

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Bartel, Re, 2008 ABASC 398

Date: 20080620

Robert Vincent Bartel

Panel:	Glenda A. Campbell, QC Dennis A. Anderson, FCA Kenneth B. Potter
Appearing:	Diane Volk for Commission Staff Robert Vincent Bartel on his own behalf
Submissions Completed:	1 May 2008
Date of Decision:	20 June 2008

I. OVERVIEW OF THE PROCEEDING

[1] This decision concludes a two-part hearing into allegations made by Staff (Staff) of the Alberta Securities Commission (the Commission) in a notice of hearing dated 31 July 2007 (the Notice of Hearing) regarding trades and distributions of securities of McKinley North Ventures Inc. (McKinley), NOF Electrical Generation Inc. (NOF), Mountain Star Capital Corp. (Mountain Star) and Resolute Financial Corp. (Resolute) (collectively, the Four Issuers) contrary to the *Securities Act*, R.S.A. 2000, c. S-4 (the Act) and the public interest. The first part of the hearing dealt with the merits of Staff's allegations against Robert Vincent Bartel (Bartel). Our decision and reasons on the merits of the allegations (the Merits Decision) were issued on 12 March 2008 (see *Re Bartel*, 2008 ABASC 141). We found that between July 2002 and December 2004 Bartel engaged in illegal trades and distributions of securities of the Four Issuers contrary to the Act and the public interest.

[2] The purpose of this second and final part of the hearing is to determine whether it is in the public interest to order any sanctions against Bartel or appropriate to order that Bartel pay any costs of the investigation and hearing. For the reasons given below, we find it to be in the public interest to order that Bartel:

- cease trading in or purchasing any securities, and be denied the use of all exemptions under Alberta securities laws, for seven years, except for certain trading or purchasing in a personal account;
- resign from all positions he holds as a director or officer of any issuer, and not act for seven years as a director or officer (or both) of any issuer; and
- pay an administrative penalty of \$40 000.

[3] We are also ordering that Bartel pay \$30 000 towards the costs of the investigation and hearing.

II. BACKGROUND

[4] We received written submissions on sanctions and costs dated 31 March 2008 from Staff. We also received written submissions dated 25 April 2008 from Bartel, to which Staff replied in writing on 1 May 2008. Neither Staff nor Bartel requested an appearance before the panel.

[5] We briefly review some of our findings made in the Merits Decision, as the misconduct found therein is the misconduct we consider when determining whether, or what, sanctions are in the public interest.

[6] We found that Bartel was a commissioned sales agent for McKinley and NOF. We also found that Bartel was a founding director and the guiding mind of Mountain Star and Resolute. Bartel had been a licensed insurance agent. He had also been registered

under the Act as a mutual fund salesperson from October 1998 to December 2002 but not thereafter.

[7] McKinley and NOF, British Columbia companies, had never been registered under the Act and had never filed a prospectus with or received a receipt therefor from the Commission. We found that through Bartel's selling efforts at least two Alberta residents purchased at least \$57 130 of McKinley Shares and at least seven Albertans purchased approximately \$178 554 of NOF Shares. We found that Bartel solicited prospective investors, provided information to them on which they based their investments in McKinley and NOF and also provided subscription paperwork. Information provided to prospective investors of McKinley suggested that it was a low-risk investment that would yield extraordinary returns – from 8% to 18% per annum.

[8] Mountain Star and Resolute, Alberta corporations, had also never been registered under the Act and had never filed a prospectus with or received a receipt therefor from the Commission. There was evidence from a Staff investigator that at least 27 investors, 19 of them Albertans, invested at least \$337 590 in Mountain Star and at least eight investors, four of them Alberta residents, invested approximately \$147 800 in Resolute. Indeed, our review of the evidence revealed 42 Mountain Star investors, 27 of them Albertans, and 13 Resolute investors, seven of them Alberta residents.

