common shares in Bracetek issued to the Investor were securities;

b) Bracetek was an issuer as it was proposing to issue a security to the Investor;

c) Bracetek engaged in a trade of securities when it issued those shares to the Investor for $1.75 million;

d) the trade in those shares was a distribution under the Act; and

e) no prospectus was filed in connection with the distribution.

[60] On the question of whether an exemption from the prospectus requirements of the Act was available, the only possible exemption that might be relevant was the accredited investor exemption.

[61] The evidence clearly established that the Investor purchased the Bracetek shares as principal, and she did not qualify as an accredited investor when she invested in Bracetek in December 2015. She was divorced then and had no spouse. Her financial assets at the time (which by definition did not include her home) were far less than $1 million. Her net assets were less than $5 million. Bracetek did not rely on the income test but the evidence also clearly established that her annual net income before taxes in the relevant years was significantly less than $200,000.

[62] The executive director asked us to find that the roadside meeting on December 16, 2015 never took place. The evidence on this point consisted of the contradictory statements of Sidhu Sr. versus the Investor. Both were made under oath, but neither of them testified before us. We find it difficult to assess their relative credibility when we did not have the opportunity to observe their demeanor or how they would have responded to cross examination. The documentary evidence provided by the Investor (texts she exchanged with Sidhu) to support her version of what happened was not sufficiently clear and cogent on this point.

[63] For the purpose of determining liability, we need not decide if the roadside meeting on December 16, 2015 took place. Even if that meeting did occur, as described by Sidhu Sr., the questions asked to assess if the Investor qualified as an accredited investor were woefully inadequate.

[64] Firstly, assuming for the purposes of this analysis that the December 16, 2015 did take place, conducting due diligence after the Investor had already mortgaged her home, on the street outside her bank when she was driven there to pick up the bank draft for this investment using her mortgage proceeds, and after she had already completed the subscription agreement and forms, all suggest a very perfunctory attempt at due diligence.

[65] Secondly, Sidhu Sr. did not take adequate steps to verify that the Investor understood the meaning of what she was signing or initialing when she checked and initialed boxes on the subscription agreement and accompanying forms to indicate that she qualified as an accredited investor. As stated in *Solara*, a bare assertion alone is not sufficient to determine if an exemption was available. Even if the Investor had told Sidhu Sr. that she understood the subscription agreement and qualified as an accredited investor, as he claimed, that verbal bare assertion was no more adequate than the written bare assertion she made on the forms.

[66] The Investor was so far removed from qualifying as an accredited investor that any genuine effort at enquiry would have uncovered that. The Due Diligence Notes referred vaguely to various investments, assets and businesses the Investor owned or co-owned, without clarity on whether she still owned them. Noticeably absent was any enquiry about what she currently owned and the present value of her assets. There were references to assets she co-owned with her husband with no indication that Sidhu Sr. asked or knew that she was divorced so her former husband's assets would not be included in any calculation of her assets. There was no enquiry as to which of her assets were "financial assets" and their value. The short description of her assets in the Due Diligence Notes suggests that most of them would not qualify as "financial assets," but Sidhu Sr. did not seek clarification. There was no enquiry about her debts and liabilities for the purpose of determining her "net assets." In fact, Sidhu Sr.'s statement to Commission staff that he learned of her house mortgage in January 2016 demonstrated that he was not aware of it on December 16, 2015.

[67] In addition, Sidhu Sr. wrote in the Due Diligence Notes "I then said needed to have her confirm what Geoff had told me that she told him." We have no evidence of what Sidhu told his father, but Sidhu was sufficiently aware of the Investor's financial circumstances which clearly suggested that she did not qualify as an accredited investor. If Sidhu gave that information to his father, then Bracetek should have suspected or concluded that she did not qualify as an

accredited investor but accepted her investment in any case. If Sidhu did not share what he knew with his father, then Bracetek failed to take reasonable steps to assess if the Investor qualified as an accredited investor, as outlined above.

