

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Hav-Loc Private Wealth Partners Inc., Re, 2010 ABASC 43

Date: 20100204

Hav-Loc Private Wealth Partners Inc. and Thierry Gevaert

Panel:

Stephen R. Murison
Karl M. Ewoniak, CA
Kenneth B. Potter

Appearing:

Kelly Hannan
for Commission Staff

Thierry Gevaert
for himself and for Hav-Loc Private Wealth
Partners Inc.

John Blair
for Brian Gaudet

Dawn Winters
for herself

Date of Hearing:

18 and 19 January 2010

Date of Decision:

4 February 2010

I. INTRODUCTION

[1] This proceeding involved allegations of illegal "advising" and misleading or untrue statements (in essence, misrepresentations) to Alberta investors. The allegations were levelled by staff ("Staff") of the Alberta Securities Commission (the "Commission") against five respondents – Hav-Loc Private Wealth Partners Inc. ("Hav-Loc"), Thierry Gevaert ("Gevaert"), Brian Gaudet ("Gaudet"), Dawn Winters ("Winters") and Roberte Hinks ("Hinks") – in a 17 July 2009 notice of hearing.

[2] The hearing into the allegations began on 18 January 2010. Prior to the hearing, Staff withdrew their allegations against Hinks. The remaining respondents all participated in the hearing. Gaudet was represented by legal counsel; Gevaert (acting for himself and, as we understood it, also for Hav-Loc) and Winters were self-represented. We received documentary evidence, including transcripts of Staff investigative interviews of two investors and of Gevaert himself (only a redacted extract of his 21 January 2009 interview was in evidence; we refer to it as the "Gevaert Transcript") and a more recent statutory declaration by one of those interviewed investors. We also heard the sworn testimony of a Staff investigator, a third investor and the respondents Gaudet and Winters. On the second day of the hearing, after all evidence had been entered but before parties began their oral arguments, Staff announced the withdrawal of all allegations against Gaudet and Winters, commenting that the evidence adduced by those respondents had been "responsive to the allegations" against them. Based on the lack of evidence relating to those two individuals in the context of the allegations against them, the hearing panel commented at the time that the withdrawals were "wise". The hearing then continued with closing remarks by Gaudet's counsel and by Winters, and with oral submissions by Staff and Gevaert.

[3] The only allegations to be considered, therefore, are those against Hav-Loc and Gevaert. For the reasons discussed below, we sustain the allegations of misrepresentation against both, but we dismiss the allegations of unregistered advising. This proceeding will now move to a second phase for consideration of whether any orders ought to be made against either or both Hav-Loc and Gevaert.

II. FACTUAL BACKGROUND

A. Hav-Loc and Gevaert

[4] Hav-Loc is an Alberta company with its head office in Calgary. According to Gevaert, it has become a shell of a company, indebted but without income or assets.

[5] Gevaert, a resident of Ontario, was (and apparently remains) Hav-Loc's president and chief executive officer, as well as its sole director. Hav-Loc and Gevaert did not dispute Staff's assertion that Gevaert was Hav-Loc's guiding mind and authorized, permitted or acquiesced in the conduct of Hav-Loc that was the subject of this proceeding.

[6] Neither Hav-Loc nor Gevaert has ever been registered under the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") in any capacity.

[7] Both had a regulatory history in Ontario. Hav-Loc was at some point registered there as a "limited market dealer". Gevaert was at one time registered in Ontario to sell mutual fund securities. That registration was suspended effective 2 July 2003, the reason – according to filings on the National Registration Database, although Gevaert disputed this – being an "Employment Termination" or resignation for "cause". An application to the Ontario Securities Commission to reactivate his registration in Ontario was denied in January 2009.

B. Sales of Securities through Hav-Loc

[8] The allegations, after being much narrowed by the withdrawal of allegations against three individuals, were simply that Hav-Loc and Gevaert contravened sections 92(4.1) and 75(1)(b) of the Act through misrepresentations to investors and by acting as advisors without the requisite registration. Those allegations related to the sale, by or through Hav-Loc, of units in two limited partnerships – Clear Vistas Community #1 Limited Partnership ("Clear Vistas") and Goldstone Private Equity Partners Limited Partnership ("Goldstone") – beginning, apparently, in January 2008 and November 2007, respectively.