[9] We found that Bartel solicited prospective investors, provided information to them on which they based their investments in Mountain Star and Resolute and also provided subscription paperwork. Investments in Mountain Star and Resolute were structured along similar lines. Investors participated by first purchasing one class C non-voting, non-transferable share of Mountain Star or Resolute for \$100. After this purchase, investors would make shareholder loans – information provided to prospective investors stipulated a minimum loan amount of \$10 000 – to either Mountain Star or Resolute. The same information indicated that loaned funds were committed for at least one year, with an option to renew the loan for another term, and that interest on the loaned funds of between 1% and 3% per month was to be paid directly to the investors. Investors received a promissory note in the amount of their loan investment issued by either Mountain Star or Resolute.

[10] We found that the investments made in the Four Issuers constituted "securities" and that the selling activities of Bartel involved "trading" and "distributing" these securities (within the meaning of those terms under the Act) without the requisite registration and prospectus and without an available exemption from those requirements contrary to sections 75(1)(a) and 110 of the Act.

[11] Specifically concerning exemptions, we found that there was no exemption available or apparently available to Bartel under Alberta securities laws to trade and distribute the McKinley and NOF securities to the Alberta investors.

[12] There was some evidence that Bartel had relied on the private issuer exemption under Alberta securities laws in distributing securities of Mountain Star and Resolute to Alberta investors. We found that, although the claimed exemption was available for some investors, there was no persuasive evidence tendered from Mountain Star, Resolute or Bartel to satisfy their onus that Bartel's trades and distributions of those securities to other investors were validly made in reliance on available exemptions.

[13] We also found that Bartel's failure to comply with the registration and prospectus requirements and to appropriately use the exemptions under Alberta securities laws was conduct contrary to the public interest.

[14] This decision should be read with the Merits Decision.

III. PARTIES' SUBMISSIONS

A. Staff

[15] In their written submissions, Staff contended that ordering the following sanctions against Bartel would be in the public interest:

- that he cease trading in or purchasing securities or exchange contracts for seven years;
- that all of the exemptions contained in Alberta securities laws do not apply to him for seven years;
- that he resign all positions he holds as a director or officer of any issuer;
- that he be prohibited from becoming or acting as a director or officer (or both) of any issuer for seven years; and
- that he pay an administrative penalty of \$40 000.

[16] In support of the sanctions sought, Staff referred us to the factors set out in *Re Lamoureux*, [2002] A.S.C.D. 125 at para. 11 (aff'd on other grounds 2002 ABCA 253), placing emphasis on certain of them. Staff submitted that the proven allegations of unregistered trading, illegal distributions and conduct contrary to the public interest were serious, caused harm to investors and put the Alberta capital market and the exemptions regime at risk.

[17] Staff observed that investors suffered harm as a result of purchasing securities of the Four Issuers. Investors not only lost the principal amount of their investments but also forfeited any potential gains; investors have been left holding what are effectively worthless securities. This direct financial harm occasioned on investors in the Four

Issuers has shaken their confidence in the integrity of the Alberta capital market. Staff contended that other investors learning of these investors' experience with the Four Issuers might also have lost confidence in the Alberta capital market. This loss of confidence can, in turn, impair the raising of capital by those who follow the law, to the detriment of both issuers and investors.

[18] Staff submitted that Bartel, previously licensed as an insurance agent and registered as a mutual fund salesperson, must have been well aware or should have been aware that he had to comply with a regulatory regime when selling securities. His abuse of the exemptions from the registration and prospectus requirements under Alberta securities laws not only caused harm to investors but also damages the integrity of the Alberta capital market and puts the entire exemption regime in jeopardy.

[19] Staff argued that the sanctions appropriate to Bartel's misconduct must be significant enough to deter not only Bartel from a recurrence of his wrongful behaviour but also others considering unregistered trading or illegal distributions of securities in Alberta.

[20] Staff acknowledged as a mitigating factor that Bartel has not been the subject of prior sanctions by the Commission. However, Staff contended that Bartel's suggestion that he relied on the principals of McKinley and NOF to ensure that the sales of those securities were conducted in accordance with Alberta securities laws was not a mitigating factor because Bartel bore that responsibility as the seller of those securities, as this panel noted in the Merits Decision.

