# In the Court of Appeal of Alberta

**Citation: Spaetgens v Alberta (Securities Commission), 2018 ABCA 410**

**Date:** 20181203
**Docket:** 1701-0111-AC
**Registry:** Calgary



**Between:**

**Dwight Victor Spaetgens**

Appellant

- and -

**Alberta Securities Commission**

Respondent

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**The Court:**

**The Honourable Mr. Justice Brian O'Ferrall**
**The Honourable Madam Justice Barbara Lea Veldhuis**
**The Honourable Madam Justice Ritu Khullar**

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**Memorandum of Judgment**

Appeal from the Decisions of the
Alberta Securities Commission
Merits Decision dated 7th day of November, 2016
(2016 ABASC 270)
Sanctions Decision dated 8th day of March, 2017
(2017 ABASC 38)

**Memorandum of Judgment**



**The Court:**

## I. Introduction

[1] Mr. Spaetgens appeals the November 7, 2016 and March 8, 2017 decisions of a panel of the Alberta Securities Commission (the Panel) that found him to be in breach of the *Securities Act*, RSA 2000 c S-4 (the *Act*) and imposed various sanctions. He also appeals a May 5, 2016 decision of the Panel which dismissed his request for an adjournment of the merits hearing.

[2] For the reasons that follow, we allow the appeal in part.

## II. Background

[3] In 2009, Mr. Spaetgens and his spouse, Ms. Murray, entered into a settlement agreement with the Alberta Securities Commission (the Commission) following an investigation into their activities. The settlement agreement included undertakings by Mr. Spaetgens and Ms. Murray not to act as a director or officer of any issuer and to not trade in securities for two years from September 9, 2009 (the Undertakings).

[4] The notice of hearing issued September 8, 2015, alleged that both Mr. Spaetgens and Ms. Murray worked as *de facto* directors and officers in a suite of companies: Regency Capital Partners Inc. (Regency), Westmont Capital Corporation (Westmont) and Valemont Developments Ltd. (Valemont) from September 9, 2009 to September 2, 2011. It further alleged that they traded securities of Regency, Westmont, and Valemont between September 10, 2009, and March 24, 2010 in a number of ways, including by accepting investor money, promotion and soliciting investment. Westmont and Valemont are in the business of developing assisted living and retirement homes in Irricana and Sundre, Alberta. Regency was created, in part, to raise funds for these projects.

[5] In November 2015, the Panel scheduled the merits hearing to commence on May 9, 2016. At the conclusion of the hearing, the Panel found that Mr. Spaetgens had violated the Undertaking by acting as a *de facto* director and officer of the corporations and by trading in securities. The allegations against Ms. Murray were dismissed.

[6] Mr. Spaetgens appeals on the grounds that:

1. He was denied an adjournment to enable him to retain counsel and, as a result, was denied a fair hearing;

2. The Panel erred in determining that he was involved in trading securities by soliciting for investments in four different circumstances; and

3. The sanction was unreasonably onerous.

Mr. Spaetgens does not appeal the findings that he was a *de facto* officer and director, although his counsel noted that all of the findings would fall if he was successful on the natural justice argument.

## III. Standard of Review

[7] This Court has already determined that the Panel is entitled to deference with the respect to issues involving the interpretation of evidence, interpretation of the Panel's enabling legislation, and the imposition of sanctions. Accordingly, the standard of review is reasonableness for these issues: *Alberta Securities v Brost*, 2008 ABCA 326 at para 28, [2008] 440 AR 7 (*Brost*). The standard of review for questions of procedural fairness, such as whether denial of an adjournment deprived the appellant of a fair opportunity to meet the case against him, is correctness: *Brost* at para 29.

## IV. The Adjournment Decision

[8] On November 4, 2015, the Panel set dates for the merits hearing, which was to begin on May 9, 2016 and end on May 18, 2016. The Panel also scheduled hearing management sessions to take place each month between January and April 2016. The January and February sessions did not take place but at the March 9, 2016 hearing management session, counsel for Mr. Spaetgens applied for leave to withdraw as counsel. Such an application was required by the Commission rules.

[9] The application was granted. At the time, Mr. Spaetgens indicated that he was in the process of obtaining new counsel. The Panel urged Mr. Spaetgens to advise any new counsel to be available for the scheduled hearing. The Panel also indicated that it could be contacted at any time to arrange hearing management sessions should the need arise.