VI. Findings on liability

[68] Bracetek bears the onus of establishing that the accredited investor exemption was available, and failed to do so.

[69] We find that Bracetek contravened section 61 of the Act by distributing shares totaling $1.75 million to the Investor, without a prospectus and without an exemption from the prospectus requirements of the Act.

VII. Sanctions

[70] The executive director sought the following orders against Bracetek:

a) broad market bans for the longer of eight years or until Bracetek pays in full the amounts ordered under section 161(1)(g) and 162 of the Act;

b) an order of $1.75 million under section 161(1)(g) of the Act; and

c) an administrative penalty of $50,000 under section 162 of the Act.

[71] In his further submissions, the executive director changed the section 161(1)(g) order sought to $1.75 million less any payment Sidhu makes to the Commission under the section 161(1)(g) order issued against him.

VIII. Analysis on sanctions

A. Factors

[72] In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified 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."

B. Application of relevant factors

[73] Section 161(1) orders are protective and preventative in nature and prospective in orientation. In determining what orders are appropriate, the Commission aims to protect investors, promote the fairness and efficiency of the capital markets, and preserve public confidence in those markets.

Seriousness of the conduct; damage to markets

[74] Contraventions of section 61 are inherently serious because that section is a part of the foundational requirements for protecting investors and the integrity of capital markets. Section 61(1) requires that those who wish to distribute securities file a prospectus with the Commission, so that investors and their advisors get the information they need to make an informed investment decision.

[75] The specific requirements for exemptions from section 61(1) are designed to protect investors and markets, so an issuer who intends to rely on the exemptions must ensure they are met. See: *Solara Technologies Inc. and William Dorn Beattie*.

[76] The accredited investor exemption is premised on the concept that certain sophisticated Canadian investors do not require the additional information contained in a prospectus and are capable of managing the risks associated with acquiring securities without it. The conditions in the accredited investor exemption limit its application to that narrow class of investors and in so doing protect individuals exactly like the Investor, who did not have that sophistication or capability.

Enrichment

[77] Bracetek was directly enriched as it received all of the proceeds of the illegal distribution and used the money to pay its debts and obligations.

Harm to investor

[78] The Investor suffered financial and other harm. The financial harm is significant given the size of the investment relative to her net worth and annual income.

[79] The Investor had to sell her home in a desirable area in Vancouver to pay off the mortgage. The outcome of her civil lawsuit against Bracetek is unknown at this time. There is no evidence before us on whether Bracetek has any present or future value. Even if the Investor were ultimately successful in recovering some or all of the $1.75 million, she has lost the use of those funds in the intervening years.

[80] There is a possibility that the Commission will be paid up to $900,000 from Sidhu under section 161(1)(g) of the Act. Given the Commission's practice of allowing investors to claim amounts paid to it under section 161(1)(g) of the Act, there is a possibility that the Investor may recover up to $900,000 through that process.

Mitigating or aggravating factors

[81] There are no mitigating factors.

[82] The executive director submitted that it is an aggravating factor that Bracetek through Sidhu Sr. lied about the roadside meeting and provided fake Due Diligence Notes to Commission investigators. As we did not make a finding on this point, we do not find any aggravating factors.

Past conduct

[83] There is no evidence that Bracetek has any history of regulatory misconduct.

Risk to investors and markets; fitness to participate in the capital markets

[84] Bracetek's conduct fell far short of that expected of a participant in our capital markets.

[85] It would have taken minimal effort to ascertain that the Investor had little income and only one asset of value, her home. Even if we accept the Due Diligence Notes at face value and assume Sidhu did not tell Sidhu Sr. of her financial circumstances, the perfunctory and woefully inadequate efforts that Bracetek took to ascertain her financial circumstances, especially in light of the size of her investment, went beyond carelessness and amounted to reckless indifference.

