2019 BCSECCOM 123
British Columbia Securities Commission

Mountainstar Gold Inc. and Brent Hugo Johnson, 2019 BCSECCOM 123

Judith Downes, Don Rowlatt, Audrey T. Ho

Date: April 9, 2019

Reference: None

Subject: Securities

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. The Findings of this panel on liability made on October 12, 2018 (2018 BCSECCOM 317) are part of this decision.

[2] We found that:

a) Mountainstar Gold Inc. repeatedly contravened section 168.1(1)(b) of the Act by making disclosure in its required public filings concerning certain Chilean mining claims and related legal proceedings (the Villar Proceedings) that was false or misleading in a material respect and at the time and in light of the circumstances in which the disclosure was made, or omitted facts necessary to make the disclosure not false or misleading; and

b) Brent Hugo Johnson authorized, permitted or acquiesced in Mountainstar's repeated contraventions of section 168.1(1)(b) and therefore Johnson repeatedly contravened the same provision.

[3] The disclosure in issue was contained in management discussion and analysis (MD&A) filed by Mountainstar from December 2012 to December 2015.

[4] The executive director provided written and oral submissions on the appropriate sanctions in this case.

[5] The respondents did not make any submissions regarding appropriate sanctions. Instead, the respondents disputed our Findings on liability.

[6] At the sanctions hearing, Johnson read a statement that appeared to relate to legal proceedings commenced by L in Chile against the executive director of the Commission, the Commission, Barrick Gold Corporation and others relating to the Chilean mining claims that are the subject matter of this case.

[7] In written submissions made after the sanctions hearing, the respondents asked that our proceedings be stayed until the Chilean legal proceedings are concluded. Although they did not articulate their argument, we assume that the basis for the respondents' application is that these Chilean legal proceedings could have a determinative or substantial impact on our proceedings.

[8] The respondents' submissions require us to consider the appropriate balance between the potential prejudice to the respondents if we issue our sanctions decision and the outcome of the Chilean legal proceedings has a determinative or substantial impact on that decision versus the public interest in issuing timely orders to protect the public.

[9] This Commission's decision in *Starflick.com (Re)*, 2014 BCSECCOM 25, took note of the Supreme Court of Canada's views on the appropriate manner in which to view this balance in the regulatory context as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 SCR 311:

> 71 ... In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant.... The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting and protecting the public interest and upon some indication that the impugned legislation, regulation, or activity is undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result

from the restraint of that action.

[10] The respondents have not demonstrated that the Chilean legal proceedings are relevant to our Findings or that their outcome could have a determinative or substantial impact on our sanctions decision. Even if we were to accept that these proceedings are relevant and there may be potential prejudice to the respondents if we issue our sanctions decision and the Chilean legal proceedings are decided in L's favour, we do not consider a stay of our sanctions decision to be in the public interest.

[11] As discussed in more detail below, the contraventions of the Act for which the respondents have been found liable constitute serious misconduct. The time required to conclude the Chilean legal proceedings could result in an indeterminate and potentially substantial delay in our decision relating to sanctions for the respondents' misconduct. The respondents' continued participation in our capital markets pending the outcome of the Chilean legal proceedings poses a serious risk to investors and those markets. We do not consider that to be in the public interest.

[12] Weighing these factors, we believe it to be in the public interest to deny the respondents' stay application and proceed with the issuance of sanctions. Accordingly, we dismiss the respondents' stay application.

II. Position of the parties

[13] The executive director sought the following sanctions in this case:

a) permanent market prohibitions against Johnson under sections 161(1)(c), and 161(1)(d)(ii), (iii), (iv) and (v) of the Act;

b) an order under section 161(1)(b)(i) of the Act that all persons permanently cease trading in any securities of Mountainstar; and

c) an order against Johnson under section 162 of the Act in the amount of $100,000.

[14] As noted above, the respondents did not make any submissions on the appropriate sanctions in this case.

III. Analysis

A. Factors

[15] Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

[16] 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:
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> • 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 the Factors

Seriousness of the conduct

[17] A contravention of section 168.1(1)(b) of the Act is a serious breach of the Act. Accurate and timely disclosure is fundamental to the operation and integrity of the capital markets. As an officer and director of Mountainstar, Johnson occupied a position of trust and responsibility. Ensuring compliance with regulatory disclosure requirements is a critical aspect of the role of those appointed as directors or officers of publicly-listed issuers.

