

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Hav-Loc Private Wealth Partners Inc., Re, 2010 ABASC 225 Date: 20100513

Hav-Loc Private Wealth Partners Inc. and Thierry Gevaert

Panel:

Stephen Murison
Karl Ewoniak, CA
Kenneth Potter, QC

Appearing:

Carla Murray
for Commission Staff

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

Date of Hearing:

19 April 2010

Date of Decision:

13 May 2010

I. INTRODUCTION

[1] Hav-Loc Private Wealth Partners Inc. ("Hav-Loc") and its president, chief executive officer and sole director, Thierry Gevaert ("Gevaert") were both found to have made misleading and untrue statements to investors in the course of selling securities in two limited partnerships. In so doing, Hav-Loc and Gevaert contravened section 92(4.1) of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") and acted contrary to the public interest.

[2] These findings are set out in a decision of this Alberta Securities Commission (the "Commission") panel dated 4 February 2010 (the "Merits Decision", cited as *Re Hav-Loc Private Wealth Partners Inc.*, 2010 ABASC 43). The findings followed a hearing into the merits of allegations levelled by Commission staff ("Staff"), which were set out in a notice of hearing dated 17 July 2009. That notice of hearing also set out other allegations against Hav-Loc and Gevaert, as well as against three other individuals. The other allegations against Hav-Loc and Gevaert were not proved, and Staff withdrew all the allegations against the other three individuals (in the case of two of those individuals, this occurred only near the end of the merits phase of the hearing).

[3] With the issuance of the Merits Decision, this proceeding moved to a second phase in which the issue for determination was what, if any, orders should be made against Hav-Loc, Gevaert or both of them. We received written submissions from Staff, through their counsel, and from Gevaert (who is unrepresented) on behalf of himself and Hav-Loc. We also heard oral submissions from the parties.

[4] For the reasons given below, we are ordering the following:

- each of Hav-Loc and Gevaert must cease trading in all securities and exchange contracts (except for specified personal trading by Gevaert) and is denied the use of all exemptions under Alberta securities laws for five years;
- Gevaert is prohibited from acting as a director or officer of any issuer that trades in, deals in, distributes or issues securities or exchange contracts to the public, for five years;
- Hav-Loc and Gevaert must jointly and severally pay a \$15 000 administrative penalty; and
- Hav-Loc and Gevaert must jointly and severally pay \$2000 of the costs of the investigation and hearing.

II. THE MISCONDUCT

[5] As discussed in the Merits Decision, Hav-Loc and Gevaert each bore responsibility for material misleading and untrue statements in certain Hav-Loc marketing material.

[6] Specifically, a Hav-Loc paper handout communicated to investors that research or due diligence had been done by Hav-Loc for products it was offering for sale to investors through Hav-Loc sales personnel. Those products included limited partnership units in two entities – Clear Vistas Community #1 Limited Partnership ("Clear Vistas") and Goldstone Private Equity Partners Limited Partnership ("Goldstone"). Those communications were untrue. The only due diligence on Clear Vistas and Goldstone was done by an individual closely connected to both limited partnerships. As stated in the Merits Decision (at paras. 39-42):

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.

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.

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

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.

[7] Staff had also alleged that Hav-Loc and Gevaert had engaged in unregistered, and therefore illegal, "advising". We dismissed that allegation as unproved.

III. POSITIONS OF THE PARTIES

A. Orders Sought by Staff

[8] Staff submitted that the gravity of the misconduct by Hav-Loc and Gevaert was such that it would be in the public interest for us to order a significant package of sanctions. Specifically, Staff sought:

- a permanent securities trading and purchasing ban against Hav-Loc;
- 15-year securities-trading-and-purchasing, use-of-exemptions and director-and-officer bans against Gevaert; and
- a \$200 000 administrative penalty against Gevaert.

[9] Staff also sought an order that Hav-Loc and Gevaert jointly and severally pay \$45 283.23 of the costs of the investigation and hearing.