[86] That attitude regarding regulatory compliance presents a risk to our capital markets. We are mindful that Bracetek is no longer directed by Sidhu Sr. and our orders are preventative and prospective. But we have no indication that Bracetek would act differently if it continued under new direction and management. We find a market ban to be necessary to protect investors and preserve public confidence in the markets. But the duration of the ban we order is less than what we would have imposed if Sidhu Sr. remained in control of Bracetek.

Specific and general deterrence

[87] The sanctions we impose must be sufficiently severe to ensure that both Bracetek and others will be deterred from engaging in similar conduct.

[88] Our orders must also be proportionate to the misconduct and the circumstances surrounding it. See: *Davis v. British Columbia Securities Commission,* 2018 BCCA 149.

Previous orders

[89] The executive director referred us to four previous decisions of the Commission: *Re Flexfi Inc.*, 2018 BCSECCOM 166, *Re HRG Healthcare*, 2016 BCSECCOM 5, *Re SBC Financial Group Inc.*, 2018 BCSECCOM 267, and *Re Pegasus Pharmaceuticals*, 2022 BCSECCOM 145.

[90] In *Re Flexfi Inc.*, Flexfi and its director raised $2.2 million from 47 investors through illegal distributions. The Commission found two significant factors that were reflected in its orders: there was no evidence of investor harm, and the respondents' admission of liability was a significant mitigating factor. At the time of the hearing, Flexfi remained an active business and was operating in compliance with its obligations under the securities it illegally distributed and under its other securities. The Commission ordered a limited market ban of four years against each respondent, and ordered Flexfi's director to pay $40,000 in administrative penalty. There

was no disgorgement order. The Commission was concerned that a disgorgement order against Flexfi could harm its investors.

[91] In *Re HRG Healthcare,* HRG raised $4 million from 109 investors through illegal distributions. Its two directors were responsible for directly raising $693,500 and $1.7 million respectively, and for significant portions of the illegal distributions by HRG by virtue of section 168.2(1) of the Act. In addition, they filed false and misleading exempt distribution reports with the Commission contrary to section 168.1 of the Act. All of the investors lost their investments. There was no evidence that the respondents had intentionally structured their affairs to avoid the provisions of the Act. Their conduct was found to be either careless or reckless or both. One director was a significant investor in HRG and lost his investment. The Commission ordered permanent market bans against HRG since its business had failed and the investors had lost all their money. It ordered seven-year market bans against each of the two directors. A disgorgement order was made against one director in the amount of the enrichment he received from his misconduct. No disgorgement was ordered against HRG, as the Commission found that HRG used investors' funds consistent with their expectations. The executive director did not seek and the Commission did not order any administrative penalty against the company. Each director was ordered to pay $75,000 in administrative penalty.

[92] In *Re SBC Financial,* SBC raised $1.54 million on 45 issuances of securities from multiple investors through illegal distributions. SBC also did unregistered trading contrary to section 34(a) of the Act. The Commission found that five- to ten-year market bans represented the "bookends" in the length of market prohibition orders in recent Commission decisions for misconduct of the general nature that SBC and its director engaged in. The Commission issued ten-year market bans against SBC and its director, due to: the quantum of investor losses and enrichment of the respondents, the significant multiple contraventions of both sections 34 and 61 over a long period of time, the significant aggravating factor of the director's previous registration status, and the director's demonstrated dishonesty. The majority of the panel held that since a majority of the investors' funds were used in a manner consistent with investors' expectations, it was in the public interest to only issue a disgorgement order against SBC and its director for the portion that was paid to the director. The dissenting commissioner would have issued a disgorgement order for the entire amount raised on the basis that the use of investors' funds in accordance with their expectations was irrelevant when investors were denied the fundamental protection of the Act and did not receive sufficient information regarding SBC and its securities to make an informed investment decision, and the respondents dealt with investors in an unregistered capacity without fulfilling their basis obligations as registrants. The Commission ordered SBC's director to pay a $100,000 administrative penalty, but held that it was unnecessary to order SBC to pay an administrative penalty because SBC did not act independently from its director.