[21] Staff referred us to two Commission decisions that, they said, dealt with misconduct similar to that in the present case and are supportive of the sanctions sought against Bartel: *Re Hughes*, 2007 ABASC 583; and *Re InstaDial Technologies Corp.*, 2005 ABASC 965.

B. Bartel

[22] As noted, the panel received written submissions from Bartel dated 25 April 2008 (Bartel's 2008 Submissions). Bartel's 2008 Submissions were silent on the issues of sanctions and costs and did not address the specifics of the sanctions proposed by Staff in their written submissions dated 31 March 2008. Instead, Bartel's 2008 Submissions set out three contentions arising as a result of Staff's apparent non-response to a letter sent by Bartel to Staff dated 5 June 2007 (Bartel's June 2007 Letter):

- that the Commission has no jurisdiction in this matter;
- that Bartel has not been provided with full disclosure as required by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; and

- that, as no complaint sworn by an injured party has been produced to him, the Commission has no authority to act as the "Plaintiff" in this matter.

[23] Bartel's 2008 Submissions continued that "your offer is hereby refused for cause without dishonour in the instant matter", and that "[t]his fact now constitutes that your errors are errors and any demands by the Commission and the staff are null and void". Accompanying Bartel's 2008 Submissions were Bartel's June 2007 Letter, a newspaper article and a news release and notice of hearing issued by the British Columbia Securities Commission, the latter three naming among others NOF, VG Capital Group Inc., HG and AJ.

[24] Bartel's reference to "your offer" appeared to follow from Bartel's June 2007 Letter that read as follows:

Please be advised of my Conditional Acceptance of your Offer to Contract, as laid out in your correspondence dated May 17, 2007, pursuant to your fulfillment of the following conditions:

1. That you will first establish in rem jurisdiction and in personam jurisdiction prior to any attempt to proceed, as I give formal notice that I do not waive my constitutionally guaranteed rights, inclusive of my right to challenge jurisdiction in the instant matter. You are hereby put on notice that the claim and exercise of a constitutional Right cannot be converted into a crime.
2. That you will provide me with full disclosure prior to any attempt to proceed, as required by all lawful obligations pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
3. That you will produce the complaint sworn by an injured party, granting the Alberta Securities Commission the authority to come forward as the Plaintiff in this matter.

Your timely response to this conditional acceptance is required within ten (10) days of the date of mailing of this presentment, complete with all of the above-referenced documentation, or in the alternative your offer will thereby be refused for cause without dishonour, as your failure to respond will constitute your agreement to cease and desist in the instant matter.

IV. SANCTIONS

A. Sanctioning Principles and Factors

[25] Contrary to Bartel's 2008 Submissions, the Commission, by operation of the Act, clearly has responsibility for the administration of Alberta securities laws, including jurisdiction in the public interest over the trading and distribution of securities in Alberta – the very conduct that Bartel engaged in. A pivotal part of the Commission's public interest jurisdiction is the protection of investors and the Alberta capital market from harmful misconduct by those who enjoy the privilege of access to our capital market. In

exercising our public interest authority to order sanctions under sections 198 and 199 of the Act, we act prospectively to protect against and prevent future harm in our capital market; we do not punish or remedy capital market misconduct (see *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). An important consideration in making protective and preventive orders is the need to provide general deterrence (see *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62).

[26] A number of factors may be relevant to determining whether, or what, sanctions are in the public interest in the circumstances of a particular case (see *Re Ironside*, 2007 ABASC 824 at paras. 62-64). Our analysis in this regard is assisted by a consideration of the factors identified in *Lamoureux*.

B. Sanctioning Considerations

[27] In applying the sanctioning principles and factors to the circumstances of Bartel's misconduct, we are of the view that orders for significant sanctions against Bartel are in the public interest for the following reasons.

Serious Misconduct

[28] Bartel's misconduct was serious. While it was true that he acted as a sales agent in the distribution of McKinley and NOF securities to Alberta investors, his participation was clearly integral to the success of the McKinley and NOF investment schemes in Alberta. Bartel solicited prospective investors, provided information to them on which they based their investments in McKinley and NOF, provided subscription paperwork and assisted with the transfer of investment funds to OT, the trust company used by McKinley and NOF. Without Bartel's participation, these Alberta investors would not have invested in McKinley or NOF.

