ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Shimoon, 2015 ABASC 702 **Date: 20150511**

Edmund Shimoon

Panel:	Stephen Murison Roderick McKay, FCA Glen Roane
Representation:	Robert Stack Garner Groome for ASC Staff James Eamon, QC David Bishop for the Respondent
Submissions Completed:	14 April 2015
Decision:	11 May 2015

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I. INTRODUCTION

[1] Edmund Shimoon (**Shimoon**) breached the *Securities Act* (Alberta) (the **Act**) and acted contrary to the public interest by making an untrue statement to Alberta Securities Commission (**ASC**) staff (**Staff**) in the course of a Staff investigation.

[2] These were among the findings set out in our decision (the **Merits Decision**, cited as *Re Calvalley Petroleum Inc.*, 2015 ABASC 568) following a hearing (the **Merits Hearing**) into the merits of numerous allegations levelled by Staff against Shimoon and other respondents. Apart from the one proved untrue statement by Shimoon to Staff, the allegations were either withdrawn or dismissed. The proceeding then entered a second phase for the determination of appropriate orders.

[3] Given our Merits Decision findings, and additional evidence and submissions from Staff and Shimoon concerning appropriate orders, we are ordering that Shimoon pay an administrative penalty of $25,000 and $7,500 of the investigation and hearing costs.

II. BACKGROUND

[4] The allegations in this proceeding largely pertained to the claimed misuse of non-public information – by Shimoon, among others – pertaining to the evaluation of year-end 2008 oil reserves of Calvalley Petroleum Inc. (**Calvalley**). Calvalley was a Calgary-headquartered public company engaged in oil and gas exploration, development and production overseas. Shimoon was (and apparently remains) Calvalley's chief executive officer (**CEO**) and chairman of its board of directors, and a significant Calvalley shareholder.

[5] An important aspect of several of the allegations was the extent of Shimoon's knowledge of, and access to information regarding, a potential increase in Calvalley's year-end 2008 oil reserves as work on its annual reserves evaluation proceeded. Staff had asked Shimoon about this in investigative interviews in July 2010 and April 2012 (respectively the **2010 Shimoon Interview** and the **2012 Shimoon Interview**, and together the **Shimoon Interviews**) at which Shimoon had legal counsel and spoke under oath.

[6] Notably, Staff in the 2012 Shimoon Interview asked Shimoon whether, in the period October 2008 through February 2009, he had "hear[d] any discussions or see[n] any communications regarding a potential increase" in Calvalley's 2008 reserves. Shimoon answered "I think I have answered that question many times. The answer is no."

[7] This unambiguous response was atypical. We observed in the Merits Decision that Shimoon's statements in the Shimoon Interviews were frequently vague or ambiguous, and we discerned a consistent pattern of Shimoon having self-servingly downplayed his access to information and knowledge. We observed something similar in his hearing testimony. Mostly, though, this was more a matter of shading – presenting a flavour of uninvolvement – than of obvious untruth or misrepresentation.

[8] We concluded in the Merits Decision that Shimoon in fact become aware not later than 24 February 2009 that 2008 reserves increases were likely. We therefore found his quoted 2012 Shimoon Interview response (which addressed a topic clearly germane to Staff's investigation) to have been untrue in a material respect and therefore contrary to section 221.1(2) of the Act.

[9] Explaining in the Merits Decision that the investigation of capital-market misconduct is crucial to fulfilling the purposes of the Act, we also found that Shimoon's conduct in breach of the Act was contrary to the public interest.

III. ORDERS AVAILABLE

A. Sanctioning Authority, Principles and Factors

[10] Sections 198 and 199 of the Act authorize an ASC hearing panel to order an array of sanctions against a respondent. That authority is to be exercised prospectively in the public interest, with a view not to punishment but rather to protecting investors and the capital market (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). Achieving such objectives can involve an assessment of the need to deter both the respondent from a repetition of misconduct (specific deterrence) and others (general deterrence) who might be minded to emulate the respondent's misconduct (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17).