[93] In *Re Pegasus Pharmaceuticals*, Pegasus raised US$45 million from multiple investors through illegal distributions. Another company (Careseng) contravened section 61 when it engaged in acts in furtherance of trades in connection with US$12.8 million of Pegasus' distributions. Pegasus' director was found responsible for the contraventions of both companies. There was no evidence that the respondents were enriched by their misconduct. The Commission issued ten - year market bans against Pegasus and its director, and an eight-year ban against Careseng. The

Commission did not order any disgorgement order. It found no evidence that Pegasus had used investors' funds for other than corporate purposes and held that a disgorgement order would only potentially harm the investors. It found no evidence that Careseng or the Pegasus director obtained any amount directly or indirectly from their contraventions. The Commission ordered Pegasus' director to pay $500,000 in administrative penalty. It did not order an administrative penalty against Pegasus on the basis that it did not act independently from its director and an administrative penalty would impact Pegasus' ability to generate income and profits and harm the very investors who were the victims of the misconduct. The executive director did not seek and the Commission did not order an administrative penalty against Careseng as it had no assets or operations and had been dissolved.

[94] We find *Re HRG Healthcare* and *Re SBC Financial* helpful as the circumstances in those cases are generally comparable to the circumstances in this case. We find *Re Flexfi* or *Re Pegasus* less helpful due to the significant mitigating circumstances present in the first and the significantly higher amount involved in the latter, except that they suggest bookends for the range of sanctions (in terms of the length of market bans and quantum of administrative penalty) issued by the Commission in recent decisions involving illegal distributions in the absence of fraud or misrepresentation.

C. Appropriate sanctions

Market bans

[95] For the reasons set out earlier, we find it is appropriate to order a market ban on Bracetek.

[96] The total amount raised by Bracetek was similar in magnitude to the amounts raised by HRG and SBC. In each case, the misconduct was found to be due to carelessness or recklessness or both. Although HRG and SBC involved more investors, the amount Bracetek raised from one investor through its misconduct was comparable in magnitude to the total amounts raised by HRG and SBC. Although HRG and SBC had additional contraventions, those contraventions were related to the illegal distributions. We do not find a permanent ban to be appropriate here because, unlike HRG, we do not know if Bracetek has permanently ceased operations and whether Bracetek shareholders may appoint new directors and resume its business. Nor do we find a ten-year ban to be appropriate because, unlike SBC, we did not find aggravating factors, and Bracetek is no longer under the direction and control of Sidhu Sr.

[97] Having regard to all the circumstances, we find a market ban of seven years to be appropriate.

[98] On the issue of whether the market ban should continue until the financial sanctions are fully paid, we agree with the following statements from *Re Pegasus*:

> [71] The integrity of the capital markets is based on the principle of compliance. There is a legislative and regulatory framework that governs the operation of those markets. If a respondent were allowed to resume participation in the markets after complying with only part of the sanctions imposed on them, it would send the wrong message to the markets as to importance of compliance and undermine the goals of specific and general deterrence underlying our sanctions.

> [72] It is always open to the respondents to make a variation application under section 171 of the Act if, after expiry of the term of the market bans, there are circumstances which could cause the Commission to reconsider the sanctions.