[29] Bartel, as a founding director and the guiding mind of Mountain Star and Resolute, was the architect of the Mountain Star and Resolute investment schemes. Bartel solicited prospective investors in Alberta, provided information to them on which they based their investments in Mountain Star and Resolute and also provided subscription paperwork. The money received by Mountain Star and Resolute in the form of shareholder loans was apparently invested in business ventures identified by Bartel.

[30] Through Bartel's involvement Alberta investors were induced to invest money in one or more of the Four Issuers without being afforded the two most fundamental protections mandated by Alberta securities laws for trades and distributions of securities: the advice of a registrant and the information disclosed by a prospectus.

[31] Any failure to comply with the two most fundamental requirements of Alberta securities laws is serious misconduct. This serious misconduct by Bartel calls for significant sanctions to be ordered against him.

Harm Suffered

[32] It seems that money paid by Alberta investors to the Four Issuers through Bartel's involvement has been, for the most part, lost, with no realistic hope of recovery. For some investor witnesses, the loss of their investment money has depleted retirement funds with the potential consequence of delayed retirement.

[33] The harm caused by Bartel's illegal trades and distributions of securities is not necessarily limited to that directly suffered by the Alberta investors in the Four Issuers. Bartel's illegal capital market activities may also have damaged the integrity of the Alberta capital market generally, with serious negative implications for other market participants. Alberta investors who have lost all or most of their money invested in the Four Issuers have undoubtedly had their confidence shaken in the fairness and integrity of the Alberta capital market. As a result, in future, they may be reluctant to invest in private sales of securities of other issuers. A similar loss of confidence could conceivably spread to other investors looking to make similar exempt market investments as they come to learn of the plight of investors in the Four Issuers. Thus, Bartel's misconduct could impair legitimate capital-raising efforts by others seeking to use the capital-raising exemptions. Bartel's misuse of the capital-raising exemptions could also contribute to the eventual abolition or amendment of certain exemptions by securities regulators, thereby depriving lawful users of the benefit of these exemptions.

[34] These considerations call for significant sanctions to be ordered against Bartel.

Capital Market Experience and Recognition of Misconduct

[35] Bartel had previously been licensed as an insurance agent and registered as a mutual fund salesperson. That is, Bartel had previous experience in two regulated industries governed by extensive legal requirements, one of which was the securities industry. As a former registrant, Bartel should have been aware that he had to be registered to trade or distribute securities. Bartel also should have known that, if he sold securities without registration or without a prospectus, he was required to ensure that all of the conditions of the capital-raising exemption relied on were met before he concluded the sale. As discussed in the Merits Decision, Bartel appeared to have some knowledge of certain of the capital-raising exemptions provided under Alberta securities laws, but he either wilfully disregarded the conditions of those exemptions or apparently simply failed to ensure that he understood and complied with them when he sold securities of the Four Issuers to some Alberta investors.

[36] We also find that Bartel does not recognize the seriousness of his improprieties. Bartel's 2008 Submissions strongly indicated to us that Bartel has yet to recognize or understand the seriousness of his misconduct or, indeed, that (for Mountain Star and Resolute at least) he engaged in illegal capital-raising activities. Further, Bartel has demonstrated no remorse for his misconduct or the harm it has caused Alberta investors.

[37] Bartel's previous capital market experience as a registrant and his lack of recognition of or contrition for his misconduct compel us to the conclusion that Bartel poses a serious, continuing threat to Alberta investors and the integrity of the Alberta capital market unless we severely restrict his future capital market access.