B. Sanctioning Principles and Factors

[11] The following factors may be relevant to the assessment of appropriate sanction (*Re Hagerty*, 2014 ABASC 348 at para. 11):

- the seriousness of the respondent's misconduct and the respondent's recognition of that;
- the respondent's characteristics and history, such as capital-market experience and any prior sanctions;
- any benefit sought or obtained by the respondent, and any harm to which the capital market generally or investors were exposed by the misconduct;
- the risk to investors and the capital market if the respondent were to go unsanctioned or if others were to emulate the respondent's misconduct; and
- any mitigating considerations.

C. Cost-Recovery

[12] Section 202 of the Act authorizes an ASC hearing panel to require a respondent, if found to have acted contrary to Alberta securities laws or the public interest, to pay investigation or hearing costs (or both). As stated in *Re Marcotte*, 2011 ABASC 287 (at para. 20), such a cost-recovery order:

> . . . is not a sanction, but rather a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.

IV. APPROPRIATE ORDERS: PARTIES' POSITIONS

A. Staff Position on Sanction

[13] Staff sought against Shimoon an administrative penalty "in the range of $50,000-$75,000", coupled with a one-year ban on his acting as an officer or director of any reporting issuer. In the course of submissions Staff suggested that such ban might appropriately be extended beyond reporting issuers to apply to all issuers, subject perhaps to "carve-outs" that might exclude application of the ban to (for example) a purely private family company.

[14] In their submissions Staff stressed Shimoon's role as the CEO of a public company, cast his misconduct as deceitful, and argued that sanctions here must preclude him from simply returning to his work at Calvalley as though nothing had happened.

B. Shimoon's Position on Sanction

[15] Shimoon characterized Staff's requests for sanctions as "unreasonable and unnecessary" – a director-and-officer ban specifically as "unreasonable and disproportionate", indeed "impermissible"; and the quantum of administrative penalty sought by Staff as excessive.

[16] In his submissions Shimoon argued, among other things, that Staff were in effect improperly seeking a new factual finding beyond what had been found in the Merits Hearing, namely that Shimoon intentionally misled Staff. It was suggested that something other than dishonest intent could have accounted for Shimoon making the untrue statement we found.

[17] Shimoon submitted that the protective purpose of sanction did not require any ban, and indeed that any administrative penalty ought not to approach the quantum sought by Staff. He suggested instead "a reprimand, or at most, an administrative penalty not exceeding" $10,000 to $20,000.

C. Common Position on Cost-Recovery

[18] Staff submitted that a $7,500 cost-recovery order against Shimoon would be appropriate, while Shimoon stated that he would not contest the appropriateness of that quantum, and would require no formal record of costs incurred in respect of an order in that amount.

V. ANALYSIS

A. The Misconduct Under Consideration

[19] The starting point for our analysis was not in dispute. As stated, we found in the Merits Decision that Shimoon made an untrue statement to Staff in an investigative interview. Our task in this phase of the proceeding is to determine, in light of that finding, what, if any, sanctions are appropriate in the public interest.

[20] No basis was adduced for us here to reconsider or revise our Merits Decision findings, and such is not the purpose of this second phase of the proceeding. Thus, for example, while (as noted) we observed in the Merits Decision a self-serving aspect to Shimoon's statements in the Shimoon Interviews, we made no explicit finding concerning his motivation or intention. We do not do so here. That disposes of some of the arguments advanced by both parties.

[21] Further, we are not here considering the imposition of sanctions on conduct not proved to have been contrary to law or to the public interest. This does not, however, preclude us from considering whether certain other behaviour on which we commented in the Merits Decision

aggravated the misconduct found, and is therefore relevant to our determination of whether, or to what extent, deterrence is necessary in respect of that found misconduct.

