ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Cloutier, 2014 ABASC 170 **Date: 20140505**

Ronald Theodore Cloutier, Venture Contractors Ltd., Viva Communications Ltd., Sunterra Resource Audit Equipment Ltd. and Sunterra Seismic Inc.

Panel:	Ian Beddis Daniel McKinley, FCA
Appearing:	Deanna Steblyk for Commission Staff Ronald Theodore Cloutier for himself and all other Respondents
Submissions Completed:	10 April 2014
Date of Decision:	5 May 2014

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I. INTRODUCTION

[1] In our decision cited as *Re Cloutier*, 2014 ABASC 2 (the **Merits Decision**), we found that five respondents (collectively, the **Respondents**) – Ronald Theodore Cloutier (**Cloutier**), Venture Contractors Ltd. (**Venture**), Viva Communications Ltd. (**Viva**), Sunterra Resource Audit Equipment Ltd. (**SRAE**) and Sunterra Seismic Inc. (**SSI**, and, together with the other corporate Respondents, the **Corporate Respondents**) – breached Alberta securities laws and acted contrary to the public interest.

[2] Specifically, in the Merits Decision, we found that each of the Respondents illegally traded in and distributed securities in breach of sections 75(1)(a) and 110(1) of the *Securities Act* (Alberta) (the **Act**), made statements that were misleading or untrue (or both) to investors in breach of section 92(4.1), and engaged in a course of conduct relating to securities that they knew perpetrated a fraud on investors in breach of section 93(b). We found that Cloutier, Venture and Viva made prohibited representations about a refund of purchase money in breach of section 92(1)(b), and engaged in the unfair practice of putting unreasonable pressure on certain investors in breach of section 92(3)(d). We found that, in breach of section 93.1, Cloutier failed to comply with a temporary cease-trade order (the **Interim Order**) made by the Alberta Securities Commission (the **Commission**). We also found that all such conduct was contrary to the public interest. We further found that, as a director and officer, or de facto director and officer, of the Corporate Respondents, Cloutier authorized, permitted or acquiesced in their breaches of the Act. Our reasons for these findings are set out in the Merits Decision.

[3] This decision should be read together with the Merits Decision, which defines certain terms also used in this decision.

[4] The issuance of the Merits Decision concluded the first phase of this proceeding – the hearing into the merits of Staff's allegations against the Respondents (the **Merits Hearing**). In this phase of the proceeding, we determine what, if any, orders for sanctions and costs ought to be made against the Respondents. Concerning this issue, we received written and oral submissions from staff (**Staff**) of the Commission and from Cloutier (on behalf of himself and all other Respondents).

[5] In all the circumstances, we consider it in the public interest to order significant sanctions, and appropriate to make costs orders, against the Respondents. The particulars of those orders, and our reasons, follow.

II. PARTIES' POSITIONS

A. Staff

[6] In their written submissions, Staff contended that it would be appropriate in the public interest to order the following sanctions:

- against Cloutier: permanent prohibitions on trading in or purchasing securities, using exemptions under Alberta securities laws, acting as a director or officer (or both) of any issuer, and acting in a management or consultative capacity in connection with securities market activities; and a $1 000 000 administrative penalty; and

- against each of the Corporate Respondents: permanent prohibitions on its trading in securities and use of exemptions under Alberta securities laws until such time, if any, as it has filed a prospectus with the Commission and been issued a receipt in respect thereof.

[7] In their oral submissions, Staff suggested it was oversight that they in their written submissions had not sought a prohibition on trading in or purchasing of the Respondents' securities, but added that they did not want to jeopardize investors' ability to recoup their investments. Staff also explained that they had not sought in their written submissions a purchasing prohibition against the Corporate Respondents because Staff had not considered the Corporate Respondents to be in the business of or involved in the purchasing of securities; Staff noted, however, that it is within our purview to order such a prohibition if we consider it appropriate.

[8] Staff also sought orders that the Respondents be jointly and severally liable for $200 000 of the costs of the investigation and hearing.

B. The Respondents

[9] In the Respondents' written submissions, Cloutier stated that "[o]ver the five years of raising money the technologies [those associated with the SRAE/SSI Model and the Venture/Viva Model] were being developed to where we are today as being in the final stages of development". Cloutier contended that these technologies and the associated equipment remain valuable, and claimed that ultimately they can or will generate money for the SRAE/SSI Purchasers and Venture/Viva Purchasers. Cloutier stated: "I need to complete this legal matter with the [Commission] and seek legal and accounting advice on corporate law, security law and tax law before going forward with a new business plan that complies with any sanctions that the [Commission] may place on me or my companies."