B. Position of Hav-Loc and Gevaert

[10] Gevaert, although not challenging our findings on the merits of the allegations against Hav-Loc and himself, contended that the orders sought by Staff would be inappropriate and punitive. He expressed a willingness to write letters of apology to investors and "work with the . . . Commission". However, he submitted that no bans, administrative penalty or costs should be ordered against him or Hav-Loc.

IV. ANALYSIS

A. Principles

[11] Sections 198 and 199 of the Act empower the Commission to order sanctions that it considers to be in the public interest, with a view to protection and prevention. This authority is to be exercised prospectively in the public interest to those ends; Commission sanctions are not intended to punish or to remedy harm done – see *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45. Our assessment of the public interest may consider, among other things, both specific deterrence (aimed at dissuading a respondent from repeating its own misconduct) and general deterrence (aimed at discouraging others from engaging in similar misconduct) – see *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62.

[12] In applying the sanctioning principles and objectives to the facts of a particular case, the Commission may consider the more pertinent of the factors enumerated by this Commission in *Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds, 2002 ABCA 253), as summarized in *Re Sea Sun Capital Corporation*, 2009 ABASC 407 at para. 12:

- the seriousness of the findings against the respondent and the respondent's recognition of that seriousness;
- characteristics of the respondent, including capital market experience and activity and any prior sanctions;
- any benefits received by the respondent and any harm to which investors or the capital market generally were exposed by the misconduct found;
- the risk to investors and the capital market if the respondent were to continue to operate unimpeded in the capital market or if others were to emulate the respondent's conduct;
- decisions or outcomes in other matters; and
- any mitigating considerations.

[13] Costs orders under section 202 of the Act are not sanctions. Rather, they serve as a means of recovering certain costs that would otherwise be borne indirectly by other market participants whose fees fund the Commission's operations. This Commission commented on costs orders as follows in *Sea Sun* (at para. 38):

... A measure of cost recovery from a respondent found to have engaged in misconduct is, generally, appropriate. In assessing whether, and to what extent, that is so in a particular case, we look primarily to the efficient resolution of enforcement proceedings (*Re Workum and Hennig*, 2008 ABASC 719] at paras. 192-93, 252) and respondents' respective contributions to that end.

B. Sanctioning Principles and Factors Applied to the Facts of this Case

[14] We summarize here our analysis of the circumstances of this case in light of the sanctioning principles and key factors.

Seriousness of Misconduct and Respondents' Recognition of Seriousness

[15] We considered first the nature of Hav-Loc's and Gevaert's misconduct, and its seriousness. Stated simply, they told an untruth to investors. They had not conducted the due diligence they claimed to have performed. As we said in the portion of the Merits Decision quoted above, Hav-Loc and Gevaert made misleading assurances to investors that could not but have made Clear Vistas and Goldstone units more attractive and more enticing to prospective

investors than would otherwise have been the case – and this was known to and intended by Hav-Loc and Gevaert. We also noted that this was "obviously incompatible with fairness to investors and with assisting them in making informed investment decisions – two basic objectives of our securities regulatory regime". In that fundamental sense, we find this to have been serious misconduct.

[16] Gevaert said that he accepted our findings against Hav-Loc and himself. He spoke respectfully to the panel and seemed to take the proceeding seriously. However, we are not persuaded that he – and Hav-Loc, through Gevaert – fully appreciated the seriousness of their misconduct. In his oral submissions, Gevaert seemed to downplay the seriousness of what happened, pointing, for example, to what he described as costly efforts to obtain legal advice and attempts to garner assistance from Staff to ensure that the Hav-Loc operation complied with Alberta securities laws. These submissions, in our view, missed the point. The misconduct involved no technical quibble or misapprehension of any legal requirement. Hav-Loc and Gevaert made assertions to prospective investors that were, simply, factually untrue, in respect of matters wholly within their knowledge. These assertions were used as an enticement for investors to buy securities through Hav-Loc. This was simply and plainly wrong, and seriously so. It was not mitigated, in our view, by any amount of reliance on third-party advice, for one does not need professional advice to conclude that telling untruths is wrong.