Section 161(1)(g) orders

[99] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, adopted a two-step approach from *Re SPYru Inc.*, 2015 BCSECCOM 452 at paragraphs 131 and 132, to determining appropriate orders under section 161(1)(g) of the Act:

> [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
>
> [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[100] The Court of Appeal adopted several principles to apply in interpreting section 161(1)(g), at paragraph 143:

> 1. The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e., by ensuring the person does not retain the "benefit" of their wrongdoing.
>
> 2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under Part 3 of the Securities Regulation or the s. 157 compliance proceedings in the *Act*.
>
> 3. There is no "profit" notion, and the "amount obtained" does not require the Commission to allow for deductions of expenses, costs, or amounts other persons paid to the Commission. It does, however, permit deductions for amounts returned to the victim(s).
>
> 4. The "amount obtained" must be obtained *by that respondent, directly or indirectly,* as a result of the failure to comply with or contravention of the *Act*. This generally prohibits the making of a joint and several order because such an order would require someone to pay an amount that person did not obtain as a result of that person's contravention.
>
> 5. However, a joint and several order may be made where the parties being held jointly and severally liable are under the direction and control of the contravener such that, in fact, the contravener obtained those amounts *indirectly*. Non-exhaustive examples include use of a corporate *alter ego*, use of other persons' accounts, or use of other persons as nominee recipients.

Step 1 – can a section 161(1)(g) order be made?

[101] The evidence is clear that Bracetek directly obtained the benefit of the full $1.75 million and it was obtained from the Investor by its contravention of the Act. As a result, we could make an order under section 161(1)(g) against Bracetek in the amount of $1.75 million.

Step 2 – is it in the public interest to make a section 161(1)(g) order?

[102] We next considered if it is in the public interest to make an order in the full amount, in a lesser amount or not at all. This is not a legal question but one of the exercise of our discretion to make an order in the public interest.

The executive director's position

[103] The executive director submitted that we should disgorge the entire $1.75 million, because Bracetek did not use the Investor's funds in accordance with her expectations. He submitted that the December 16 roadside meeting never took place and Sidhu Sr. never disclosed to the Investor the purported use of her funds. The only disclosure that could be found was in the subscription agreement where Bracetek stated that the funds "may be used by the Issuer for general corporate purposes", and that its "primary business objective will be the direct and/or indirect distribution of products based on the [three proprietary] inventions within Canada and the United States (and its territories)." The executive director said that is inconsistent with Bracetek using nearly 90% of the Investor's funds to benefit Bracetek's sole director, his family and his girlfriend.

[104] The executive director submitted that his position is consistent with *Re Sand, Achs, Gulston.* In that decision, at paragraph 61, the Commission concluded that it was not in the public interest to order Sand and Achs to pay $100,000 of the investor funds obtained by them but immediately paid by them to Gulston's company, because the evidence was clear that it was Gulston (and not Sand or Achs) who obtained the financial benefit of that $100,000.

[105] The executive director submitted that in this case, it is in the public interest to include the $900,000 paid by Bracetek to Sidhu in the section 161)1(g) order against Bracetek, because Bracetek also obtained a financial benefit from that $900,000. The benefit to Bracetek was to safeguard its option to acquire a fourth patent from Sidhu and to pay off three years of licensing fees for the three patents necessary to fulfill its stated business objective.

[106] The executive director also submitted that it would only be in the public interest to reduce the order against Bracetek from $1.75 million to reflect any amounts Sidhu pays to the Commission under his section 161(1)(g) order, if and when those payments are made. To avoid the necessity of a variation order in the future, the executive director suggested the panel make an order against Bracetek in the amount of $1.75 million less any payments Sidhu makes to the Commission under his section 161(1)(g) order.

Our analysis and conclusion

[107] In exercising our public interest jurisdiction under step 2, we considered the principles articulated by the majority in *Re SBC Financial*, at paragraph 77:

a) the purpose of our orders under section 161(1)(g) is to strip respondents of the benefit of their misconduct; and

b) the orders should be equitable (not in the strict legal sense of that term) and proportionate to the misconduct.

[108] Again, we can reach a conclusion without making a finding on whether the December 16 meeting took place.

[109] We considered the purpose of section 61 and the harm done. The objective of a prospectus is to provide information concerning the issuer that an investor needs in order to make an informed investment decision. Securities law requires the issuer to set out in a prescribed form specific disclosures that are in addition to the general requirement under securities legislation to provide full, true and plain disclosure of all material facts relating to the securities being distributed. Materiality is the standard to apply in deciding the degree of details to disclose in a prospectus. Information is considered material if it is probable that its omission or misstatement would influence or change an investment decision with respect to the issuer's securities. See: General instructions 1 and 3 in Form 41-101F1.