[10] On March 22, 2016, at a hearing management session, Mr. Spaetgens asked for an adjournment to enable him to obtain counsel. Mr. Spaetgens identified two challenges: finding a lawyer willing to take the case and not having the funds to pay. He thought that new counsel would need time to prepare and that, if Mr. Spaetgens ended up representing himself and Ms. Murray, he would need more time too. When asked how long an adjournment he was seeking, Mr. Spaetgens was unsure but suggested another 60 days. Commission staff opposed the application.

[11] The Panel denied the adjournment because it found that another 60 days would not address the concerns about finding new counsel, paying for counsel and preparing for the hearing. Rather,

the Panel urged Mr. Spaetgens and Ms. Murray to begin preparing to defend themselves by reviewing all of the disclosure.

[12] At hearing management session on April 13, 2016, the hearing dates were confirmed. Mr. Spaetgens appeared to be preparing to represent both himself and Ms. Murray. He asked a number of questions and the Panel assisted by advising him of the procedure to be followed at the hearing. Mr. Spaetgens indicated he could not afford a lawyer but that staff at the Commission were trying to assist, although obviously they could not provide legal advice.

[13] On April 30, 2016, Mr. Spaetgens filed a written motion requesting an adjournment of the merits hearing scheduled for May 9, 2016. He indicated that he was in discussions with a lawyer in Edmonton, whose name and contact information he gave. Mr. Spaetgens said that an adjournment was required because the lawyer was not available on the scheduled hearing dates. He suggested that the parties could work together to reschedule a mutually satisfactory hearing date.

[14] There was an oral hearing on the adjournment motion. Mr. Spaetgens testified that if he had understood the implications of being without counsel, he would have opposed the application of his lawyer to withdraw. His motion also referred to Ms. Murray's health and mentioned that he wanted to obtain disclosure from a third party, for which he would need the help of a lawyer.

[15] On May 5, 2016, the Panel denied the motion for the adjournment for a number of reasons: Mr. Spaetgens had not actually retained counsel; as recently as April 13, 2016, Mr. Spaetgens had given the impression he was representing himself; there was no real evidence related to Ms. Murray's health and nothing to suggest that those health issues would resolve quickly enough to benefit from an adjournment; if Mr. Spaetgens wanted disclosure from a third party, he should have taken the steps to obtain it in the preceding six months; Mr. Spaetgens did not propose any alternative hearing dates and was, in effect, seeking an "indefinite adjournment"; an adjournment would prejudice witnesses who were scheduled to testify, including one who was in poor health; and the Commission had already taken steps to arrange the merits hearing which could not be undone. Another consideration was that individuals had represented themselves at merits hearings in the past and the Panel found that the allegations in this case were not complicated. In the words of counsel for the Commission before this Court, these were minor infractions.

[16] The denial of an adjournment is reviewed on a standard of correctness when it raises a question of procedural fairness. In this case, Mr. Spaetgens had counsel until two months prior to the scheduled hearing. He initially asked for an adjournment orally, not following the rules which required a written motion. Nevertheless, the Panel entertained, and dismissed, that request. On April 13, 2016, Mr. Spaetgens indicated that he intended to continue to represent himself but then, on April 30, 2016, he asked for an adjournment again. At the adjournment hearing, he gave evidence of attempts to hire a lawyer but said it was difficult to do so because the hearing dates were fixed. However, he was not able to identify any lawyer or law firm that he contacted. He indicated that he had made arrangements with an Edmonton lawyer who would represent him if the hearing was adjourned. The Panel did not believe that Mr. Spaetgens had taken real steps to retain

counsel, a conclusion it was entitled to come to on the evidence. Mr. Spaetgens had also claimed financial problems. In the face of those problems and in the absence of any independent corroboration from the Edmonton lawyer about his willingness to act, the Panel concluded that an adjournment would achieve nothing but unreasonable delay.

[17] Mr. Spaetgens was not denied a fair opportunity to meet the case against him. He received disclosure and assistance from the Commission staff and the Panel leading up to and during the hearing. He was able to argue his defence that he had been following legal advice on how to structure his affairs in light of the Undertakings. He was able to call witnesses, enter documentary evidence and make submissions in his defence.

[18] On this record, there was no error in denying the adjournment.

## V. Findings of Illegal Trading

[19] The definition of "trade" in the *Act* is broad. It includes any act in furtherance of various activities related to selling securities: s 1(jjj)(iv) of the *Act*. Mr. Spaetgens argued before the Panel that he was mindful of ensuring he did not cross the line of talking about the investment side of the real estate business to prospective investors and that he confined himself to communicating about development projects. The Panel found that sometimes Mr. Spaetgens acted consistently with this distinction but, in four instances, he crossed the line. Mr. Spaetgens appeals from these findings.