[9] Gevaert launched Hav-Loc in 2007. According to evidence before us, Gevaert wished to start a business, through Hav-Loc, of selling "private placement" securities in a manner "completely aboveboard and compliant with any and all the standards of the financial industry". Gaudet and Winters were sufficiently impressed that they joined Hav-Loc as, essentially, salespeople; so, apparently, did many other individuals.

[10] In written material made available to prospective investors – text on its website, in PowerPoint or DVD presentations, and in a short handout that investors would use to sign up to receive an offering memorandum (the "Handout") – Hav-Loc touted a "Product Framework" involving investments that would combine a supposedly favourable combination of "structure", "return/risk" and "tax awareness" or "tax effectiveness" for investors. As stated on the Hav-Loc website as it appeared on 28 April 2009 (the date of the "screen captures" in evidence):

The Hav-Loc team is constantly researching and developing private equity opportunities to present to our investors

. . .

[Hav-Loc] is unique to our competition [sic] by being able to investigate and develop private equity investments in a variety of industries. Since Hav-Loc does not (nor will not) own these companies, there will never be any opportunity for a conflict of interest to arise. This allows [Hav-Loc] to complete due diligence in an objective manner, keeping the interests of their clients as their primary goal.

. . .

. . . As a company we strive to identify and set apart the best combined investment and tax strategies available in the market place today and put those in front of qualified investors.

[11] The Handout had only three paragraphs of text, two of which we reproduce here:

We share a responsibility with our clients to ensure that each product introduced meets three fundamental elements within a Hav-Loc Product Framework before they are introduced to the public. Each product offered must meet the elements of balance between capital preservation, risk and return combined with overall tax effectiveness all of which are firm standards at [Hav-Loc].

Our symbol of excellence ensures that the product has met these standards and will provide favourable investments today and into the future.

[12] Hav-Loc contracted to sell limited partnership units in Clear Vistas and Goldstone for commissions of 15% of cash received by Clear Vistas from the sale of its units, and 7.5% of the "aggregate gross proceeds" from the sale of Goldstone units. Both contracts provided that Hav-Loc would be granted the opportunity to conduct due diligence on the respective limited partnership. Gevaert signed the two contracts for Hav-Loc. A Ken Lagasse ("Lagasse") also signed both contracts – in each case, on behalf of different third-party companies that made many representations and covenants jointly with the relevant limited partnership; and also, in the Clear Vistas contract, for Clear Vistas' general partner, of which he was president.

[13] Hav-Loc, through its salespeople, did indeed sell units in Clear Vistas and Goldstone and thereby earned commissions totalling approximately \$1.5 million. A document prepared by Staff suggested that some two-thirds of the sales were made in Alberta.

[14] The limited partnership units in Clear Vistas and Goldstone were clearly securities. They were sold to investors pursuant to registration and prospectus exemptions under Alberta securities laws, using offering memoranda. Copies of a 5 November 2007 Clear Vistas offering memorandum and a 17 September 2007 Goldstone offering memorandum were in evidence. There were no allegations about the documents themselves, or about the availability of exemptions for the sales made. There was no dispute that both offering memoranda set out, at some length, an exposition of risk factors relevant to an investment in the respective units.

[15] According to the Clear Vistas offering memorandum, Clear Vistas was a British Columbia limited partnership that proposed to develop a real estate project in Saskatchewan. According to the Goldstone offering memorandum, Goldstone was a British Columbia limited partnership that "will make an investment(s) in either a domestic or international private equity fund(s) whose investment mandate is to participate in the exploration, development or acquisition of a gold mining interest(s)".

[16] Both offering memoranda included some unaudited financial statements – showing, essentially, that Clear Vistas and Goldstone, respectively, were at the time effectively shells. Prefacing the respective financial statements were "Notice[s] to Reader" from "Ken Lagasse Inc., Chartered Accountants" (for Clear Vistas) and "Ken Lagasse Chartered Accountants" (for Goldstone).