[110] The texts exchanged between the Investor and Sidhu revealed the Investor to be a person who was extremely vulnerable financially and emotionally. The Investor lacked the financial sophistication and resources to understand or withstand the risks of making the Bracetek investment. A prospectus would require financial statement disclosure and full, true and plain disclosure of material facts. The Investor needed the protection of prospectus disclosure requirements. In the circumstances of this case, depriving her of that protection could not be remedied by the incomplete disclosure that Sidhu Sr. purported to have given her at the December 16 roadside meeting. Even if we accepted the Due Diligence Notes at face value, Sidhu Sr. did not tell the Investor the following important information:

a) that much of her funds (aside from the $900,000) would be paid to Sidhu Sr. and his family for past services and office overhead, or to Sidhu Sr.'s girlfriend to buy back her Bracetek shares at a significant premium;

b) that very little of her investment would be left for future expenses; and

c) it was uncertain whether Bracetek had sufficient funds left to finance future operations to accomplish its stated business objective.

[111] We agree with the dissenting view in *Re SBC Financial,* at paragraph 94, that, as a general principle, it is not inequitable or punitive to make a section 161(1)(g) order in the full amount of the benefit obtained by respondents even though the proceeds raised from investors were used in accordance with investor expectations and not for personal gain. However, we do not agree with the view that the use of investor funds is not relevant. Whether and how investor funds were used in accordance with what investors were told or expected is one factor to be considered together with all the other circumstances of the case.

[112] Clearly, in this case, the use of funds to buy back the shares of a founding shareholder, especially one at a staggering premium for a ten-month investment in a company with no money or revenue, did not fit within any reasonable interpretation of the corporate purpose and business objective of Bracetek as set out in the subscription agreement, nor within Sidhu Sr.'s own description of using the Investor's funds for "salary, legal fees, and other expenses."

[113] Even if we took the Due Diligences Notes at face value, what Sidhu Sr. told the Investor about the use of her funds was inadequate. A reasonable person would perceive a material difference between using funds to pay for a company's ongoing expenses to further its business of manufacturing, selling and distributing its products in the marketplace (although a portion of that could be for ongoing overhead and salary), versus using the funds to pay its sole director and his family largely for past services and office overhead. That is material information that should have been made clear to the Investor. Even with respect to the $900,000 payment, it was not due for another two years and by Sidhu Sr.'s own admission to Commission staff, he paid that amount as soon as Bracetek had cash flow to preserve Bracetek's option to get a fourth patent, one that was not part of Bracetek's stated primary business objective.

[114] Bracetek's conduct should not be condoned in these circumstances. Not only did it directly obtain the benefit of the full $1.75 million as a result of its misconduct, it spent virtually all of that money as soon as it had the cash to do so, to pay back and benefit its sole director, his family and girlfriend. Equity and the public interest demand a section 161(1)(g) order in the full amount raised, subject to one caveat which we explain in the following paragraphs.

[115] We agree with the executive director's interpretation of *Re Sand, Achs, Gulston* and that an order in the amount of $1.75 million would not be inconsistent with the Commission's analysis in that decision.

[116] It is clear from *Re Poonian* that in determining the amount of a section 161(1)(g) order, we are not required to allow for deductions of a respondent's expenses or any amounts that other persons paid to the Commission. Nevertheless, if we make a section 161(1)(g) order for $1.75 million against Bracetek, in light of the section 161(1)(g) order already issued against Sidhu, the Commission would be issuing two section 161(1)(g) orders that total more than the $1.75 million obtained in the illegal distribution, and could receive amounts exceeding that amount. Given:

a) the purpose of a section 161(1)(g) order;

b) that Bracetek's and Sidhu's acts of misconduct arose from the same illegal distribution;

c) that both Bracetek and Sidhu would have been respondents before us in one proceeding if not for the Sidhu settlement; and

d) that $900,000 of the amount obtained by Bracetek as a result of misconduct was immediately paid to Sidhu's company;

it is appropriate in these unique circumstances to take into account, for the purpose of a section 161(1)(g) order against Bracetek, the amount that Sidhu has been ordered to pay the Commission under his section 161(1)(g) order.