### A. Investors Meeting in Vancouver

[20] In this ground of appeal, Mr. Spaetgens argues that the Panel unreasonably found that his conduct at a meeting in Vancouver amounted to participation in the trade of securities in Regency when, on similar facts relating to investor dinners in Calgary, the Panel concluded that Mr. Spaetgens' conduct did not amount to trading securities. This argument is based on the premise that the evidence in both instances was substantially the same.

[21] The premise is false. The investors' dinners in Calgary took place in restaurants, in public meeting places. Mr. Spaetgens was in attendance and the evidence was that he chatted with potential investors about general topics but that other members of Regency made the presentations and the pitches for investment.

[22] The evidence about the Vancouver meeting in in October 2009 was that Mr. Spaetgens and his colleague, Mr. Bennett, participated in a private presentation to a couple already known to them. The presentation took place in Mr. Bennett's residential building where both Mr. Bennett and Mr. Spaegtens spoke. Also present was an employee, Ms. Swedburg. The evidence was that both Mr. Bennett and Mr. Spaetgens presented about development projects, the terms of a specific investment and what was happening with the investment. Mr. Spaetgens denied that he spoke about the investment and admitted only to speaking about a land development project. However, the Panel rejected his evidence and accepted the evidence of Ms. Swedburg who testified that Mr.

Spaetgens had spoken about investment opportunities. This is a finding the Panel was entitled to make and deference is owed to it. This ground of appeal is dismissed.



### B. GT Situation

[23] GT initially invested $100,000 with Valemont in September 2009. This investment was self-directed and pre-dated the Undertakings of September 9, 2009. After that initial investment, Mr. Spaetgens spoke with GT on the phone about further investments. Mr. Spaetgens argues that his involvement was similar to his involvement at the Vancouver meeting. As such, this ground of appeal is dependent on this Court accepting the argument that the circumstances of the Vancouver meeting were the same as the Calgary investment dinners.

[24] Having rejected that ground of appeal above, this Court also rejects this ground of appeal. There was evidence of two subsequent attempts of Mr. Spaetgens to try to get GT to invest further money. They were both on the phone. The first attempt was when Mr. Spaetgens spoke with GT alone, and the second was a call with GT, Mr. Spaetgens and another person. GT testified that Mr. Spaetgens solicited investment from him in both calls. The Panel was entitled to find that the evidence proved this allegation. This ground of appeal is dismissed.

### C. DC Situation

[25] DC made a $100,000 loan to Regency for the purpose of saving a home that belonged to Mr. Spaetgen's wife's family from foreclosure. The proposal was to secure the loan with a guarantee and an equity interest in one of the retirement complexes. The Panel found that while Mr. Spaetgens was not the author of the deal, he was aware of what was happening and he responded to a question about whether he had the authority from Mr. Bennett to make the deal. The Panel generally found that Mr. Spaetgens tried to minimize his role and to enhance Mr. Bennett's role. The Panel implicitly rejected Mr. Spaetgens' evidence and found that he was a full participant in soliciting the investment, one from which his family benefitted. The Panel was entitled to make the finding based on the evidence. This ground is dismissed.

### D. Institutional Investors

[26] There is no direct evidence of who said what to the institutional investors. The evidence establishes that Mr. Colwill came up with the idea to approach institutional investors. Mr. Spaetgens approved the plan. They both participated in approximately a dozen calls.

[27] The Commission argues that the Panel is entitled to draw reasonable inferences from the evidence. Regency was only developing three projects: one in Irricana through Westmont, one in Sundre through Valemont and another one in Olds. They were the only projects for which funds were being raised. The Commission argues that it was reasonable for the Panel to infer that Mr. Spaetgens was promoting investments on these calls, rather than just speaking about property development.

[28] We agree. The standard of review of the Panel's inferences of fact is reasonableness. There was evidence on which the Panel could conclude that Mr. Spaetgens was engaged in trading in securities. The direct evidence was that Mr. Colwill came up with the idea of approaching the institutional investors and that, during a dozen or so calls, he attempted to persuade them to invest. During the same phone calls, Mr. Spaetgens explained the merits of the real estate developments in which Mr. Colwill was encouraging the institutional investors to invest. The Panel implicitly rejected Mr. Spaetgens evidence and inferred that his conduct did stray into encouraging investments. Given the context of institutional investors, the focus of the calls, and the broad definition of trade, any act in furtherance of a sale of securities, it was reasonable for the Panel to conclude that Mr. Spaetgens' conduct during the calls amounted to trading in securities. This ground of appeal is dismissed.