[10] In the Respondents' oral submissions, Cloutier expressed concern that, were he to be precluded from being a director, officer, shareholder or manager of private corporations in Alberta and were investors to be precluded from selling what they purchased, this would jeopardize investors' ability to recapture their investments. Cloutier spoke of seeking contracts for the technology or technologies, and asked that "the sanctions be postponed until I can show the proof of the contracts in order to provide the investors with a return on their investment[s]". He stated that he is planning to return $10.6 million to investors under a payment schedule to be proposed, suggesting the postponement of any sanctions while scheduled payments were made and perhaps the imposition of no sanctions were all scheduled payments made.

[11] Cloutier had no issue with the costs orders sought by Staff.

III. ANALYSIS

A. Sanctions and Costs Orders Generally

1. Sanctioning Principles and Factors

[12] In this phase of the proceeding, we determine what, if any, sanctions ought to be ordered in the public interest against the Respondents under sections 198 and 199 of the Act. Sanctions are to be 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). The objective is to protect investors and our capital market by deterring future misconduct, whether by a particular respondent (specific deterrence) or by like-minded others (general deterrence) – *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17.

[13] Among potentially relevant sanctioning factors are those set out at para. 11 of *Re Lamoureux,* [2002] A.S.C.D. No. 125 (affirmed on other grounds 2002 ABCA 253), and restated at para. 43 of *Re Workum and Hennig*, 2008 ABASC 719 (affirmed 2010 ABCA 405):

- 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.

2. Costs Orders

[14] Orders for payment of investigation and hearing costs are authorized under section 202 of the Act. Costs orders are distinct from sanctions, and the applicable considerations differ. As stated by the Commission 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 Commission'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.

B. Sanctions

1. Applying Relevant Sanctioning Principles and Factors

(a) Seriousness of Misconduct and Recognition of Seriousness

[15] The Respondents' capital-market misconduct, spanning several years, was very serious. The Respondents breached key provisions of Alberta securities laws – provisions aimed at protecting investors and fostering a fair and efficient capital market. In consequence, Purchasers – investors – made investment decisions without the fundamental protection of a registrant's involvement or a prospectus, and on the basis of information that was misleading or untrue (or both). Moreover, the Respondents' breaches included fraud, among the most serious of capital-market misconduct, and Cloutier's breaches included the very serious failure to comply with a Commission order – the Interim Order. This argues for significant sanctions against the Respondents.

[16] Staff submitted that Cloutier and (through him) the Corporate Respondents have shown no remorse for or recognition of their capital-market misconduct, or for the harm caused. Cloutier, in the Respondents' written submissions, countered that he has shown remorse and been responsible and accountable for his actions:

> . . . I offered to buy [the equipment owners'] equipment back at the time I started to raise money for [Zaruba] and later for [Stevenson], a year or more before the [Commission] investigation started. Please note that offer went out to all equipment owners and not just the ones that participated in the loan program.
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> . . . I have not run or stopped or quit on the equipment owners so I have been here to deal with the [Commission] on all their issues as we come to closure on this action, with any sanctions that they assess on me or my corporations. Then I am prepared to go forward with the technologies in the best interest of the equipment owners to recapture their capital and make profit to the best of my abilities.

[17] We accept that, by participating in the Merits Hearing, the Respondents acknowledged the seriousness of the allegations against them. Further, through their participation in this phase of the proceeding, the Respondents acknowledged that their activities were found to involve the selling of securities and that there may be sanctions imposed on them.