Bartel Received Financial Benefit

[38] While we do not know the exact amount of commissions paid to Bartel for his sales of McKinley and NOF securities, we do know that he was paid a commission ranging from 3% to 10% for his sales of the latter to Alberta investors. The evidence was unclear as to what financial or other benefit Bartel received for his sales of securities of Mountain Star and Resolute. Nevertheless, we do believe that Bartel expected to benefit financially from his capital-raising activities for companies of which he was a founding director and the guiding mind. In short, we believe that Bartel engaged in his capital-raising activities for the Four Issuers in the expectation that he would profit financially from such activities. We consider that his receipt or expectation of financial benefit as a result of his unregistered trading and illegal distributions calls for significant sanctions.

Risk of Bartel's Continued Capital Market Participation

[39] Bartel, an experienced capital market participant, raised capital in the exempt market apparently without making any reasonably serious effort to ensure that any exemption purportedly relied on was available to make trades or distributions to some Alberta investors at the time of the trades or distributions.

[40] In our view, this serious disregard for Alberta securities laws is a strong indicator that Bartel poses a continuing threat to Alberta investors and the integrity of the Alberta capital market. In the circumstances, we believe that we must take proactive steps to significantly curtail Bartel's continued participation in the Alberta capital market.

Deterrence

[41] For the reasons given, we conclude that it is in the public interest to order sanctions that are significant enough to deter Bartel from repeating his contraventions of Alberta securities laws.

[42] As evidenced by recent decisions of the Commission, the Alberta capital market continues to be plagued by individuals, like Bartel, who engage in unregistered trading

and illegal distributions of securities to Albertans. These illegal activities often have serious financial consequences for Alberta investors who have been denied the protections given them by Alberta securities laws. These illegal activities can also weaken investor confidence, making it increasingly difficult for legitimate capital-raising activities to succeed.

[43] It is essential that the Commission use the means it has, including market-access bans and administrative penalties, to deter others who might be inclined to engage in misconduct similar to Bartel's. The sanctions we order must make clear the consequences for such misconduct and create trepidation in the minds of those considering future illegal or non-compliant activities in the Alberta capital market.

Mitigating Factors

[44] The only mitigating factor of which we are aware is that Bartel has not been the subject of prior sanctions by the Commission. However, given the seriousness of his misconduct that spanned over two years and involved four different issuers, we are loath to give this mitigating factor much weight. Bartel's conduct overall exhibited serious, perhaps wilful, disregard for Alberta securities laws.

C. Sanctions Ordered

[45] For the foregoing reasons, we consider that it is in the public interest to order significant sanctions against Bartel in the nature of market-access bans and a monetary administrative penalty.

[46] We believe that the nature and duration of the market-access bans and the quantum of the administrative penalty sought by Staff will provide the requisite protective and deterrent results required in this case. In our view, however, neither these results nor the public interest would be jeopardized were we to permit Bartel to trade in or purchase securities through a registrant (who has first been given a copy of this decision) in a registered retirement savings plan (an RRSP, as defined in the *Income Tax Act* (Canada)) account for his benefit.

[47] Accordingly, we consider that it is in the public interest to make the following orders:

- under sections 198(1)(b) and (c) of the Act, Bartel must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to him, for seven years from the date of this decision, except that this order does not preclude him from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in an RRSP account for his benefit;

- under sections 198(1)(d) and (e) of the Act, Bartel must resign all positions he holds as a director or officer of any issuer, and he is prohibited for seven years from the date of this decision from becoming or acting as a director or officer (or both) of any issuer; and
- under section 199 of the Act, Bartel must pay an administrative penalty of \$40 000.

V. COSTS

[48] In addition to sanctions, Staff sought an order under section 202 of the Act that Bartel pay \$35 000 towards the costs of the investigation and hearing.

[49] Staff tendered a two-page itemization of investigation costs (about \$30 030) and hearing costs (about \$15 595) totalling approximately \$45 625. Staff said that, while there were investigation costs incurred in respect of other possible respondents, those costs were not included in the itemized costs. Staff also said that, where investigation costs appeared to relate to other possible respondents as well as to Bartel and could not be "definitively apportioned" to Bartel, those too were not included in the itemized costs. Staff further noted that all hearing costs itemized related solely to Bartel.