[18] As set out in *Re Ironside*, 2007 ABASC 824 (at paragraph 117):

> • A sound and reliable disclosure system is fundamental to the operation, integrity and strength of the capital market. High disclosure standards for public issuers foster investor confidence and thereby contribute to a fair and efficient market. Disclosure also assists the market in valuing accurately a public issuer's share price. However, the disclosure standards will provide inadequate protection if the investors are unable to trust in and rely on the integrity and honesty of those who are appointed to serve as directors or occupy senior management positions within a public issuer. The public rightly depend on directors and senior executives to comply with regulatory requirements and to be honest and truthful in the public disclosure they make. It is serious when an officer or director of a public issuer causes it to fail consistently in complying with disclosure requirements.

[19] The seriousness of the misconduct in this case is exacerbated by the repetition of the false or misleading disclosure over a three-year period even, in some instances, in the face of evidence establishing that the disclosure was clearly wrong as discussed in paragraph 25.

Risk to investors and the markets and fitness to be a director or officer

[20] Johnson's conduct clearly illustrates that his ongoing participation in our capital markets poses a serious risk to investors and the capital markets.

[21] Core requirements to fitness as a director or officer of a public issuer are honesty, integrity and an ability to act in the best interests of shareholders. Johnson failed in all of these requirements.

[22] As CEO, he failed to cause Mountainstar to conduct the due diligence procedures that would reasonably be expected of public issuers in connection with significant acquisitions. These due diligence procedures would enable a public issuer to confirm title to and the nature of assets being acquired as well as, among other things, to ensure the accuracy of public disclosure relating to the acquisition.

[23] The option and underlying rights agreements with L constituted Mountainstar's key project and principal asset during the period in issue.

[24] Johnson did not obtain independent legal advice regarding L's ownership of the mining interests underlying the option agreement or the related legal proceedings. Instead, L was paid by Mountainstar to provide the services of his lawyer to give this advice. Johnson failed to recognize the conflict of interest inherent in this arrangement. The situation was exacerbated by the fact that Johnson was unable to communicate directly with L's lawyer due to language difficulties and relied on L to translate the advice provided by L's lawyer.

[25] Johnson's lack of fitness to be a director or officer is further exemplified by his failure to disclose in Mountainstar's MD&A a Chilean court decision material to Mountainstar's interests on the basis that he believed the decision to be wrong. This is a blatant failure to understand and comply with regulatory disclosure requirements and a failure in the integrity and honesty required of those who serve as directors and officers of public issuers.

[26] Johnson was uncooperative during the Commission investigation of this matter. He refused to provide any of the documents required under production orders issued with respect to the Commission investigation or requested at his compelled interview with Commission investigators. He also dared Commission staff to file contempt charges against him.

[27] Johnson's failure to cooperate in the Commission investigation and his unwillingness to recognize the regulatory authority of the Commission is unacceptable conduct for a director and officer of a public issuer.

[28] It is also clear that Johnson has yet to understand or accept our Findings that Mountainstar made false or misleading disclosure regarding its Chilean mining interests and related legal proceedings. At the sanctions hearing, he continued to maintain that the disclosure in Mountainstar's MD&A was accurate. This is very troubling and confirms that Johnson's ongoing participation in our capital markets poses a serious risk to investors and the capital markets. It is also relevant to our consideration of the appropriate specific deterrence required with respect to Johnson.

Harm to investors and damage to the markets

[29] Accurate and timely disclosure is fundamental to the operation and integrity of the capital markets. False or misleading MD&A misleads investors regarding the facts relevant to their investment decisions, distorts the trading price of an issuer's securities and undermines investor confidence and the integrity of the capital markets.

[30] In this case, the false or misleading disclosure in issue fundamentally misrepresented ownership of the mining interests comprising Mountainstar's principal asset and key project. The MD&A stated, among other things, that L was the registered holder of titles to certain mining concessions which were the subject of the option agreement. In fact, L had simply filed petitions with respect to those concessions. He never acquired any mineral or exploitation rights to the areas subject to the petitions. The MD&A also fundamentally misrepresented the status of L's legal proceedings challenging title to the underlying mining interests. This disclosure was made repeatedly over a period of three years.

[31] Mountainstar raised over $6.4 million from investors from 2011 forward to fund its payments to L under the option agreement. Mountainstar's shares traded publicly during this period on the Canadian Securities Exchange (CSE) and OTC markets in the United States. From January 2013 to December 2015, the value of trading in Mountainstar's securities on the CSE exceeded $1 million.

[32] It is reasonable to infer that material false or misleading disclosure regarding a publicly-listed issuer's key project and principal asset causes harm to investors. In this case, it is unlikely that investors would have invested in Mountainstar, either through private placements or through purchases in the public markets, if Mountainstar's MD&A accurately disclosed the facts regarding the optioned property, the underlying claims and the Villar proceedings. Although in this case, there is no specific evidence of the amount of the loss to investors, given the fundamental nature of the false or misleading disclosure, it is reasonably likely that such losses were significant.

