ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Lymer, 2014 ABASC 495 **Date: 20141212**

Neil Alan Lymer,
Tri-Corp Canada Investments Inc.,
and 1351368 Alberta Ltd.

Panel:	Stephen Murison Tom Cotter
Representation:	Deanna Steblyk for Commission Staff Simon Renouf, QC for the Respondents
Submissions Completed:	10 October 2014
Decision:	12 December 2014

I. INTRODUCTION

[1] This is a proceeding before the Alberta Securities Commission (the **ASC**) to consider whether it is appropriate to make orders under sections 198, 199 and 202 of the *Securities Act* (Alberta) (the **Act**) against three respondents (the **Respondents**): Neil Alan Lymer (**Lymer**); Tri-Corp Canada Investments Inc. (**TCI**); and 1351368 Alberta Ltd. (**135**).

[2] ASC staff (**Staff**) alleged that the Respondents breached sections 75(1), 110(1) and 92(4.1) of the Act and that such breaches constituted conduct contrary to the public interest.

[3] At the request and with the consent of Staff and the Respondents, we are conducting this proceeding as a hearing in writing. The parties have tendered, for our consideration, a Statement of Admissions and Joint Recommendation as to Sanction (the **Statement**).

[4] Our decision and reasons follow. In summary, we find (consistent with the Statement) that the allegations against the Respondents are proved. In consequence, we are imposing the sanctions and costs orders jointly recommended by the parties.

II. FACTUAL BACKGROUND

[5] The following factual background, relevant to our decision, is drawn from the Statement, the contents of which we accept as generally truthful and accurate.

A. The Respondents

[6] Lymer, a resident of Edmonton, was the sole director, officer, voting shareholder and directing mind of TCI and 135. He authorized, permitted or acquiesced in the conduct of TCI and 135.

[7] TCI and 135 were Alberta corporations, now struck from the Alberta corporate registry.

[8] TCI held itself out as being in the business of raising money to provide financing to other entities, including other corporations owned or controlled by Lymer (among them, Tri-Corp Canada Business Group Inc. (**TCBG**) and Tri-Corp Canada Developments Inc.). According to the Statement, the "various Tri-Corp entities were commonly referred to collectively as 'Tri-Corp' or 'Tri-Corp Canada,' and were engaged in a variety of businesses, including real estate acquisition and development, vehicle sales, kitchen cabinetry making, publishing, and others".

B. Sales of Investments and Associated Activity

[9] Beginning in approximately 2002 or 2003 the Respondents raised money by obtaining loans from investors. In return, the Respondents issued to the investors promissory notes (the **Promissory Notes**) variously naming Lymer, TCI, 135, or both Lymer and either TCI or 135. The Promissory Notes stipulated interest to be payable monthly at from 6% to 24% per annum.

[10] The majority of the Promissory Notes were accompanied by a form of "Guarantee", under which Lymer and TCI purported to guarantee repayment of the investor loans to them.

[11] In addition, some investors who lent money to 135 entered into loan agreements (the **135 Loan Agreements**) with Lymer or 135 (or both) and received shares of 135 (the **135 Shares**).

(We refer to the Promissory Notes, the 135 Loan Agreements and the 135 Shares together as the **Investments**.)

[12] Since September 2008 the Respondents raised at least $3.1 million from sales of the Investments to approximately 55 investors resident in Alberta and elsewhere.

[13] Lymer was solely responsible for the fundraising; he solicited and collected money from the investors, and prepared and delivered the paperwork documenting the Investments.

[14] None of the Respondents has ever been registered with the ASC in any capacity or made any filings with the ASC. Exemptions from the registration and prospectus requirements of the Act were not available for all of the Investments, and the Respondents did not attempt to qualify all of the investors for exemptions before accepting their money.

[15] Generally, investor money was lent by the Respondents to TCBG, and in turn lent to other Lymer-controlled companies for their operations and acquisitions. (Some investor money lent to Lymer or 135 (or both) was used directly for 135's operations and acquisitions.)

[16] The Investments financed expansion of the Respondents' network of companies. Earnings from the various businesses were supposed to fund the interest payable on the Investments. However, according to the Statement, over-expansion and economic downturn resulted in the companies being unable to meet their debt obligations, the companies collapsing and their assets being lost.

[17] While fundraising the Respondents made verbal and written statements to investors and prospective investors that the Respondents knew or reasonably ought to have known were misleading or untrue. These statements were particularized in the Statement as follows:

> (a) the Investments were safe because they were accompanied by a guarantee, and/or because they were secured by assets, even though there was no reasonable basis for such a statement given that the Respondents were guaranteeing their own debt, did not possess any realizable assets or did not possess sufficient realizable assets to cover all of the debt, and the personal guarantees were not in compliance with the Alberta *Guarantees Acknowledgement Act* . . .; and
>
> (b) funds loaned to the Respondents would be loaned to other companies to finance their operations and generate the income which would be used to pay interest on the Investments, without disclosing that the Respondents would simply lend the funds to other Lymer-controlled businesses and not to third party entities in order to spread the risk of failure, and without disclosing that the Respondents did not obtain security for the funds it loaned to other companies.