[18] However, the Respondents also suggested that others shared responsibility for what transpired, indicated an intention to move ahead with a new or restructured business plan, and stated their belief in the Corporate Respondents' technologies being ultimately "beneficial to all players" including the Purchasers. In contending that "the GST collected and not remitted to CRA may not be an issue today", the Respondents also demonstrated a fundamental misapprehension concerning certain of our fraud findings, namely, that a considerable amount of purchase money represented to be for a specific purpose was not in fact used for that purpose. As well, we are troubled by Cloutier's claimed, and wholly implausible, expectation of money through the Inheritances, whether or not a continuing one. Such expectation resulted in additional illegal raising of money; if a continuing expectation, it could result in further such illegality. Even if that expectation no longer persists, we are concerned that Cloutier, given his continuing enthusiasm for the Corporate Respondents' business enterprises, may develop and operate on other similarly implausible expectations to the detriment of the investing public. In all the circumstances, we are not persuaded that Cloutier and (through him) the Corporate Respondents fully recognize the seriousness of, or truly accept responsibility for, their capital-market misconduct or the harm caused by it. We are therefore concerned that, absent significant sanctions, the Respondents may well engage in the future in the same or similar misconduct in the Alberta capital market.

(b) The Respondents' Characteristics

[19] Cloutier told us that he previously worked in the construction, technology and health food sectors and in so doing raised money for a few start-up ventures. Cloutier's submissions in the Merits Hearing suggested that a lawyer he retained was involved in structuring the Corporate Respondents' fundraising activities so as not to engage Alberta securities laws. Cloutier admitted he declined to act on that lawyer's recommendation that he (Cloutier) also obtain an opinion from a securities lawyer. All of this indicates to us that Cloutier and (through him) the Corporate Respondents were from the outset alert to the existence of securities regulatory requirements, and their possible applicability to at least some of their fundraising activities. It was incumbent on the Respondents to learn of, and comply with, any such applicable requirements, yet they chose not to do so.

[20] This calls for significant sanctions against the Respondents, despite their not having been previously sanctioned by the Commission.

(c) Benefit and Harm from the Misconduct

[21] In the Merits Decision, we found that in excess of $10.6 million was raised through the sale of securities to the Purchasers and those among them who were also Lenders, many of which sales were made in breach of Alberta securities laws. We know that very little of the money raised remains. We also know that, other than the relatively insignificant revenue from the limited arrangement between Cell Bridge Communications Corp. and Shell Canada Energy, no revenue was generated by the business enterprises or endeavours pursued by the Respondents.

[22] In applying investor money in pursuit of the Corporate Respondents' business enterprises and the Inheritances, the Respondents intended to benefit, and indeed did benefit albeit not to the extent anticipated. Cloutier personally benefitted from investor money – he received a $120 000 annual salary plus expenses, and certain other investor money was used by Cloutier for personal purposes.

[23] This benefit, or expectation of benefit, by the Respondents argues for significant sanctions against them.

[24] The Respondents' capital-market misconduct has caused substantial financial harm to Purchasers. There was evidence of Cloutier directing some money to some Purchasers, including one of the Purchaser witnesses – these payments were characterized by Cloutier as loans, and they in total were insignificant vis-à-vis the total money raised by the Respondents. Apparently, there have been no other returns on, or of, investor money. Certain Purchaser witnesses also testified to other harm arising from the financial harm sustained by them.

[25] Capital-market misconduct, such as that of the Respondents, also harms the Alberta capital market, rendering it more difficult for law-abiding issuers to raise capital therein. It is clear from the testimony of certain Purchaser witnesses that their confidence in our capital market has been shaken by – and thus their willingness to invest in it again has diminished by reason of – the Respondents' misconduct. Others learning of the Respondents' misconduct or of the harm it has caused may also suffer a similar loss of confidence.

[26] The harm done by the Respondents' capital-market misconduct argues for significant sanctions against the Respondents.

(d) Risk of Future Harm – Need for Specific and General Deterrence

[27] Staff contended that the Respondents pose a substantial risk of future harm, as do others who might choose to emulate their misconduct. Staff further contended that there is a need for specific and general deterrence in the form of significant sanctions.

[28] In all the circumstances, we perceive serious risk of future harm to the Alberta capital market and the investing public were the Respondents to be permitted continued unimpeded access to our capital market.

[29] As noted, through their participation in this phase of the proceeding, the Respondents indicated an intention to move ahead with a new or restructured business plan, and stated their belief in the Corporate Respondents' technologies being ultimately "beneficial to all players" including the Purchasers. Given the Corporate Respondents' lack of capital to continue their business enterprises, there is a real risk that the necessary capital will again be sought by them and by Cloutier in our capital market.