Enrichment amount

[33] There was no specific evidence of enrichment by the respondents from their misconduct.

Mitigating or aggravating factors; past misconduct

[34] There were no mitigating factors in this case.

[35] The negligent manner in which the respondents undertook procedures to verify the truthfulness of the disclosure in the MD&A relating to L's title and Mountainstar's rights to the Chilean mining interests is an aggravating factor.

[36] Neither of the respondents has a past history of regulatory misconduct other than Mountainstar's failure to file the required disclosure set out in the cease trade order described in paragraph 57.

Specific and general deterrence

[37] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

[38] As discussed earlier, Johnson has neither admitted to wrongdoing nor understood the seriousness of his misconduct. This points to a need for a significant measure of specific deterrence.

Prior orders in similar circumstances

[39] The executive director provided three decisions in support of his requested sanctions: *Re Ironside*, *Brookmount Explorations Inc.(Re)*, 2012 BCSECCOM 445 and *Sino-Forest Corporation (Re)*, 2018 ONSEC 37. The executive

director did not cite any prior Commission decisions dealing with contraventions of section 168.1(1)(b) of the Act as he said the circumstances in those cases were significantly different from those before us.

[40] Of the three decisions, the circumstances in *Re Ironside* are most similar to the present case.

[41] In *Re Ironside*, J. Gordon Ironside and Robert W. Ruff, senior officers and, in the case of Ironside, a director, of Blue Range Resource Corporation were found to have contravened Alberta securities laws in two instances and acted contrary to the public interest when they prepared and disseminated materially misleading disclosure regarding Blue Range's operations and financial position. The disclosure in issue was made in documents publicly filed over a much shorter period than in the present case.

[42] At the time the notice of hearing was issued, the maximum administrative penalty under the Alberta Securities Act was $100,000 for each contravention. Although that maximum limit was changed to $1 million by the time of the sanctions hearing, the panel considered $200,000 ($100,000 for each of the two contraventions) as the maximum penalty that could be imposed against each of the respondents in the circumstances.

[43] The panel issued a permanent market ban against Ironside and ordered him to pay an administrative penalty of $180,000. In their determinations regarding the appropriate sanctions, the panel considered the fact that Ironside remained unrepentant and unwilling to accept that he had acted improperly. The panel found that this conduct led them to conclude that Ironside presented an extremely serious threat to the integrity of the Alberta capital market and public confidence in that market in general.

[44] The panel issued a seven-year market ban against Ruff and ordered him to pay an administrative penalty of $50,000. The panel considered Ruff's role in the misconduct to be less significant than Ironside. Ruff acknowledged both the seriousness of the allegations against him and his role in the misconduct. He represented that he had no intention of participating in the capital markets in the future.

[45] The misconduct of Ironside is similar to that of Johnson and the non-monetary sanctions imposed in *Re Ironside* are helpful to our considerations in this case. The maximum limit on administrative penalties under the Act is $1 million per contravention. Given the far lower statutory limit on administrative penalties applied by the Alberta Securities Commission in *Re Ironside*, we view the amount of the monetary sanction imposed on Ironside as helpful only in establishing a minimum (and not an equivalent) amount of monetary sanction in this case.

[46] In *Re Brookmount*, Brookmount was found to have contravened 50(1)(d) of the Act when it omitted material facts relating to its key property from news releases it issued between February 2005 and June 2007. Two of its directors and officers were found to have authorized, permitted or acquiesced in that misconduct and, accordingly, under section 168.2 of the Act, to have also contravened section 50(1)(d).

[47] The individual respondents in *Re Brookmount* were also found to have breached prior cease-trade orders made against them. Brookmount was found to have contravened National Instrument 43-101-*Standards of Disclosure for Mineral Projects* but the panel did not consider that relevant for sanctions purposes.

[48] Unlike Johnson, the respondents in *Re Brookmount* cooperated with the Commission investigation and did not contest some key elements of the allegations. The individual respondents also had acknowledged the findings against them and stated that they took them seriously. The panel found share sales by the individual respondents in breach of the cease-trade order to be an aggravating factor.

[49] The panel imposed administrative penalties against the individual respondents of $65,000 and $45,000 respectively. The panel did not set out the amount of the administrative penalty attributable to each of the different contraventions of the Act by the respondents. In determining the amount of the administrative penalty, the panel considered a settlement agreement which is a practice no longer followed by the Commission.

[50] The panel also imposed a permanent cease trade order with respect to the securities of Brookmount and market bans against the two individual respondents until the later of five and eight years, respectively, and the date these respondents paid the administrative penalties levied against them.

[51] The nature of the misrepresentations in *Re Brookmount* was similar to the false or misleading disclosure in the present case. However, there are significant differences in the other circumstances of that case and the case before us, including the facts that the respondents in *Re Brookmount* acknowledged the findings against them and said that they took them seriously. As a result, we do not find this decision helpful to our sanctions considerations.