[17] The evidence was that Hav-Loc salespeople attended training sessions – and could also subscribe to receive Hav-Loc informational "bulletins" – that would help them learn about particular offerings being sold by Hav-Loc, and about the sorts of things they should and should not tell prospective investors.

C. Investigation or Due Diligence

[18] The evidence of Gaudet and Winters was clear that each understood – whether as a result of direct statements to that effect by Gevaert or from the context of their training sessions and selling instructions from Hav-Loc – that investigation or due diligence had been undertaken, by Gevaert or someone else, before Hav-Loc determined to sell Clear Vistas and Goldstone units to investors.

[19] On this point, Gaudet stated:

. . . In the initial launch and understanding that I had about Hav-Loc going forward, was that any organization that wanted capital raised would have done their due diligence, and then [Gevaert] would ensure that his component of due diligence would be done as well. And launching any product at Hav-Loc would be done on the understanding that some kind of due diligence would have been done by an external firm or by [Gevaert] himself.

[20] Winters testified to the same effect:

. . . I truly believed and trusted Mr. Gevaert when he stated many times during training that he and others had done due diligence on many, many companies, and only the most promising were contracted with Hav-Loc to market the offering memorandum. . . .

[21] Hav-Loc used the term "due diligence" on its website in April 2009, although the evidence does not enable us to determine when it first began doing so. Whether or not that precise phrase was always used, the idea was certainly present from an early stage. The Handout given to prospective investors, as noted, spoke of the Hav-Loc "symbol of excellence ensur[ing] that the product has met [the so-called framework] standards and will provide favourable investments". Also as noted, Hav-Loc had contracted for due diligence access to Clear Vistas and Goldstone.

[22] However, when questioned by Staff in the course of their investigation about due diligence, Gevaert stated the following (in the Gevaert Transcript):

Q . . . we [Staff] had requested all due diligence completed by Hav-Loc and the companies that they have or are promoting in Alberta. Perhaps "introducing" would have been a better word, but I look through [certain material provided], and it's essentially blank, . . . and you've made a note that the due diligence for Goldstone and Clear Vistas was completed by Ken Legasse [sic]?

A . . . yes.

Q Where is that due diligence?

A It would be in his office.

Q Did you review it?

A No.

Q So did he give you a report on it?

A No, verbal.

Q What did he tell you?

A Just that it was reviewed, again, by [a] securities lawyer in Vancouver, that it was a viable and correctly structured offering memorandum.

Q Just to be clear, you have no documentation that he provided you with that?
A No, no.
Q And Mr. Legasse [sic] was the one who introduced these offering memorandum opportunities to you and was, in fact, involved with the general partner, my understanding is with both Clear Vistas and Goldstone; is that correct?
A Yes,
Q So you were relying on the companies that you were promoting to do the due diligence for you?
A Yes.

. . .

Q So other than reading the [offering memorandum], does anyone at Hav-Loc do any additional research on the companies?
A No, as I stated earlier, up until now, there was a heavy reliance on that, but I started working with Gord Krofchick, who is that forensic auditor, about four or five months ago [in context, approximately August or September 2008]. So we've started looking at different propositions, and then there's been several, so we have now set that up, that he's part of the due diligence team, rather than depending on in-house. We thought it might be better or more prudent to have an outside party do that.

No, we didn't have an outside party for this at all, and we did rely on Ken Legasse's [sic] professional corporation and his counsel.