B. Relevant Sanctioning Factors

1. Seriousness of the Misconduct

[22] As stated in the Merits Decision, "[m]isdirection of Staff through a material untruth is self-evidently incompatible" with the purpose of the Act – protecting investors and fostering capital-market fairness and efficiency, in this instance through the investigation of suspected capital-market misconduct. This is so, whatever prompted the misdirection. Shimoon's untruthfulness to Staff investigators (as found) thus amounted to serious misconduct.

[23] Staff suggested, moreover, that Shimoon's untrue interview statement had a tangible (if temporary) effect. In their submission, the fact that they did not originally name Shimoon as a respondent in this proceeding turned to some extent on what he said in the Shimoon Interviews – something that changed only later, after Staff obtained unspecified further evidence. We did not receive in this phase of the proceeding specific evidence on this point; it might in any event be difficult to quantify the effect (if any) of a single interview statement on the course of an investigation and prosecution as a whole. Still, it is not implausible that the tenor of what Shimoon said in the Shimoon Interviews – including, if not exclusively limited to the statement we found to have been untrue – indeed affected to some extent how Staff proceeded in this case. In our view, such an outcome is a foreseeable consequence of untruth in investigative interviews. This reinforces our conclusion that the found misconduct was serious.

[24] None of this turns on any inference of deceitful intent (or motivation) and we make none. Rather, we reiterate what we said in the Merits Decision: "Shimoon should have exhibited greater care and precision in the Shimoon Interviews".

[25] The seriousness of the found misconduct argues for sanction delivering real deterrence, both specific and general.

2. Recognition of Seriousness

[26] We discern no real indication of contrition, by Shimoon, in respect of the misconduct we found. He suggested in submissions (citing authority, specifically *Walton v Alberta (Securities Commission)*, 2014 ABCA 273) that this "cannot be an aggravating factor".

[27] We do not rule out the possibility that a credible demonstration of remorse and contrition on the part of a respondent could indicate both a recognition of the seriousness of misconduct and, with it, a diminished need for specific deterrence. That said, we do not consider the absence of such a demonstration here to be compelling one way or the other.

[28] In the circumstances, this factor neither adds to nor diminishes the need for deterrence as established by other factors.

3. Shimoon's Characteristics and History

[29] There was no evidence of Shimoon having any prior history of regulatory investigation or sanction.

[30] Staff stressed Shimoon's important role as Calvalley's CEO (and chairman of its board of directors), suggesting that this underlined the seriousness of his misconduct and warrants the significant sanctions they seek.

[31] Reiterating our focus on the making of an untrue statement in an investigative interview, we regard this as having been essentially an instance of misconduct by Shimoon as an individual, rather than as a Calvalley officer and director. No mitigation lies in this; it ought to be obvious to anyone summoned to such an interview that truth is expected and untruth wrong. On the other hand, Shimoon's positions with Calvalley are not irrelevant to our present task. Persons holding positions like Shimoon's with a public company play important roles in our capital market. They are expected to understand the importance of capital market regulation and enforcement, and of dealing forthrightly with Staff in the course of any investigation. Shimoon fell short in this.

[32] In the circumstances, we consider that Shimoon's public-company officer and director positions argue for more specific and general deterrence than might otherwise be warranted.

4. Benefit Sought and Harm Done

[33] Staff suggested that Shimoon intended to benefit from his misconduct. The suggestion itself seemed to imply deceitful motive on the part of Shimoon, with the anticipated benefit (for which he, presumably in this interpretation, for a time enjoyed) of not being swept into Staff's prosecution along with others already named as respondents by the date of the 2012 Shimoon Interview.

[34] This is not wholly implausible and could account for the untrue statement we found. It is arguably consistent with our observations (as expressed in the Merits Decision) concerning "the degree to which Shimoon was unforthcoming in the Shimoon Interviews" and what we discerned to have been "a consistent pattern of Shimoon having self-servingly downplayed his access to information and knowledge", albeit it "typically a matter more of shading than of obvious untruth or misrepresentation".