## VI. The Sanctions Decision

[29] Mr. Spaetgens appeals the sanction. Before the Panel, the Commission sought a 15-year ban, a $200,000 administrative penalty, and $132,000 in costs. Mr. Spaetgens argued for a three-year ban, a $25,000 administrative penalty, and $21,000 in costs. In the result, the Panel imposed a 15-year ban, $40,000 administrative penalty, and $65,000 in costs. This decision is reviewed on a standard of reasonableness.

[30] The Panel noted that the overall aim of sanctions is to protect investors and ensure a fair and efficient capital market and that this goal can be achieved by general and specific deterrence: *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities )*, 2001 SCC 37 at paras 39-45, [2001] 2 SCR 132.

[31] In addition, the Panel properly noted that there are many factors that have to be considered in fashioning an appropriate sanction, including: (1) the seriousness of the conduct; (2) any relevant history; (3) any benefit sought or obtained; and (4) mitigating and aggravating circumstances.

[32] The Panel made the following findings in relation to Mr. Spaetgens:

- his misconduct was reckless and inadvertent, rather than planned or deliberate;
- his misconduct was not motivated by dishonesty and deceit;
- he was an experienced capital markets participant;
- he was a repeat offender having already engaged in market misconduct which resulted in the Undertakings;
- he is impecunious and there is no guarantee that his financial situation will improve, although it might;

- he benefited from his misconduct by continuing to lead Regency and by saving a family home from foreclosure;

- he is a layperson, not a lawyer, but that is not a mitigating factor because he did not need to be a lawyer to comply with the Undertakings;

- he was not a victim of the economic downturn or staff shortages but his self-portrait as a victim is an aggravating factor because it shows that he does not take responsibility for his misconduct; and

- he obtained legal advice to assist him to comply with the Undertakings but that did not mitigate his breaches because the lawyer did not direct his conduct and he followed the lawyer's advice selectively.

[33] The Panel referred to its decision in *Re Cadman*, 2015 ABASC 836 (*Cadman*) as a comparator in determining an appropriate sanction. The Cadman brothers breached an undertaking made pursuant to an earlier settlement with the Commission that required them to refrain from acting as director or officer for two years. They were found to have been *de facto* directors during the entire two years of the undertaking. The total sanction was an administrative penalty of $110,000; a five-year ban on advising; a 10-year ban on director and officer roles and capital markets management-consulting (the bans were concurrent); and costs of $12,500.

[34] The Panel found that there were two significant factors which distinguished *Cadman* from this case: (1) early on, the Cadman brothers had received a letter from the Commission warning them they might be breaching the undertaking, which was ignored; and (2) the Cadman brothers had raised a much greater amount ($73 million) in capital markets during the two years they breached their undertaking. As such, the Panel held that the magnitude of the sanctions (viewed as a package) in *Cadman* exceeded what was appropriate in this case.

[35] Nevertheless, the Panel then imposed on Mr. Spaetgens a 15-year ban against holding the position of officer or director and trading in securities which exceeded the 10-year ban in *Cadman*. It justified the lengthy ban because it imposed a smaller administrative penalty than Mr. Spaetgens had requested. The Panel arrived at $40,000 because, as part of the 2009 settlement, Mr. Spaetgens had agreed to pay $30,000 and the Panel reasoned that the administrative penalty for the subsequent misconduct should not be lower than that.

[36] There are two unreasonable conclusions in this analysis. First, the 15-year ban is longer than the 10-year ban in *Cadman*. Second, a $30,000 administrative penalty imposed on an individual who is working is significantly less onerous than a $40,000 penalty imposed on someone who is impecunious, who may have difficulty paying any amount.

[37] Normally, we would remit this matter to the Panel for reconsideration of sanction but, to save all parties time and costs, we will address the sanction in light of the principles set out by the Panel and its basic assumption that the sanction imposed on Mr. Spaetgens should be less than the sanction imposed in *Cadman*. We impose a ban of 10 years in relation to holding the position of officer or director and trading in securities and an administrative penalty of $10,000. We would not disturb the award of costs.

Appeal heard on November 7, 2018

Memorandum filed at Calgary, Alberta
this 3rd day of December, 2018

O'Ferrall J.A.

Veldhuis J.A.

Khullar J.A.

**Appearances:**

G.I. Zinner
for the Appellant

T.G. McCartney
for the Respondent