[52] The executive director also cited *Re Sino-Forest Corporation* in support of his sanctions submissions. The respondents in that case were found to have perpetrated one of the largest corporate **frauds** in Canadian history. While the decision included separate sanctions relating to misleading statements made in Sino-Forest's continuous disclosure filings, those misleading statements and the fraudulent transactions were interrelated. As a result, we do not find that decision helpful to our sanctions considerations.

C. Analysis of appropriate orders

Market prohibitions

[53] The executive director seeks broad, permanent market prohibitions against Johnson and a permanent cease trade order against Mountainstar.

[54] Broad, permanent market prohibitions against Johnson are necessary and appropriate.

[55] Johnson's failure to comply with regulatory disclosure requirements over a three-year period, his refusal to cooperate with the Commission investigation or recognize the regulatory authority of the Commission and his failure to understand or accept our Findings make it clear that he continues to pose a very serious risk to the integrity of our capital markets and public confidence in those markets.

[56] We found that Mountainstar filed materially false or misleading continuous disclosure over a three-year period. Given Mountainstar's materially deficient public disclosure record, it is appropriate to issue a permanent cease trade order with respect to its securities.

[57] There is an existing cease trade order outstanding under section 164 of the Act with respect to the securities of Mountainstar. That order is indefinite in length but can be revoked as soon as practicable upon the filing of the annual audited financial statements and MD&A noted in the order. The existing order permits sales of Mountainstar securities acquired before the date of the cease trade order in limited circumstances.

[58] We are concerned about the existence of two separate orders with respect to the trading of securities of Mountainstar and any confusion that may arise as a consequence. Additionally, given our Findings regarding the material false or misleading disclosure in Mountainstar's existing public disclosure record, we do not consider it appropriate that there be an exception for limited trading in Mountainstar's securities or that it be possible for Mountainstar to have the cease trade order revoked by filing the required records.

[59] As a result, we have determined to revoke, under section 171 of the Act, the existing cease trade order with respect to the securities of Mountainstar.

Administrative penalties

[60] The *Re Ironside* decision suggests that the minimum amount of an administrative penalty for misconduct similar to Johnson's is $90,000 (Ironside having received an administrative penalty of $180,000 for two contraventions of Alberta securities laws).

[61] However, the administrative penalty in *Re Ironside* must be viewed in light of the statutory limits on the maximum amount of such penalty applied by the panel in that case. Additionally, the misconduct of Johnson continued over a longer period of time than that of Ironside. In this case, there is also an aggravating factor relating to the negligent manner in which the respondents undertook procedures to verify the truthfulness of the disclosure in issue. All of this warrants a higher administrative penalty than that in *Re Ironside*.

[62] Given Johnson's refusal to acknowledge the regulatory authority of the Commission and his failure to understand and accept our Findings, it is important that a significant administrative penalty be imposed against him as a specific deterrent.

[63] A significant administrative penalty is also warranted to make it clear to other senior officers and directors of public issuers that failure to comply with regulatory disclosure requirements is serious misconduct. Members of the investing public should be able to rely on directors and senior officers of public issuers to be diligent in ensuring that disclosure about the issuer and its securities is fair, accurate and timely.

[64] In the circumstances, we find an administrative penalty against Johnson of $150,000 is appropriate.

[65] The executive director did not seek any monetary sanctions against Mountainstar. He said that Mountainstar's shareholders have been harmed by its disclosure violations and payment of a monetary sanction by Mountainstar would cause its shareholders further harm.

[66] We agree. We find it is not appropriate to issue an administrative penalty against Mountainstar in these circumstances.

IV. Orders

[67] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

Johnson

(a) under section 161(1)(d)(i), Johnson resign any position he holds as a director or officer of an issuer or registrant;

(b) Johnson is permanently prohibited:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;
(ii) under section 161(1)(c), from relying on any of the exemptions set out in the 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 acting in a management or consultative capacity in connection with activities in the securities market; and
(vi) under section 161(1)(d)(v), from engaging in investor relations activities;

(c) Johnson pay to the Commission $150,000 pursuant to section 162 of the Act.

Mountainstar

(d) under section 161(1)(b)(i), that all persons permanently cease trading in, and be prohibited from purchasing, any securities of Mountainstar.

[68] Considering it not to be prejudicial to the public interest, and pursuant to section 171 of the Act, we order that the previously issued order against Mountainstar (Cease Trade Order dated September 10, 2015, 2015 BCSECCOM 344) be revoked permanently.

For the Commission

Judith Downes
Commissioner
Don Rowlatt
Commissioner
Audrey T. Ho
Commissioner