[50] An order for payment of costs under section 202 of the Act is not dictated by the nature or magnitude of the capital market misconduct, and is not part of our consideration of the appropriate sanctions to order. Rather, a costs order is directed at the recovery of costs incurred by the Commission in conducting enforcement proceedings related to a market participant's non-compliance with Alberta securities laws or conduct contrary to the public interest. A costs order also serves an additional important purpose by providing the Commission with an effective means of promoting procedural efficiency in the conduct of enforcement proceedings. Thus, we believe that, when a respondent has been found to have contravened Alberta securities laws or acted contrary to the public interest, it is generally appropriate that the respondent pay at least a portion of the costs of the investigation and hearing that led to such findings. The extent to which the respondent facilitated or impeded an efficient investigation and hearing process is a factor that we consider when determining the amount of the costs incurred that ought to be paid by the respondent.

[51] The types of costs itemized by Staff are of the types for which we can make costs orders under section 202 of the Act. Further, the quantum of costs itemized by Staff does not appear unreasonable for the investigation and hearing that occurred here, but for an overcharge of about \$645 in respect of hearing administration costs. In the result, we accept that approximately \$44 980 is potentially recoverable under a costs order.

[52] We are unable to say whether Bartel facilitated or impeded Staff's investigation. However, we do know that Bartel did little to facilitate an efficient hearing process. The

evidence clearly established that Bartel engaged in unregistered trading and illegal distributions of securities of the Four Issuers. Indeed, Bartel himself seemed to acknowledge in his closing submissions in the first part of the hearing that he had illegally traded and distributed McKinley and NOF securities but that he had relied on others to ensure that his selling of those securities was in compliance with securities laws. We believe that Bartel could have made such concessions to Staff while maintaining his position that others were responsible. This narrowing of issues in dispute would have shortened the first part of the hearing, resulting in a more efficient hearing process.

[53] We also found that, although the claimed private issuer exemption was available for some investors in Mountain Star and Resolute, there was no persuasive evidence tendered from Mountain Star, Resolute or Bartel to satisfy their onus that Bartel's trades and distributions of those securities to other investors were validly made in reliance on available exemptions. In other words, it appeared that Bartel had no realistic basis for asserting that he properly relied on the private issuer exemption in selling securities of Mountain Star and Resolute to some Alberta investors. Despite this, Bartel put the Commission to the cost of a full hearing on the merits.

[54] Contrary to Bartel's 2008 Submissions, there was no indication in the first part of the hearing that Staff had failed to make proper disclosure to Bartel of all relevant information in their possession. In his closing submissions in the first part of the hearing Bartel did reference Bartel's June 2007 Letter. In that regard, Bartel stated that, although he gave formal notice to Staff for disclosure of all relevant information within ten days of 5 June 2007, he received some relevant information as late as 28 November 2007, and he received other information (which we note was in the nature of argument) on 5 December 2007. Bartel had the right to be present and heard at the hearing, and he exercised those rights. Indeed, as we noted in the Merits Decision, we extended considerable latitude to Bartel in his conduct of his case. While we appreciate that Bartel chose to represent himself, his lack of focus on the allegations in the Notice of Hearing created inefficiencies in the conduct of the first part of the hearing. In consequence, the hearing process was not as efficient as it might have been.

[55] That said, it seems that others were investigated but not named as respondents in this matter. We do not believe that costs incurred as a result of the investigation of those others should be included in any costs order made against Bartel. Because Staff did not explain their methodology in "definitively apportion[ing]" to Bartel certain investigation costs relating to other possible respondents as well as to Bartel, we think it necessary to discount the potentially recoverable investigation costs. This, we believe, will ensure that no investigation costs incurred as a result of the investigation of others will be charged to Bartel.

[56] In the circumstances, we consider it appropriate to order that Bartel pay \$30 000 towards the costs of the investigation and hearing. We so order under section 202 of the Act.

VI. PROCEEDING CONCLUDED

[57] This proceeding is now concluded.

20 June 2008

For the Commission:

"original signed by"

Glenda A. Campbell, QC

"original signed by"

Dennis A. Anderson, FCA

"original signed by"

Kenneth B. Potter