III. ANALYSIS

A. IFFL Connection Not Relevant

[23] The panel heard numerous references in the hearing to an entity referred to as the "Institute For Financial Learning" or "IFFL", and to individuals with an actual or assumed connection to IFFL. Some of those individuals were connected to this proceeding; others were not. The references to IFFL were often negative and perhaps could be thought to prejudice Hav-Loc or Gevaert. We therefore emphasize that this was not a hearing into IFFL and its activities, nor into the activities of individuals not named in the notice of hearing. The only connection – and it was slight – between IFFL and this proceeding was that some of the individuals named in the notice of hearing, as well as Lagasse (and, possibly, another individual behind Goldstone), had earlier dealings with or knowledge of one another through association with IFFL, and some of them put forward their apparently unhappy experiences with IFFL as motivation or explanation for some of their conduct relevant to this proceeding. All of this was irrelevant to the allegations before us, and we drew no prejudicial conclusions against Hav-Loc or Gevaert based on any connection or reference to IFFL.

B. Advising

[24] Staff contended that Hav-Loc and Gevaert, in their dealings with Alberta investors, had gone beyond merely offering Clear Vistas and Goldstone units for sale and effecting sales, but had also proffered opinions on the merits of those securities and recommended their purchase – thereby crossing the line from mere selling into "advising".

[25] Section 75(1)(b) of the Act, as it read during the October 2007 to May 2009 period specified in the notice of hearing, stated that no person or company may "act as an advisor" in respect of securities unless registered for that purpose with the Commission's Executive Director. As noted, neither Hav-Loc nor Gevaert was so registered. "Advisor" at that time meant (under section 1(a) of the Act):

... a person or company engaging in or holding out the person or company as engaging in the business of advising others with respect to investing in or the buying or selling of securities ...

[26] Case law and commentary provide guidance on the concept of "the business of advising", which clearly goes beyond the mere provision of factual information. In *Re Donas*, 1995 LNBCSC 18, the British Columbia Securities Commission discussed "advising" and determined that it had occurred in that case:

As indicated by the definition of "advice", the nature of the information given or offered by a person is the key factor in determining whether that person is advising with respect to investment in or the purchase or sale of securities. A person who does nothing more than provide factual information about an issuer and its business activities is not advising in securities. A person who recommends an investment in an issuer or the purchase or sale of an issuers [sic] securities, or who distributes or offers an opinion on the investment merits of an issuer or an issuers [sic] securities, is advising in securities. If a person advising in securities is distributing or offering the advice in a manner that reflects a business purpose, the person is required to be registered under the [securities legislation].

The information given in the Donas newsletters goes far beyond the simply factual. Through the newsletters, Donas distributed opinions on the investment merits of [the company] and its shares, as evidenced by such phrases as "industry leader", "latest state of the art technology", "quadruple profit centre", "Impressive 10 Year Track Record", and "[the company] has achieved a technical "Break-Out" by closing at \$4.05 on Tuesday, April 23, 1991". Both newsletters contain share price charts showing substantial price increases in the shares of [the company] since 1988. Finally, both newsletters contain a clear recommendation to buy the shares of [the company]. The "Red Alert" Newsletter contains the words "Recommendation Buy Now! This stock is on verge of Explosive Action". The "Yellow Banana Alert" Newsletter states "Recommendation Why not share in this Explosive Growth? Own a piece of an outstanding B.C. company." In our view, it is clear that, by distributing these newsletters, Donas was distributing opinions on the investment merits of [the company] and its shares and recommending the purchase of shares of [the company] and was, therefore, advising in securities.

[27] Recently, this Commission also found activity indicative of advising in *Re Global Trading Center LLC*, 2009 ABASC 614 (at paras. 32-34):

The determination of whether a person is "advising", for purposes of the Act, involves two considerations, described as follows by D. Johnston and K.D. Rockwell in *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis, 2006) at 359:

First, did the purported adviser express an *opinion* or make a *recommendation*? Merely reciting facts does not make one an adviser; recommending an investment or opining on the investment merits of an issuer or securities is advising. Second, did the purported adviser offer the recommendation in a way which reflected a business purpose? [original emphasis]

As to whether the person is in "the business of advising", this in our view connotes elements both of intended profit and a degree of organization, repetition or regularity – neither a gratuitous provision of advice nor a merely isolated act or incident would generally suffice to evidence a business.