[30] Indeed, in all the circumstances, we conclude that, unless tightly and permanently constrained, Cloutier would pose a serious risk of future harm to the Alberta capital market and the investing public. Cloutier – a, or the, guiding mind of each of the Corporate Respondents with primary, if not sole, responsibility for all fundraising activities undertaken by each of them – engaged in very serious capital-market misconduct, and authorized, permitted or acquiesced in the Corporate Respondents' capital-market misconduct. As discussed, we are not persuaded that he fully recognizes the seriousness of, or truly accepts responsibility for, his (or the Corporate Respondents') capital-market misconduct or the harm caused by it; this underscores the need for meaningful specific deterrence in respect of him. In the Respondent's written submissions, Cloutier stated that any movement forward will be in compliance with Alberta securities laws and any sanctions imposed by us. This does not allay our concerns, all else considered: intentions can change; Cloutier's belief in and enthusiasm for the Corporate Respondent's business enterprises continue unabated; Cloutier admitted to declining to act on a lawyer's recommendation that he (Cloutier) obtain an opinion from a securities lawyer for certain of the Respondents' fundraising; and Cloutier failed to comply with the Interim Order.

[31] This calls for significant sanctions against the Respondents that will effect meaningful specific and general deterrence – the Respondents must be dissuaded from engaging in the same or similar capital-market misconduct, and others must be discouraged from similarly acting.

(e) Other Decisions

[32] Staff cited several decisions of the Commission and other securities regulatory authorities. Other decisions are of limited assistance given the circumstance-specific nature of sanctioning. That said, we discern from the decisions cited a consistent, and germane, theme – serious capital-market misconduct resulting in substantial harm will result in significant consequences, typically in the form of market-access bans together with monetary sanctions.

(f) Mitigating Considerations

[33] We acknowledge, as Staff noted, that "this is not a case of a 'pure scam' with no underlying legitimate business of any kind". However, this is of no mitigating effect – it in no way diminishes the seriousness of the Respondents' capital-market misconduct, or the harm done by their misconduct.

[34] Cloutier pointed to his efforts to assist Purchasers, through his pursuit of the Inheritances. However, this too is of no mitigating effect. Cloutier's pursuit of the Inheritances did not result in any moderating of the harm done. Rather, it resulted in additional illegality – illegal raising of additional money – and additional harm.

[35] In sum, we discern no mitigating considerations.

(g) Conclusion on Sanctioning Principles and Factors

[36] For the reasons given, we conclude that significant sanctions against the Respondents that will effect meaningful specific and general deterrence are warranted and in the public interest.

2. Conclusion on Sanctions – Type and Extent of Sanctions Appropriate

[37] For the foregoing reasons and the reasons set out below, we conclude that broad market-access bans against the Respondents and, in the case of Cloutier, an administrative penalty are required to prevent future harm to, and thereby protect, investors and the Alberta capital market from the Respondents and like-minded others.

[38] In all the circumstances, we are satisfied that, unless permanently removed from the Alberta capital market in key capacities, Cloutier would pose a serious risk of future harm to our capital market and the investing public. Further, we are satisfied that the market-access bans sought by Staff against Cloutier, together with a trading and purchasing ban under section 198(1)(a) of the Act, will provide the requisite deterrence and protection in the public interest. We will order those bans.

[39] Further, we are satisfied that to provide the deterrence and protection needed in the public interest in the circumstances of Cloutier it is essential to impose an administrative penalty on him. Mindful of the market-access bans we are imposing on Cloutier, we consider the quantum of administrative penalty sought by Staff to be appropriate. We will therefore order a $1 000 000 administrative penalty against Cloutier.

[40] There was legitimacy to the Corporate Respondents' business enterprises, and, by virtue of the market-access bans we are imposing on Cloutier, he will no longer be a principal or guiding mind of the Corporate Respondents. Given this and all other circumstances, we are satisfied that, to provide the deterrence and protection needed in respect of the Corporate Respondents, each of them must be subject to broad permanent market-access bans, unless and to the extent a prospectus is cleared. In our view, those bans must include a trading and purchasing ban under section 198(1)(a) of the Act and, mindful of the Repurchase Agreements, a purchasing ban against each of the Corporate Respondents. We thus find that, in respect of each of the Corporate Respondents, it is in the public interest to prohibit all trading in or purchasing of its securities and to prohibit it from trading in or purchasing securities and using all exemptions under Alberta securities laws, except for trading in or purchasing of securities of it for which a filed (final) prospectus has been receipted by the Executive Director of the Commission (the **Executive Director**). We will so order.