[17] This in our view argues for meaningful and preventative sanction.

Harm Done

[18] There are two types of harm to consider in the securities regulatory context: direct harm to identifiable investors or participants in the capital market; and the less precise concept of harm to the capital market as a whole.

[19] Without diminishing the seriousness of Hav-Loc's misleading and untrue statements to investors, we consider that the character of those misstatements was such that they were only indirectly connected to any investments made and, therefore, to any resulting losses.

[20] Further, even if the misrepresentations here led to investments, we had scant evidence of actual, quantifiable harm to particular investors. We did hear from an investor witness testifying in respect of \$222 000 that she and her husband had invested in Goldstone units in November 2007. She understood that her investment had somehow been moved or changed into an investment in Clear Vistas, which she did not want. According to this investor:

The investment today, as far as I know, stands at absolutely zero. I don't believe there is a way to recuperate anything of the [\$]222[000].

[21] Gevaert, however, took issue with this evidence. In his oral submissions – which, as was noted at the time, did not amount to evidence – he criticized the witness's understanding of her investment and its status. Further, he contended that Clear Vistas' "general partner" (we understood him to be referring to the Clear Vistas business, not only its general partner) was "prospering".

[22] The only pertinent evidence before us is the testimony of the investor witness. We appreciate that Gevaert is not a lawyer and that he was not represented by a lawyer in this proceeding. As a Commission panel we need not be, and are not, bound by all the formal evidentiary rules of the courts. That said, there is a fundamental difference between evidence and mere assertions in the course of submissions. Evidence – particularly witness testimony – can be tested and challenged in cross-examination. Here, Gevaert could have questioned the witness on those points, but did not take that opportunity. Nor did he tender evidence of his own that might support his assertions. Finally, even were he correct in his assessment that Clear Vistas' business is now "going forward", we still would not know what has actually happened, or will happen, with any of the Hav-Loc clients' investments.

[23] On the other hand, we have essentially no evidence as to any direct pecuniary loss definitively incurred by any investor as a result of the untrue and misleading Hav-Loc statements. Hav-Loc misrepresented its marketing process. These were not statements misrepresenting the specific merits or risks associated with an investment in a particular security, the nature or terms of the security, the issuer of the security, or the use to be made of invested money. Rather, they were more general statements as to the existence of a due diligence process that Hav-Loc supposedly followed before selling any investment. In this sense, the present case differs from others – including others that resulted in substantial sanctions. We do not doubt that the due diligence assertions were, and were meant to be, an enticement to investors. However it is impossible for us to determine the extent to which that enticement affected any investment decisions or with what specific consequence.

[24] In the result, we are unable to reach any firm conclusion as to the quantum or extent of direct pecuniary harm to identifiable investors attributable to the misconduct here.

[25] We do, however, agree with Staff's assertion that misconduct of the type here posed a more general sort of harm to investors, and to the capital market generally. Untrue and misleading enticements to investment are, as stated in the Merits Decision, incompatible with the basic objectives of fairness and assisting investors to make informed investment decisions. Such misconduct exposes investors to at least the risk of harm. It works an unfairness and jeopardizes confidence in the fairness and efficiency of the capital market as a whole. This can be particularly the case in the so-called exempt market, which was the focus of the Hav-Loc operation. This is a vibrant and important sector of the Alberta capital market, but one which depends to a high degree on investor confidence and the integrity of its participants.

[26] We conclude that the untrue and misleading investment enticements exposed Hav-Loc's clients to harm or the risk of harm, and also risked broader harm to market integrity and confidence. This argues for meaningful sanction.

Benefits Received by the Respondents

[27] Hav-Loc and Gevaert both clearly intended to profit from their securities-selling business, which the impugned marketing communications were used to promote. They did derive financial benefit through their commissions, although the proportion of such commissions directly attributable to the untrue and misleading communications is unknowable. This factor, in our view, argues in favour of meaningful sanction.

