

IN THE MATTER OF
THE SECURITIES ACT, 1988, S.S. 1988, c.S-42.2

AND

IN THE MATTER OF
DARCY LEE BERGEN

DECISION

Hearing Held: October 11, 2000

Before: Marcel de la Gorgendière, Q.C., Chairman
 Rand Flynn, Commission Member

Appearances: Patti Pacholek, representing Commission staff
 Kenneth Karwandy, counsel for Darcy Lee Bergen

Decision dated: October 31, 2000

DECISION

The September 14, 2000 Findings in this matter provided for a hearing on October 11, 2000 to make representations in regard to sanctions to be applied as a result of the Findings. Having heard from counsel for the respondent and from the Commission, we are now in a position to give our decision in regard to sanctions.

The Commission counsel recommends that Mr. Bergen be ordered to cease trading in securities and be restricted in use of exemptions under the Act; prohibited from advising and acting as a Director or officer of any issuer or registrant or employed by an issuer or registrant for an indefinite permanent period of time; pay an administrative penalty of \$100,000 (the maximum under the Act) and pay costs of the Commission in the amount of \$25,501.05.

Counsel for the respondent Bergen suggests that an appropriate penalty is what is appropriate to protect the public from a breach of the know your client responsibilities. He envisages a suspension of around five years, a \$10,000 administrative penalty and, while not suggesting a specific amount for costs, argues that given Mr. Bergen's cooperation with the Commission and as the costs relate to investigations of others, that the costs should be moderated and allocated to others in some proportion such as 25%.

The Commission in its Findings from pages 20 to 24 dealt with examples of why it felt Mr. Bergen had not demonstrated the knowledge and attitude necessary to fulfill his duties as a registrant. The Commission finds that for the reasons given his conduct was contrary to the public interest.

The British Columbia Securities Commission in the matter of Eron Mortgage Corporation et al, BCSC Weekly Summary Edition 00:7 at page 22 stated that in making orders when it must consider what is in the public interest, "in the context of its mandate to regulate trading in securities", that it should consider the relevant factors from the following non-exhaustive list:

- C the seriousness of respondents' conduct,
- C the harm suffered by investors as a result of the respondent's conduct,
- C the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
- C the extent to which the respondent was enriched,
- C factors that mitigate the respondent's conduct,
- C the respondent's past conduct
- C the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
- C the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- C the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- C the need to deter those who participate in the capital markets from engaging in inappropriate

conduct, and
C orders made by the Commission in similar circumstances in the past.

The Commission in this matter has made the same considerations. The evidence showed a considerable amount invested in a number of schemes and extensive losses sustained. (Up to 85 persons in "Platinum" alone). Several millions have been lost with serious consequences to investors who could not afford the loss of such significant portions of their savings. One couple lost \$194,000 investing in "Platinum."

In applying the above factors we considered that as the conduct involved a significant number of people and attended publicity it constituted a significant setback to confidence in the Saskatchewan capital markets. In particular, we have considered the need to "demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets." Individuals who are registered to sell securities are often in a position where their advice is relied upon in matters that are fundamentally important to their customers financial well being. When they take advantage of that reliance to place their customers in investments in which they have no particular expertise, they are not acting in the public interest. To judge a sanction's adequacy the consequences to the registrant has to be significant in order to stress the importance of acting in the public interest. They also "need to deter those who participate in the capital markets from engaging in inappropriate conduct." Engaging in the sale of exempt securities is often rewarded by high commissions as was shown in this hearing. The potential reward may, by the brightness of its allure, blind the registrant to the maintenance of responsibilities to the purchasers and to ensure that the proposed investments are proper within all the requirements of the Securities Act. Substantive penalties bring the potential of focusing on these responsibilities rather than high profits. Insignificant ones in relation to prospective gain will not encourage a registrant to make enquiries as to whether there is in fact an exemption.