C. Admitted Contraventions

[18] The Statement included the following specific admissions:

> . . . the Respondents admit that:

(a) they breached [section] 75(1) of the *Act* by trading in or engaging in the business of dealing in or trading securities with Alberta residents and others, without being registered with the Executive Director of the [ASC];

(b) they breached section 110(1) of the *Act* by distributing securities of the Respondents to Alberta residents and others, without filing and receiving a receipt for a preliminary and final prospectus from the Executive Director of the [ASC];

(c) they breached section 92(4.1) of the *Act* by making statements they knew or reasonably ought to have known were misleading, untrue, or did not state facts required to be stated to make the statements not misleading, and which would reasonably be expected to have a significant effect on the market price or value of the Investments; and

(d) the breaches of the *Act* described herein constitute conduct that is contrary to the public interest.

III. ANALYSIS REGARDING THE ALLEGATIONS

A. Illegal Trades (Dealing) and Distributions

[19] Before 28 September 2009, under section 75(1)(a) of the Act a person or company was prohibited from trading in a security without registration, unless an exemption was available. From 28 September 2009, under section 75(1)(a) a person or company is prohibited from acting as a dealer – engaging in the business of trading in securities – without registration, unless an exemption is available.

[20] Under section 110(1) of the Act a person or company is prohibited from distributing securities without a receipted prospectus, unless an exemption is available.

[21] Alberta securities laws provide registration and prospectus exemptions. However, as stated in *Re Robinson*, 2013 ABASC 203 (at para. 151), "those claiming reliance on an exemption in trading or distributing securities must have made a reasonable, serious effort – or taken whatever steps were reasonably necessary – to satisfy themselves that the exemption was available to make the trade or distribution at the time of the trade or distribution". The onus of demonstrating the availability, and compliance with the terms, of a registration or prospectus exemption for each trade or distribution by a respondent lies with the respondent: *Re TransCap Corporation*, 2013 ABASC 201 at para. 90.

[22] Having regard to the Statement, we are satisfied on several points. First, the Investments issued by the Respondents were "securities" within the meaning of the Act; these securities, which had not been previously issued, were sold to investors for valuable consideration. Thus there were "trades" of, or activities constituting engaging in the business of trading in, these securities as well as "distributions" of these securities within the meaning of the Act. Second, none of the Respondents has ever been registered with the ASC in any capacity or made any filings with the ASC, and exemptions from the registration and prospectus requirements of the Act were not available for all of the Investments.

[23] We therefore find (consistent with the Statement) that each of the Respondents contravened section 75(1)(a) of the Act by trading or dealing in securities without the requisite registration, and contravened section 110(1) by illegally distributing securities.

[24] The Respondents' illegal trades (or dealing) and distributions were serious capital-market misconduct, depriving investors of key protections mandated by our securities regulatory regime. We accordingly find (again consistent with the Statement) that the Respondents' contraventions of sections 75(1)(a) and 110(1) of the Act constituted conduct contrary to the public interest.

B. Materially Misleading or Untrue Statements

[25] Section 92(4.1) of the Act provides:

> (4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,
>
> (i) is misleading or untrue, or
>
> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
>
> and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security . . . .

[26] Having regard to the Statement, we are satisfied that the Respondents made verbal and written statements to investors and prospective investors (as particularized) that the Respondents knew or reasonably ought to have known were misleading or untrue. We are also satisfied (consistent with the Statement) that these statements would reasonably have been expected to have a significant effect on the market price or value of the Investments, and that the Respondents knew or reasonably ought to have known this.

[27] We therefore find (consistent with the Statement) that the Respondents contravened section 92(4.1) of the Act by making materially misleading or untrue statements to investors and prospective investors.

[28] We do not doubt that these misleading or untrue statements by the Respondents unfairly induced prospective investors to invest and encouraged existing investors to remain invested, thereby impairing capital-market integrity. We accordingly find (again consistent with the Statement) that the Respondents' contraventions of section 92(4.1) of the Act constituted conduct contrary to the public interest.

IV. SANCTIONS AND COSTS ORDERS

A. Parties' Joint Recommendations

[29] In the Statement, based on the facts and admissions therein, the parties jointly recommended orders to the effect that, under sections 198, 199 and 202 of the Act:

- TCI and 135 cease trading in or purchasing securities and be denied the use of exemptions under Alberta securities laws, permanently;

- Lymer cease trading in or purchasing securities, be denied the use of exemptions under Alberta securities laws, and be barred from acting as a director or officer (or both) of any issuer and from acting in a management or consultative capacity

in connection with securities market activities, for 15 years from the date of the Statement; and

- the Respondents pay, jointly and severally, an administrative penalty of $200,000 and $10,000 of the investigation costs.

B. Appropriate Sanctions

[30] Sanctions ordered in the public interest under sections 198 and 199 of the Act are protective and preventive, not punitive or remedial: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45. They are directed at protecting investors and our capital market by deterring future misconduct, whether by a particular respondent (specific deterrence) or by others (general deterrence): *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17.