Prior History of the Respondents

[28] Gevaert and Staff referred, during the merits phase of the hearing, to Gevaert having been involved (before the Hav-Loc operation began) with an unrelated entity to which some negative references were made. These references were irrelevant to the allegations before us and potentially prejudicial to the respondents, and they played no part in our findings on the merits of the allegations. However, there was potential relevance to the issue of appropriate sanction: Gevaert suggested that this unhappy experience had motivated him to take seriously the need to ensure that the Hav-Loc operation complied with Alberta securities laws, and pointed to his mentioned efforts at obtaining legal advice and Staff's assistance.

[29] There was no evidence of either Hav-Loc or Gevaert having been previously sanctioned by securities regulatory authorities. This was not shown to have been repeat misconduct. However, both had been registered in the past in Ontario (Hav-Loc as a "limited market dealer", and Gevaert to sell mutual fund securities), although Gevaert's registration had been suspended in 2003. Given that registration history, Hav-Loc and Gevaert should have been particularly alive to the importance of participating honestly in the securities industry.

[30] On balance, the registration history and the lack of sanction history are neither mitigating nor aggravating factors.

Future Risk

[31] Gevaert himself suggested a preference not to be restricted by sanctioning bans and "to still work in a field that I enjoy". This suggests that he wishes to continue or resume selling securities. Except to the extent constrained by any orders we might make, we are aware of no impediment to Hav-Loc or Gevaert continuing or resuming their securities selling activity (although Gevaert indicated that Hav-Loc essentially "no longer exists"). These facts are not themselves indicators of future risk or its absence, but they underline the importance of considering risk factors.

[32] As mentioned, Gevaert emphasized that he, and Hav-Loc, wanted to ensure that they operated in compliance with Alberta securities laws, and he suggested that this remained an objective. We accept this assertion.

[33] There was evidence during the merits phase of the hearing that, although Hav-Loc had not conducted its touted due diligence before the securities sales at the heart of this proceeding, practice had since changed, such that Gevaert began working with a "forensic auditor" to review offerings before they were sold through Hav-Loc. This suggests that Hav-Loc's practice in fact became far more consistent with its marketing depiction than it had been. As such, this would greatly diminish the future risk of a repetition of the precise misconduct identified in this proceeding.

[34] However, these seemingly positive circumstances are somewhat undermined by the fact of the misconduct that did occur – and its basic and obvious nature – as well as our observations, noted above, of Gevaert's less-than-complete appreciation of the seriousness of that misconduct.

[35] On balance, we consider that Hav-Loc and Gevaert would continue to pose a risk to investors and the capital market – particularly when a registration exemption is relied upon – unless constrained for a time through sanctioning orders.

Mitigating Factors

[36] We commented above on aspects of Gevaert's, and Hav-Loc's, history and motivations that Gevaert suggested amounted to mitigating factors. We do not consider them to be such, but we did take them into account in our assessment of other factors, as discussed.

Previous Decisions

[37] We do not consider the circumstances addressed in other decisions discussed by the parties to be apposite to this case, and hence we draw no guidance from them on the issue of appropriate sanction here.

C. Appropriate Sanctions

[38] In the result, we conclude that appropriate protection and deterrence warrant meaningful sanctions against Hav-Loc and Gevaert. We simply do not agree with Gevaert's contention that the public interest would be adequately served by making no orders against Hav-Loc or Gevaert. That said, we are similarly not persuaded that sanctions of the magnitude proposed by Staff are necessary or warranted.

[39] We conclude that appropriate sanctions would include a combination of market-access bans and a direct monetary penalty. In this, we agree with Staff. However, we do not consider a purchasing ban necessary or warranted in the circumstances. Moreover, we perceive no grounds for differentiating in the nature or magnitude of sanctions as between these two respondents. We consider their misconduct, and their responsibility, essentially equal and shared – Hav-Loc having apparently acted as a sort of alter ego for Gevaert. Finally, we do not consider it necessary to bar Gevaert from acting as a director or officer of an issuer except, for a limited period, in respect of an issuer that interacts with the public in respect of securities.