Given these two important considerations we have to consider whether the maximum weight of sanction should be applied as proposed by counsel for the Commission staff. The respondent's counsel urged consideration of a hierarchy of culpability. Others were involved who were more responsible and who have profited more. We should also consider the efficacy of the supervision of Mr. Bergen involving some of the products approved for sale and from which substantive fees were received by the supervising firm. The suggestion is that there should have been much better supervision of not only Mr. Bergen but of the promoters who had access to the sales staff. We are asked to consider that Mr. Bergen was not a part of any of the schemes just a tool in its implementation and that is demonstrated by investments he, his wife and mother-in-law made in the schemes. Reference was made to the BCSC Decision Re Connor Financial corporation dated November 30, 1995, BCSC Weekly Summary 95:48 page 76 which considered that the BC Act "does not create an offense and does not impose a sanction that constitutes a true penal consequence. Section 144.1 is a remedial provision intended to regulate the conduct of persons who participate in the securities market by enforcing compliance with the legislation." In accepting the decision as to the non-penal nature of the similar Saskatchewan provisions one still must decide what is necessary to enforce compliance taking into account the factors listed above and in particular the need for deterrence and demonstrating the consequences of inappropriate conduct to market participants.

We were also requested to take into account Mr. Bergen's cooperation in the investigation, attending three examinations and providing records and sales materials and efforts made to assist customers in mitigating losses. We are aware of all these suggestions and can agree that they should be considered but we are not prepared to accept that achieving the goal of proper sanctions in these circumstances is met by Mr. Karwandy's proposed sanction of a five-year suspension, \$10,000 fine and 25% of costs.

The Commission staff has presented a bill of costs for \$25,501.05. It covers investigators and staff counsel costs who are commission employees. It includes \$2,121.05 in disbursements for court reporter charges regarding examinations held and fees paid for service of documents. All of these charges relate to a matter that involved others in addition to Mr. Bergen. \$10,000 in costs was levied against Mr. Owens. As Mr. Bergen is the only one to appear before the Commission, to the conclusion of a hearing, it is difficult to attribute many of the costs. Much of the work of investigation must have been used in support of the proceeding involving Kent Owens. In the circumstances we assess the liability for costs as follows:

1. \$1,566.75 for costs in connection with Grace Atherton testimony including costs shown for service and witness interviews by the investigator as per Schedule A plus an additional \$500 for counsel's involvement and a further \$500 attributable to inquiries in regard to "Foundation Financial" and "Cascade."
2. \$3,483 for 25% of the costs remaining after deducting the sum in item one above and \$10,000 allocated by settlement to Kent Owens from the Bill of Costs of \$25,501.05.

The Commission feels it should be guided by a comparison of the settlement accepted by one of the principal actors of the Platinum tragedy which was a permanent life time suspension, a \$100,000 administrative penalty and \$10,000 in costs, the first two being the maximum possible. We do not consider Mr. Bergen as responsible as Mr. Owens and while Mr. Owen wasn't a registrant under the Securities Act, he was in a similar position with an insurance license. The evidence we have heard indicates there are others who have contributed to the losses that have occurred. As mentioned above in referring to the findings we have given the reasons why Mr. Bergen cannot escape responsibility for his part regardless of the conduct of others.

After the above considerations we order in this matter that

1. Pursuant to section 134(1) of the Act, it is in the public interest to order that for a period of ten years from the date hereof:
 - a. All of the following exemptions do not apply to Darcy Lee Bergen ("Bergen"):
 - i. the exemptions in section 39, 39.1, 81, 82 and 102 of the Act;
 - ii. the exemptions in *The Securities Regulations* (the "Regulations") providing for exemptions from sections 27, 58, 71 or 104 to 109 of the Act; and
 - iii. Any exemption in any decision of the Commission providing for an exemption from any provision of the Act or the Regulations;

- b. Bergen cease trading in securities, specified securities, exchange contracts or specified exchange contracts;
 - c. Bergen cease giving advice respecting securities, specified securities, trades, specified trades, exchange contracts or specified exchange contracts;
 - d. Bergen:
 - i. resign any position that he holds as a director or officer of an issuer or registrant;
 - ii. is prohibited from becoming or acting as a director or officer of any issuer or registrant; and
 - iii. is prohibited from being employed by any issuer or registrant; and
2. Pursuant to section 135.1 of the Act, that Darcy Lee Bergen pay an administrative penalty of \$50,000.
3. Pursuant to section 161 of the Act, Bergen pay the costs of or relating to this hearing in the amount of \$5,049.75.

DATED at Regina, Saskatchewan, October 31, 2000

"Marcel de la Gorgendiere"

Marcel de la Gorgendière, Q.C.

Chairman