[41] In all the circumstances, including the market-access bans we are imposing on each of the Corporate Respondents, we perceive no useful purpose in ordering administrative penalties against them.

[42] Finally, we are not persuaded that any postponement of, or other exception from, such sanctions is warranted at present for any purpose, or would in the circumstances be in the public interest. However, the Respondents, or others, are not precluded from seeking variation of any sanctions herein ordered at such time, if any, as they are in a position to demonstrate a present or necessary basis for variation, and that it would not be prejudicial to the public interest.

C. Costs Orders

[43] In seeking orders that the Respondents be jointly and severally liable for $200 000 of the costs of the investigation and hearing, Staff tendered a summary of incurred investigation and hearing costs as well as supporting documentation. This summary indicated total costs of $208 068.98, consisting of fees (Staff costs based on time expended at stated hourly rates) of $145 950 and disbursements of $62 118.98.

[44] Staff submitted that the total costs of $208 068.98 "already [represent] a substantial discount (over $50,000) from the amount of costs actually incurred" and detailed what was excluded from their summary and why.

[45] As noted, Cloutier had issue with the costs orders sought by Staff.

[46] Having reviewed Staff's summary and supporting documentation in light of Staff's submissions, we are satisfied that the costs of $200 000 claimed by Staff are reasonable and are potentially recoverable pursuant to costs orders. Moreover, we are of the view that the Respondents (through Cloutier) did very little to contribute to the efficiency of this proceeding, and indeed through certain of their actions compromised the efficiency of this proceeding.

[47] Joint and several costs orders may be appropriate where, for example, respondents mounted a common defence, as was the case here. In all the circumstances, we consider it appropriate that the Respondents be jointly and severally responsible for $200 000 of the costs of the investigation and hearing. We will so order.

IV. CONCLUSION

A. Sanctions and Costs Ordered

[48] For the reasons given, we find it is in the public interest to order the following sanctions, and it is appropriate to make the following costs orders:

Cloutier

- under section 198(1)(a) of the Act, all trading in or purchasing of securities of Cloutier cease, permanently;

- under sections 198(1)(b) and (c), Cloutier cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to him, permanently;

- under sections 198(1)(d) and (e), Cloutier resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, permanently;

- under section 198(1)(e.3), Cloutier is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently;

- under section 199, Cloutier pay an administrative penalty of $1 000 000; and

- under section 202, Cloutier pay, jointly and severally with the other Respondents, $200 000 of the costs of the investigation and hearing;

Venture

- under sections 198(1)(a), (b) and (c), all trading in or purchasing of securities of Venture cease, Venture cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to Venture, permanently, except that these orders do not preclude trading in or purchasing of securities of Venture for which a filed (final) prospectus has been receipted by the Executive Director; and

- under section 202, Venture pay, jointly and severally with the other Respondents, $200 000 of the costs of the investigation and hearing;

Viva

- under sections 198(1)(a), (b) and (c), all trading in or purchasing of securities of Viva cease, Viva cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to Viva, permanently, except that these orders do not preclude trading in or purchasing of securities of Viva for which a filed (final) prospectus has been receipted by the Executive Director; and

- under section 202, Viva pay, jointly and severally with the other Respondents, $200 000 of the costs of the investigation and hearing;

SRAE

- under sections 198(1)(a), (b) and (c), all trading in or purchasing of securities of SRAE cease, SRAE cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to SRAE, permanently, except that these orders do not preclude trading in or purchasing of securities of SRAE for which a filed (final) prospectus has been receipted by the Executive Director; and

- under section 202, SRAE pay, jointly and severally with the other Respondents, $200 000 of the costs of the investigation and hearing; and

SSI

- under sections 198(1)(a), (b) and (c), all trading in or purchasing of securities of SSI cease, SSI cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to SSI, permanently, except that these orders do not preclude trading in or purchasing of securities of SSI for which a filed (final) prospectus has been receipted by the Executive Director; and

- under section 202, SSI pay, jointly and severally with the other Respondents, $200 000 of the costs of the investigation and hearing.

B. Interim Order

[49] The Interim Order expires, by its terms, with the issuance of this decision.

C. Proceeding Concluded

[50] This proceeding is concluded.

5 May 2014

For the Commission:

"original signed by"
Ian Beddis

"original signed by"
Daniel McKinley, FCA