[40] We conclude that necessary and appropriate specific and general deterrence will be afforded, in the public interest, by the following combination of sanctions:

- orders against both Hav-Loc and Gevaert barring them from trading in securities and exchange contracts, and denying them the use of exemptions (with an exception to permit certain personal trading by Gevaert), for five years;
- orders barring Gevaert, for five years, from serving as a director or officer of any issuer that trades in, deals in, distributes or issues securities to the public; and
- a \$15 000 administrative penalty payable jointly and severally by Hav-Loc and Gevaert.

D. Costs

[41] As noted, Hav-Loc and Gevaert asserted that no costs order would be justified, while Staff asked for \$45 283.23.

[42] In support of their costs order request, Staff tendered into evidence material indicating that a total of \$54 978.33 of costs had been incurred, after eliminating certain time spent by

litigation counsel that Staff considered to involve duplicated work. Staff also proposed that 40% of the time spent by investigators in the investigation – amounting to \$9695.10 of a total of \$24 237.75 – was allocable to the allegations against individuals other than Hav-Loc and Gevaert and should therefore not be ordered payable by the latter. This adjustment reduced the amount of costs sought to the claimed \$45 283.23.

[43] In general, the Commission considers that respondents found to have engaged in capital market misconduct should bear a portion of the investigation and hearing costs. The appropriateness of such an order, and its magnitude, must be determined in light of the circumstances.

[44] This proceeding, as mentioned, originated in a notice of hearing that named five respondents and levelled allegations, or multiple allegations, against each. Investigation costs were incurred in respect of all of those respondents and allegations. The hearing itself went forward in respect of all the allegations against the then-remaining four respondents. Hearing costs were obviously incurred in respect of each.

[45] However, only one of the allegations was proved, against only two respondents (Hav-Loc and Gevaert). Allegations – seemingly, given the facts before us, more serious allegations – of illegal advising in securities were not proved. What was left, then, was proof of only the more modest of the allegations, against only a minority of the original respondents. The proved misconduct – untrue and misleading descriptions of Hav-Loc's due diligence – may already have been addressed by Hav-Loc and Gevaert through a change in their practice, as mentioned above.

[46] We discerned nothing in Hav-Loc's or Gevaert's conduct suggesting that they had unduly complicated or prolonged the investigation or the hearing. It is certainly true that they did not agree to all of the allegations against them, but they were not bound to do so. Indeed, given the evidence that led the panel to dismiss important allegations against them, they had reason to maintain their position.

[47] In the circumstances, we consider it inappropriate to require the remaining two respondents to bear the large portion of rather significant costs suggested by Staff. We conclude that Hav-Loc and Gevaert should jointly and severally pay a total of \$2000 of the costs of the investigation and hearing.

V. ORDERS

[48] For the reasons given, we order in the public interest that:

- under sections 198(1)(b) and (c) of the Act, Hav-Loc and Gevaert must cease trading in all securities and exchange contracts, and all of the exemptions contained in Alberta securities laws do not apply to them, in each case for five years, except that this order does not preclude Gevaert from trading in securities or exchange contracts through a registrant (who has first been given a copy of this decision) in a non-registered account for his benefit or in an account for a registered retirement savings plan, a registered retirement income fund or a registered education savings plan (as defined in the *Income*

Tax Act (Canada)) for the benefit of one or more of himself, his spouse and his dependent children;

- under sections 198(1)(d) and (e), Gevaert must resign from all positions he holds as a director or officer of any issuer that trades in, deals in, distributes or issues securities or exchange contracts to the public (collectively, a "Specified Issuer"), and he is prohibited from becoming or acting as a director or officer (or both) of any Specified Issuer for five years; and
- under section 199, Hav-Loc and Gevaert must, jointly and severally, pay an administrative penalty of \$15 000.

[49] We also order, under section 202 of the Act, that Hav-Loc and Gevaert jointly and severally pay \$2000 towards the costs of the investigation and hearing in this matter.

[50] This proceeding is concluded.

13 May 2010

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Karl Ewoniak, CA

"original signed by"
Kenneth Potter, QC