Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 Brian Peter Verbeek

IN THE MATTER OF
THE SECURITIES ACT
R.S.O. 1990, C. S.5, AS AMENDED

AND

IN THE MATTER OF
BRIAN PETER VERBEEK

Sanctions Hearing:

November 14, 2005

Panel:

Wendell S. Wigle, Q.C.	-	Chair of the Panel
Suresh Thakrar	-	Commissioner

Counsel:

Brian P. Verbeek	-	On his own behalf
Karen Manarin	-	For Staff of the Ontario Securities Commission

DECISION AND REASONS ON SANCTIONS

[1] Our decision on the merits of this matter was issued on July 26, 2005, accompanied by detailed reasons. We found that Mr. Verbeek:

(a) participated in illegal distributions of securities, contrary to section 53(1) of the Securities Act, by trading securities for which there was no exemption available;

(b) failed to ascertain the general investment needs and objectives of his clients and the suitability of the purchases or sales of the securities for his clients, and thus acted contrary to the public interest and contrary to section 1.5 of Ontario Securities Commission Rule 31-505;

(c) acted contrary to the public interest by participating in the scheme that involved the subsequent loan to the investor of approximately 65% of the share purchase and by charging an administration fee to the investors of 35% of the loan proceeds;

(d) acted contrary to the public interest by processing documents that referenced "Lafferty, Harwood and Partners Ltd." without Lafferty's knowledge and at a time when Verbeek was not registered through Lafferty; and

(e) acted contrary to the public interest by making misleading or untrue representations to Staff on or about February 14, 2001 and February 22, 2001, in response to inquiries made by Staff during the investigation of this matter.

[2] The hearing with respect to sanctions was held on November 14, 2005. We received written submissions in advance from Staff but not from Mr. Verbeek.

[3] Following Staff's oral submissions on sanctions at the November 14 hearing, Mr. Verbeek made some oral submissions but then asked permission to file a written response. We considered his request and granted him leave to file written submissions on sanctions only, provided they were filed before 4 p.m. on November 25, 2005. He did file a written response but we understand it was filed after the stated date. We have reviewed his response but it appears that most of the 29 pages do not go to sanctions but rather are related to our July 26, 2005 decision on the merits. The submissions with respect to sanctions start at page 17.

[4] Both orally and in his written submissions, Mr. Verbeek made a motion pursuant to section 9(6) of the *Act* requesting a reconsideration of our decision of July 26, 2005. We consider Mr. Verbeek's motion inappropriately framed, presented, and argued. Section 9 of the Act deals with appeals of final decisions of the Commission. Subsection 9(6) allows the Commission to make a further decision despite there being an order of a court on appeal, where there is new material or where there is a significant change in the circumstances. Subsection 9(6) does not operate in these circumstances because our decision has not yet been appealed. Therefore we have no jurisdiction to hear Mr. Verbeek's motion.

[5] Even if Mr. Verbeek's motion for reconsideration were properly before us, in our opinion there is no persuasive reason for us to revisit our decision at this time. We will, however, examine one argument in his motion – the new National Instrument 45-106 – because it seems to apply to the nature and duration of sanctions that we may impose in this hearing.

[6] We have given Mr. Verbeek's submissions on sanctions serious consideration. We appreciate his concerns about being unable to return to the investment industry and its effects on his employment opportunities.

[7] Sanctions are not to be remedial or punitive; rather it is our role to make an order that will be protective of investors in the future and that will prevent their exposure to this type of conduct in the future. The Supreme Court of Canada in *Asbestos* stated the Commission's protective and preventative role is effected by removing from the capital markets "those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets."

> *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission) (2001), 199 D.L.R. (4th) 577 (S.C.C.)*

[8] We consider Mr. Verbeek's past conduct to have been so abusive.

[9] We are mindful of past Commission decisions, particularly *MCJC Holdings* and *Belteco*, which held that in making protective and preventative orders in the public interest, the Commission must take into account circumstances appropriate to particular respondents. The Commission may also go beyond specific deterrence of the particular respondent and in the appropriate case make an order based on the general deterrence of like-minded persons in the future. This was confirmed in the Supreme Court of Canada's decision in *Re Cartaway Resources Corp.* in respect of the sanctioning powers of the BC Securities Commission, but equally applicable to orders of this Commission in the public interest under section 127 of the *Act.*

> ***Re Belteco Holdings Inc.* (1998), 21O.S.C.B. 7743**
>
> ***Re MCJC Holdings Inc. and Michael Cowpland* (2002), 25 O.S.C.B. 1113**
>
> ***Re Cartaway Resources Corp.*, [2004] 1 S.C.C. 672**

[10] Factors that the Commission may consider in determining the nature and duration of sanctions include:

(a) the seriousness of the allegations proved;

(b) the respondent's experience in the marketplace;

(c) the level of the respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

(e) the restraint of future conduct that is likely to be prejudicial to the public interest by the respondent, based on the respondent's past conduct, or by like-minded people engaging in similar abuses of the capital markets;

(f) any mitigating factors; and

(g) the remorse of the respondent.

[11] The mitigating factors that Mr. Verbeek would have us consider amount, largely, to excuses for his conduct. These are, moreover, the same excuses that we rejected in our Reasons for decision.