The evidence was that the Respondents made recommendations and offered opinions on the investment merits of the option contracts they were describing. This was not (in the words of the Ontario Securities Commission in *Re Costello* (2003), 26 O.S.C.B. 1617 at para. 28 (appeal dismissed *Costello v. Ontario (Securities Commission)*, [2004] O.J. No. 2972 (Div. Ct.)), referring to *Re Canadian Shareholders Association* (1992), 15 O.S.C.B. 617) providing "mere financial information as to specific securities", but rather "providing an opinion on the wisdom or value or desirability of investing in specific securities".

[28] Staff claimed that Hav-Loc and Gevaert conveyed opinions or advice to Alberta investors in the Hav-Loc marketing materials quoted above. That is, in Staff's contention, prospective investors were given not just factual information about the Goldstone or Clear Vistas units, but also told, in essence, that these would be good investments for the investors, which they should purchase. Further, Staff argued this was for a business purpose and was not an isolated incident.

[29] In the circumstances of this case, we think this an overbroad interpretation of the term "advising".

[30] Certainly much of the Hav-Loc marketing material was unhelpful in furthering the securities regulatory objective (reflected in, among other things, the requirements for disclosure in offering memoranda) of enabling investors to make informed investment decisions. Portions of the marketing material were, in our view, too vague, or too overtly promotional – or both – to usefully inform an investment decision. The repeated references to the so-called Hav-Loc "framework", for example, seemed to suggest (as was doubtless intended) an air of analytical soundness and sophistication unsupported by anything in the evidence – nothing more, really, than a marketing slogan. We do not endorse the Hav-Loc promotional material.

[31] That said, the Hav-Loc selling effort was not confined to the marketing material. We heard convincing evidence that Hav-Loc salespeople were told not to advise prospective investors on the suitability of the securities being offered and not (for example) to make promises about the future performance of the securities. To the contrary, the salespeople were instructed to take prospective investors with some care through the factual disclosure in the relevant offering memorandum including, specifically, the applicable "risk factors". Further, we believed Winters' assertion, in her sworn statement before us, that she understood what constituted "advising" under the Act and did not act as an "advisor" in that sense. Similarly, we believed the statutory declaration of her client – apparently the only investor to whom Winters

completed a sale of securities for Hav-Loc – that the client understood that Winters was selling, not advising. No other evidence persuaded us that any other Hav-Loc salesperson had crossed the line into advising.

[32] In the result, and notwithstanding our discomfort with some of Hav-Loc's written marketing material, we do not conclude that Hav-Loc or Gevaert engaged in the business of advising. We need not address Staff's points related to whether the activity was done with a "business purpose" or was more than an "isolated incident". We therefore dismiss the allegations of unregistered advising.

C. Misrepresentations

[33] Staff also alleged that Hav-Loc and Gevaert contravened section 92(4.1) of the Act by making what amounted to misrepresentations to Alberta investors (paragraphs 9-10 of the notice of hearing):

Staff also alleges that [from October 2007 to May 2009 Hav-Loc and Gevaert] made statements to Alberta investors that Hav-Loc took certain precautions, including research and due diligence, to ensure that the [securities being sold] met certain criteria or standards associated with good or favourable investments (the **Representations**). [original emphasis]

Staff alleges that [Hav-Loc and Gevaert] knew or ought reasonably to have known that the Representations were misleading or untrue, or failed to state a fact required to be stated or that was necessary to make the Representations not misleading. Staff also alleges that the Representations would reasonably be expected to have a significant effect on the market price or value of the [securities being sold].

[34] Section 92(4.1) states:

(4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know

(a) in any material respect and at the time and in the light of the circumstances in which it is made,

(i) is misleading or untrue, or

(ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,

and

(b) would reasonably be expected to have a significant effect on the market price or value of a security

[35] Staff contended that Hav-Loc and Gevaert communicated to investors that research or due diligence had been done before Clear Vistas or Goldstone units were offered for sale to investors, but that this was misleading or untrue – and materially so – in that the only due diligence was that done by or through Lagasse. Gevaert did not dispute this.

[36] We agree with Staff's contention on this point.