[35] That said, these observations did not and do not amount to proof of Staff's assertion. That Shimoon might have thought he would benefit from his untruth does not establish such motivation.

[36] Similarly, the actual benefit suggested by Staff (and the associated temporary harm to their investigation and prosecution, or to the investigative process generally) would be a foreseeable outcome of an untrue statement in an investigative interview. We noted this above as reinforcing our conclusion as to the seriousness of the misconduct. It has not, however, been established on the evidence as a benefit actually sought or, by extension, a harm expressly attributable to the misconduct as found.

[37] In the result, in the circumstances here this factor does not affect our determination on appropriate sanction.

5. Mitigating (or Aggravating) Factors

[38] As stated, one particular of untruth was proved, and that alone is central to our sanctioning assessment. Nonetheless, we regard that misconduct as having been aggravated by what we observed to have been a pattern – persisting over a course of years of investigation and

even into the hearing itself – of Shimoon "having self-servingly downplayed his access to information and knowledge" in respect of matters germane – obviously germane, given the questions he was asked – to Staff's investigation (and eventual allegations). Shimoon simply was not forthright concerning his role at Calvalley and his knowledge at the relevant time. This should not, and cannot, be overlooked in our consideration of the appropriate response to the one instance that itself reached the level of sanctionable misconduct.

[39] In the circumstances of this case, our ultimate sanctioning objective is to encourage forthrightness, and more of what we termed in the Merits Decision "care and precision" – on the part of Shimoon or anyone else, particularly any other public-company officer or director – when questioned in any ASC investigation. The aggravating pattern of Shimoon's responses to such questioning argues for sanctions delivering a stronger deterrent message than might otherwise have been necessary.

[40] We discern no factors that mitigate the misconduct found. (Allusions in this phase of the proceeding to Shimoon supporting a current review of certain of Calvalley's practices, and to a proposed substantial reorganization of Calvalley's affairs, were not compelling, if indeed relevant at all.)

[41] In the result, this factor reinforces the conclusion prompted by other factors, that meaningful specific and general deterrence is called for here, and indeed argues for deterrence greater in extent than had the aggravating pattern of behaviour not been observed.

6. Risks Posed

[42] The nature and seriousness of the misconduct found here, and the foreseeable serious adverse effects that a repetition could have on the investigative process, persuade us that meaningful sanction is necessary. Were it to go unsanctioned, or to be insufficiently sanctioned, we perceive a real risk that a calculating individual questioned in some future investigation could regard the potential benefits of responding misleadingly or untruthfully to Staff as outweighing any negative consequences. Were that to occur, an investigation could be unduly complicated or prolonged, even significantly thwarted, with adverse implications for the efficiency and effectiveness of Staff's enforcement work, potential unfairness to others under investigation, and ultimately with jeopardy to the fairness and efficiency of our regulated capital market and public confidence therein.

[43] The outcome of this proceeding should (as stated in *Re Holtby*, 2013 ABASC 273 at para. 46 (reversed in part on other grounds by *Walton*)) "encourage market participants being questioned by Staff investigators to be truthful and candid". This encouragement must extend to Shimoon and others, if called upon in future in a Staff investigation.

[44] This factor, in other words, calls for sanction delivering meaningful specific and general deterrence.

7. Conclusion on Relevant Factors

[45] In short, we conclude that the seriousness of the misconduct and the risks a repetition could pose to the investigative process – aggravated by Shimoon's observed pattern of behaviour in the Shimoon Interviews (and in the hearing) – warrant sanction delivering meaningful measures of both specific and general deterrence.

8. Appropriate Form and Quantum of Sanction

[46] Given that conclusion, we rule out a reprimand (as suggested by Shimoon) as a sufficient response here. We are not satisfied that it would by itself deliver anything approaching the requisite deterrence or protection. Moreover, in the absence of evidence or argument as to the effect of a reprimand on Shimoon or anyone else, we have no basis for concluding that such a measure would usefully supplement any other type of sanction.