[31] Sanctioning factors that may be relevant include those set out at para. 11 of *Re Hagerty*, 2014 ABASC 348 (derived in turn from earlier ASC decisions):

- 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.

[32] We are not bound to order jointly-recommended sanctions but will do so if we are satisfied that they fall within a range of sanctions that, in our view, are reasonable in all the circumstances and would serve the public interest: *Re Rogers*, 2013 ABASC 484 at para. 62.

[33] We therefore assess the appropriateness of the sanctions jointly recommended by the parties in light of the sanctioning principles and relevant factors and mindful of our role in reviewing such sanctions. We summarize several observations and conclusions:

- The Statement declared that "Lymer states that the Respondents' breaches of the *Act* were inadvertent, and that the Respondents had no intention to mislead the [i]nvestors". Notwithstanding this, other admissions in the Statement made clear that the Respondents at least ought to have known that they were misleading investors while raising considerable sums from them. Whatever the original intentions of the Respondents, their capital-market misconduct was serious and calls for significant sanction.

- We are satisfied that Lymer – by signing and tendering the Statement – recognizes the seriousness of, and accepts responsibility for, his misconduct and that of TCI and 135. This suggests a diminished need for specific deterrence against Lymer.

- Lymer, and through him TCI and 135, have not been previously sanctioned by the ASC, which argues for some moderation in sanction against Lymer.

- The Respondents' misconduct caused considerable harm to their investors. As at the date of the Statement some investors had received some interest payments on their Investments but others had received little or nothing. Many investors returned interest received to the Respondents after (according to the Statement) "the Respondents encountered financial difficulties, on Lymer's representation that the Respondents required the funds to save the businesses". The "vast majority" of investor money has been lost, and the prospects of its recovery are unclear. Moreover, misconduct in our capital market, such as the Respondents' misconduct, jeopardizes confidence in and the reputation of our capital market. The harm caused by the Respondents' misconduct calls for significant sanction.

- The Respondents undoubtedly intended to benefit, and for a time did benefit, financially from their misconduct. This argues for sanction.

- The Statement declared that "Lymer states that he is committed to recovery efforts and eventual repayment of the [i]nvestors". This sentiment is admirable, but its substantive value is doubtful. Some of the Respondents' creditors, including some investors, took steps to recover money from Lymer personally. Lymer made a creditor proposal, but it was rejected by the court and he was deemed to have filed an assignment into bankruptcy in March 2011. As at the date of the Statement Lymer had before the court an application to annul the bankruptcy, and a revised creditor proposal. The evidence does not enable us to determine the prospects for success of either approach, nor (if successful) the extent (if any) to which Lymer would thereby assist the investors. In the circumstances, this element of the evidence falls short of mitigation.

- Overall, the circumstances warrant the imposition of sanctions that, even moderated for the reasons given, will deliver firm measures of specific and general deterrence.

[34] Ultimately, we are satisfied that the sanctions jointly recommended by the parties are within a range of sanctions that we consider reasonable for the Respondents in all the circumstances and in keeping with our protective and preventive public interest mandate.

C. Appropriate Costs Orders

[35] Orders for the recovery of investigation and hearing costs, under section 202 of the Act, are not sanctions. As stated in *Re Marcotte*, 2011 ABASC 287 (at para. 20):

> A costs order is . . . 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.

[36] According to the Statement, the Respondents generally cooperated with the investigation conducted by Staff, and the Statement saved the time and expense associated with a contested hearing.

[37] That said, it is generally appropriate that a respondent pay at least a portion of the costs associated with Staff's investigation or hearing (or both). Here (consistent with the Statement), we think it reasonable that the Respondents bear some responsibility for the investigation costs incurred by Staff, and that such responsibility be joint and several. In the absence of any contrary evidence, we also accept as reasonable the jointly-recommended amount of the costs orders.

V. ORDERS

[38] For the reasons given, we make the following orders.

Lymer

[39] Against Lymer we order that:

- under section 198(1)(d) of the Act, he must resign all positions he holds as a director or officer of any issuer;
- under section 199, he must pay, jointly and severally with TCI and 135, an administrative penalty of $200,000;
- until and including 1 October 2029:
  - under sections 198(1)(b) and (c), he must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to him;
  - under section 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of any issuer; and
  - under section 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
- under section 202, he must pay, jointly and severally with TCI and 135, $10,000 of the costs of the investigation.

TCI

[40] Against TCI we order that:

- under sections 198(1)(b) and (c) of the Act, it must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to it, permanently;
- under section 199, it must pay, jointly and severally with Lymer and 135, an administrative penalty of $200,000; and
- under section 202, it must pay, jointly and severally with Lymer and 135, $10,000 of the costs of the investigation.

135

[41] Against 135 we order that:

- under sections 198(1)(b) and (c) of the Act, it must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to it, permanently;
- under section 199, it must pay, jointly and severally with Lymer and TCI, an administrative penalty of $200,000; and
- under section 202, it must pay, jointly and severally with Lymer and TCI, $10,000 of the costs of the investigation.

[42] This proceeding is concluded.

12 December 2014

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Tom Cotter