[12] Mr. Verbeek also argues that the exemptions in the new National Instrument 45-106 *Prospectus and Registration Exemptions* ("NI 45-106") mean that his past conduct would not be viewed as a breach of the *Act* or as conduct contrary to the public interest. We do not agree with this argument.

[13] Indeed, a plain reading of the sections cited by Mr. Verbeek reinforces our view that his conduct would continue to be caught by the amended rules. For example, in the hearing on the merits, there was no evidence that the holders who purchased the CCPC shares had a close or existing relationship to the CCPCs, were "accredited investors", or were "not the public". We found that the loan advertisements effectively offered shares of private issuers to the public, a class of purchasers who are explicitly excluded from the application of the NI 45-106 private issuer exemptions. We found that Mr. Verbeek knew or ought to have known that the bulk of the holders were unsophisticated investors, earning low incomes, and requiring immediate access to cash: they were not accredited investors under any definition. In any case, we emphasize that Mr. Verbeek's obligations under Rule 31-505 would not have been affected by NI 45-106. In our opinion, therefore, the introduction of NI 45-106 has no effect on the type and duration of sanctions that we may order against Mr. Verbeek.

[14] Finally, Mr. Verbeek argues that the sanctions sought by Staff are too harsh. He cites two commission decisions in his argument for lighter sanctions: *Re David Singh* and *Re Randall Novak*. We note that both matters were orders approving settlement agreements negotiated with Staff and based on an agreed statement of facts and admissions from the respective respondents. They are of limited assistance to us in this matter.

[15] In determining the appropriate sanctions, we have considered our findings on the merits and weighed the following factors:

(i) Mr. Verbeek processed over 670 transactions in excess of $17 million while registered with Fortune, Dundee, and Buckingham.

(ii) At the time of his involvement, he was a registrant and a branch manager.

(iii) He participated in distributions of securities, contrary to section 53(1) of the *Securities Act*, by trading securities for which there was no exemption available.

(iv) He failed to ascertain the general investment needs and objectives of his clients, contrary to the public interest and contrary to section 1.5 of the Ontario Securities Commission Rule 31-505. "Instead of making enquiries to ensure that the high-risk CCPC share purchase suited the client's investment profile, he **altered** the client's investment profile to suit the high risk investment. This was the **antithesis** of his obligations under Rule 31-505."

(v) He acted contrary to the public interest by participating in the scheme that involved the subsequent loans to investors of approximately 65% of the share purchase amount and which charged an administration fee to the investors of 35% of the loan proceeds.

(vi) He was aware that the locked-in RRSP holders were unsophisticated investors who earned a low income and who required immediate access to cash;

(vii) He benefited financially from his participation in this scheme.

(viii) He persisted in participating in this scheme, even after reading the OSC Investor Alert in November 1999 and "he knew or ought to have known that the arrangements presented serious securities law concerns to the extent that the Commission considered them scams, harmful to investors and contrary to the public interest."

(ix) He improperly referenced Lafferty, Harwood and Partners Ltd. He misled investors by leading them to believe that he was registered with that firm and that they were protected by all of the safeguards that registration imports. His continued reference to Lafferty after he joined Buckingham may have been an "extreme oversight", to use Mr. Verbeek's words, but it is inexcusable.

(x) Mr. Verbeek told Staff of the Commission during the investigation that he did not know advertisements had been placed, that the transactions involved loans to investors, and that he had not received compensation for his involvement in the transactions. We found that at the time Mr. Verbeek made these representations to Staff, he knew they were misleading or untrue and, therefore, he acted contrary to the public interest.

(xi) Although Mr. Verbeek has asked for leniency, he has not shown any indication that he appreciates he at any time acted improperly.

[16] We consider Mr. Verbeek's past conduct to have been so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.

[17] Considering all of the above factors and our reasons for decision on the merits, it is in the public interest that we order under section 127 of the *Act* that:

(a) the registration of Mr. Verbeek under Ontario Securities law be terminated;

(b) Mr. Verbeek cease trading in securities permanently, except that he may trade in securities beneficially owned directly by him for the account of his registered retirement savings plan or registered income fund (as defined in the *Income Tax Act (Canada)*;

(c) the exemptions contained in Ontario securities law do not apply to him, permanently, except for those exemptions necessary to enable Mr. Verbeek to trade in securities as permitted under paragraph (b);

(d) Mr. Verbeek resign any position he holds or may hold as an officer or a director of any issuers;

(e) Mr. Verbeek be prohibited from becoming or acting as a director or officer of any issuer; and

(f) Mr. Verbeek is hereby reprimanded.

[18] In written and oral submissions, Staff requested that Mr. Verbeek pay to the Commission the sum of $94,618.75 for costs of preparation and the hearing, pursuant to section 127.1 of the *Act*. No costs have been requested for the investigation or the various pre-hearing appearances and the adjournments requested by Mr. Verbeek.

[19] In support of this request, Staff presented a schedule listing the time spent and tasks performed by members of Staff in this case. The time listings of only three members of Staff were used to calculate the final costs amount: the senior litigation counsel, senior investigator, and senior forensic accountant.

[20] We find that Staff's evidence provides a sufficient foundation for the determination of costs. In the circumstances, pursuant to section 127.1 of the *Act*, we order Mr. Verbeek to pay the full amount of $94,618.75 in costs.

December 15, 2005.

"Wendell S. Wigle, Q.C."

"Suresh Thakrar"