[117] Absent the $900,000 section 161(1)(g) order against Sidhu, we would have ordered Bracetek to pay to the Commission the $1.75 million it had raised in contravention of the Act.

[118] Given the outstanding section 161(1)(g) order against Sidhu, however, we concluded that it would be inconsistent with the intent of section 161(1)(g) in the unique circumstances highlighted above in paragraph 116 to issue an order for $1.75 million against Bracetek, as it would result in two enforceable Commission orders for a total amount in excess of the amount obtained as a result of misconduct.

[119] We considered the executive director's suggestion that we craft the order against Bracetek to automatically take into account any payment by Sidhu under his section 161(1)(g) order. We concluded that to issue an order with an uncertain amount that is dependent on the action of a third party to this proceeding or the collection efforts of the Commission's enforcement staff is fraught with difficulties.

[120] Accordingly, we find that it is in the public interest to order Bracetek to pay to the Commission $850,000 pursuant to section 161(1)(g).

Administrative penalty

[121] In the precedent cases cited, the Commission ordered an administrative penalty against the individual respondent who was the director of the respondent company. The Commission did not order a separate administrative penalty against the company because it found that the company did not act independently of its director. In some cases, the Commission also found that the company still had business operations and a penalty would only harm the investors.

[122] Bracetek also did not act independently of Sidhu Sr. But we do not have the option of ordering an administrative penalty against Sidhu Sr.

[123] For the purpose of general deterrence and maintaining public confidence in our capital markets, it is important to hold Bracetek accountable. It is also necessary for the purpose of specific deterrence if Bracetek resumes operations under new directors and management, although specific deterrence is a lesser factor than general deterrence here.

[124] The administrative penalties ordered in *Re HRG Healthcare* and *Re SBC Financial* ranged from $75,000 to $100,000. We find the amount of $50,000 sought by the executive director to be reasonable. We have set the amount below the amounts in *Re SBC Financial* and *Re HRG Healthcare* in recognition of the fact that Sidhu Sr. no longer directs Bracetek and the need for specific deterrence here is reduced. There is no evidence that an administrative penalty of $50,000 will further harm Bracetek's investors or is disproportionate.

IX. Orders

[125] Considering it to be in the public interest, we order that:

1. until the later of seven years from the date of this order and such time when the amounts set out in subparagraphs 2 and 3 below are paid in full, Bracetek:

    a) under section 161(1)(b)(ii), cease trading in, and is prohibited from purchasing, any securities or derivatives;

b) under section 161(1)(c), is prohibited from relying on any of the exemptions set out in the Act, the regulations or a decision;

c) under section 161(1)(d)(iii), is prohibited from becoming or acting as a registrant or promoter;

d) under section 161(1)(d)(v), is prohibited from engaging in promotional activities by or on behalf of:

   i. an issuer, security holder or party to a derivative, or

   ii. another person that is reasonably expected to benefit from the promotional activity;

e) under section 161(1)(d)(vi), is prohibited from engaging in promotional activities on Bracetek's own behalf in respect of circumstances that would reasonably be expected to benefit Bracetek;

2. under section 161(1)(g), Bracetek pay to the Commission $850,000; and

3. under section 162, Bracetek pay to the Commission an administrative penalty of $50,000.

March 8, 2023

For the Commission

Audrey T. Ho
Commissioner

Deborah Armour, KC
Commissioner

James Kershaw
Commissioner