[47] Staff argued forcefully that sanctions here must include a director-and-officer ban. (Shimoon noted that Staff's written submissions stated that such a ban *or* an administrative penalty was necessary, but the thrust of Staff's position, as we understood, was that both types of order were necessary.) Staff stated that our response to the misconduct found here must do more than enable Shimoon to "just go back into the office tomorrow" as though "nothing happened".

[48] We concur that the necessary deterrent and protective purposes would not be served by a response here that would easily be shrugged off. A message needs to be sent – and it needs to be received, by Shimoon and others.

[49] However, we are not persuaded that the circumstances here require the response Staff seek. Director-and-officer bans are often useful, even essential responses to misconduct. Their scope and effect can be tailored, for example by carve-outs. None of that was seriously disputed. The point, though, is that we are not convinced that the deterrence needed here – and the intended encouragement of future forthright behaviour – demand Shimoon's removal as a director and officer, even temporarily, of Calvalley or any other issuer. To the contrary, in the circumstances of this case we consider that the bans sought by Staff (however adjusted) could amount to punishment rather than protection.

[50] The necessary protective message can be sent, to Shimoon and others, by other means. The clearest, simplest and in our view most effective mechanism would be a monetary order – an administrative penalty. We are satisfied that an administrative penalty – alone, and in an appropriate quantum – will suffice in this case.

[51] The quantum must be sufficiently large to be recognized – by Shimoon, but also by others who learn of it – as a demonstration that untruth in a Staff investigation can come at an unwelcome cost. While outcomes of other matters are seldom a helpful guide in any specific sense – the circumstances of cases typically differ too much – we do discern some indication of general magnitudes of possible administrative penalty in the relatively recent *Hagerty* and *Re Singh*, 2012 ABASC 344 decisions. The cases are certainly distinguishable from one another, and each from the present case. In some respects what was observed there (for example, in *Hagerty* (at para. 36) concerning a respondent's intention and expectation of benefit from misconduct) may be thought more egregious than what we found here. That said, Shimoon's pattern of shading and lack of forthrightness cannot be overlooked. Moreover, there is in this case a clear need for general deterrence directed specifically at other public-company officers and directors; the sanctions here must encourage others in those categories to exhibit more care and attention in any future dealings with Staff in the course of an investigation than were demonstrated by Shimoon.

[52] On balance, we think that an administrative penalty of $25,000 is warranted, and that anything less would fall short of delivering the requisite specific and general deterrence. (While such quantum is not inconsequential, it would appear far from crushing or disproportionate to Shimoon's circumstances, given the scale of his compensation by Calvalley as disclosed in the information circular for its company's 2014 annual shareholders' meeting, and the quantum need not be reduced on that account.)

[53] We conclude that an order to this effect against Shimoon is in the public interest.

C. Cost-Recovery

[54] As noted above, some degree of cost recovery is generally appropriate where misconduct has been found.

[55] Given the length and scope of this proceeding as a whole, and each panel member having seen accountings of costs in other proceedings, we are in no doubt that the mentioned $7,500 figure would represent but a fraction of total investigation and hearing costs incurred by Staff in this matter. That said, much of the investigation would have been, and much of the hearing was, unrelated to the proven misconduct; there was no suggestion that Shimoon should bear the cost burden associated with that.

[56] In the circumstances, including the parties' expressed positions on the issue, we are satisfied that an order for recovery of $7,500 of investigation and hearing costs is fair and appropriate here.

VI. ORDERS

[57] For the reasons given, we order under section 199 of the Act that Shimoon pay an administrative penalty of $25,000, and under section 202 that he pay $7,500 of the investigation and hearing costs.

[58] This proceeding is concluded.

11 May 2015

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Roderick McKay, FCA

"original signed by"
Glen Roane