[37] The references in Hav-Loc marketing material, such as the Handout quoted above, to "excellence", "ensur[ing]" that "standards" were "met", and that offered products "will provide favourable investments" could not reasonably have been interpreted as other than an indication that Hav-Loc itself conducted, or caused to be conducted, for the benefit of investors, a reasonable and appropriate – "due" – objective and diligent investigation and assessment of securities before offering them for sale. By obvious extension, the clear implication – and, we find, the intended impression – was that just such a reasonable, appropriate, objective and diligent investigation was conducted by or for Hav-Loc in respect of the Clear Vistas and Goldstone units, with results demonstrating objectively that the securities met Hav-Loc's advertised "standards" of "excellence".

[38] The reality was quite different. Gevaert's statements in the Gevaert Transcript (quoted above) were unequivocal: Hav-Loc and Gevaert themselves at that time did no due diligence, and conducted no investigation on Clear Vistas or Goldstone but instead merely looked to Lagasse, who was in one or more capacities a principal or otherwise closely connected to both limited partnerships. This was akin to a car dealership that advertises its mechanical expertise representing to a customer that a used car was in good condition based only on the former owner's word, not on any inspection or assessment by dealership mechanics.

[39] Hav-Loc and Gevaert led a selling effort and sold securities based on the implication of both investigation and diligent testing against certain product standards. There was no such investigation or testing. The assurances to that effect were misleading and untrue. Gevaert – and, through him, Hav-Loc – knew the assurances to be misleading and untrue. We further agree with Staff's submission that those assurances were materially misleading and untrue. In the circumstances, these assurances could not but have made Clear Vistas and Goldstone units – securities of what were, at the time, effectively shells – more attractive, more enticing, and thus more valuable, to prospective investors than the securities would have been in the absence of any such promise. Again, we conclude that Gevaert (and, through him, Hav-Loc) knew of – indeed intended – that effect.

[40] Responsibility for these material misleading and untrue statements rests with Hav-Loc – whose marketing material it was. The responsibility also rests with Gevaert as Hav-Loc's president, director and guiding mind and as one who, we are satisfied, created, approved or acquiesced in the problematic marketing material and its use with Alberta investors.

[41] We therefore find that Hav-Loc and Gevaert both contravened section 92(4.1) of the Act.

[42] Materially misleading or untrue statements are obviously incompatible with fairness to investors and with assisting them in making informed investment decisions – two basic objectives of our securities regulatory regime. As such, conduct of the sort found here was clearly contrary to the public interest, and we so find.

IV. CONCLUSION

[43] In the result, the allegations of unregistered advising by Hav-Loc and Gevaert are dismissed, but the misrepresentation allegations against them are sustained.

[44] This proceeding will therefore resume for the purpose of determining whether it is in the public interest to make any orders against Hav-Loc, Gevaert or both, as contemplated in the notice of hearing.

[45] We therefore direct Staff to provide to the panel (through the Commission Registrar) and to Hav-Loc and Gevaert any written submissions Staff wish to make on this remaining issue, by 4:30 pm Calgary time on **Friday 26 February 2010**. If Hav-Loc or Gevaert wish to reply in writing to Staff's submissions, those written submissions must be sent to the panel (through the Registrar) and to Staff by 4:30 pm Calgary time on **Friday 19 March 2010**. Staff will be entitled to reply in writing to any such written submissions by Hav-Loc and Gevaert, that reply to be sent to the panel (through the Registrar) and sent to Hav-Loc and Gevaert by 4:30 pm Calgary time on **Friday 26 March 2010**.

[46] Any party wishing to make oral submissions on this remaining issue must advise the Registrar by 4:30 pm Calgary time on **Wednesday 31 March 2010**, with an indication of whether they propose to call witnesses and the amount of hearing time they expect to require. If such a request is made – or if the panel of its own accord considers that oral attendances would be of assistance to it – the panel will set a date in **mid-April 2010** for that purpose and advise the parties accordingly.

4 February 2010

For the Commission:

"original signed by"
Stephen R. Murison

"original signed by"
Karl W. Ewoniak, CA

"original signed by"
Kenneth B. Potter