ALBERTA SECURITIES COMMISSION

DECISION

Citation: Rogers Oil and Gas Inc., Re, 2014 ABASC 5 **Date: 20140103**

Rogers Oil and Gas Inc.

Panel:	Stephen Murison Fred Snell, FCA
Representation:	Andrew Wilson for Commission Staff
Hearing:	23 December 2013
Decision:	3 January 2014

I. INTRODUCTION

[1] Rogers Oil and Gas Inc. (**ROG**) was alleged by staff (**Staff**) of the Alberta Securities Commission (the **Commission**) to have contravened Alberta securities laws and acted contrary to the public interest by illegally distributing securities in Alberta. In consequence, Staff sought an order permanently denying ROG the use of any securities-law exemptions.

[2] As discussed below, we find the allegations to have been proved and we therefore make the order sought.

II. THE PROCEEDING

[3] The circumstances were unusual. The allegations had been the subject of an earlier Commission proceeding involving several other respondents as well as ROG, before a different hearing panel (the **Rogers Hearing**). That panel adjourned the allegations against ROG and one of its fellow respondents (another corporation, which later entered into a settlement agreement with Staff) while that proceeding continued against three respondents, culminating in the Commission decision *Re Rogers*, 2013 ABASC 484 (the **Rogers Decision**), issued on 30 October 2013. The Rogers Decision ended with the words "This proceeding is concluded".

[4] We were told in the present hearing that Staff and ROG had discussed some form of agreed outcome to the original allegations against ROG that would have provided an outcome comparable to the order sought here. However, that negotiated process was thwarted – not (we understand) owing to any opposition or reluctance on the part of anyone involved, but rather due to what seems to be a lack of legal capacity. It was explained that ROG, currently involved in a proceeding under the *Companies' Creditors Arrangement Act* (Canada) (**CCAA**), finds itself without any individual empowered on its behalf to execute a settlement agreement with Staff.

[5] Staff therefore launched this present proceeding, issuing a new notice of hearing presenting allegations against ROG alone. Although ROG was not represented at the hearing, Staff counsel indicated that it had been served with the new notice of hearing, and we are satisfied that ROG had notice of this hearing. We note that observers at the hearing included legal counsel involved in the company's CCAA proceeding, as well as a former principal of ROG, John Dale Rogers (**Rogers**).

[6] Staff suggested that this would be an appropriate case to depart from the usual Commission practice of bifurcating enforcement hearings. That practice has parties heard, and a decision made, on the merits of allegations before a second phase of hearing in which (if any allegations were found to have merit) the parties are again heard, and a decision is rendered, on appropriate sanctions or other orders. Here, Staff in effect urged a truncated approach, with a single hearing session and a single resulting decision dealing both with the merits of the allegations and any appropriate orders. We considered that this would be fair and efficient in the circumstances, and so adopted this approach.

[7] We heard testimony of a Staff investigator and received in evidence copies of (i) the Rogers Decision, (ii) a 26 September 2013 "Statement of Admissions and Joint Recommendation as to Sanction" signed by Rogers and Staff in connection with the Rogers Hearing (the **Rogers Admissions**), and (iii) an 11 June 2013 certificate to the effect that no prospectus had been filed

or receipted under the Securities Act (Alberta) (the **Act**) in respect of any distribution of ROG securities from 1997 to the certificate date. We accepted the evidence before us as accurate.

III. APPLICABLE LAW

[8] Section 110(1) of the Act (the **Prospectus Requirement**) prohibits the distribution of a security without receipted prospectus or an available prospectus exemption. Section 1(p) defines "distribution" to include a "trade" in securities not previously issued. Under section 1(jjj), "trade" includes both a "sale or disposition of a security for valuable consideration" and "any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance" of a trade.

[9] National Instrument 45-106 *Prospectus and Registration Exemptions* (**NI 45-106**) provides exemptions from the Prospectus Requirement, including for distribution by offering memorandum (respectively, an **OM** and the **OM Exemption**). Those purporting to rely on such an exemption bear the onus of ensuring – and demonstrating – that they have adhered to its conditions (see *Re Bartel*, 2008 ABASC 141 at para. 115). Conditions to the use of the OM Exemption include providing investors with an OM that (i) presents the information prescribed under NI 45-106 and (ii) is certified not to contain any misrepresentation.

[10] If the Commission considers it to be in the public interest, it may after a hearing order any of a variety of sanctions under section 198(1) of the Act, among them a denial of the use of exemptions (section 198(1)(c)). In exercising its sanctioning authority, the Commission seeks not to punish but rather prospectively to protect Alberta investors and the capital market from future harm (applying principles enunciated in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). Relevant factors may include the seriousness of any misconduct, and the risk posed by a respondent if given continued unimpeded access to the capital market (see *Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253), as restated in *Re Workum and Hennig*, 2008 ABASC 719 at para. 43 (affirmed 2010 ABCA 405)).

IV. FACTUAL BACKGROUND

[11] Staff's allegations refer to trades and distributions of securities by ROG between June 2008 and March 2011.

[12] The Rogers Admissions named Rogers as a founder and, at all material times, a promoter, director, and chief executive officer or chief financial officer of ROG. From this we conclude that Rogers had responsibility for, and access to information about, ROG's capital-raising. Accordingly, we give great weight to the Rogers Admissions to the extent relevant to the allegations against ROG here.

[13] Concerning ROG's activity in the relevant period, the Rogers Admissions stated: "Between June 2008 and March 2011, [ROG] traded its securities in Alberta. These securities had not been previously issued by" ROG.

[14] We accept this as true, and conclude that ROG was thereby distributing securities (specified elsewhere in the Rogers Admissions to have included shares and debentures), thus

triggering the Prospectus Requirement unless a prospectus exemption was available. As mentioned, there was no prospectus here.

[15] The Rogers Admissions stated that the distributions "were made pursuant to a number of offering memoranda . . . in reliance on" the OM Exemption, but conceded that seven such OMs (dated from 11 September 2009 to 6 January 2011, one among them being an amended version of another) contained "numerous deficiencies", "material defects and material omissions", including failing:

- to disclose properly how offering proceeds would be used;
- to disclose properly certain payments to various parties;
- to disclose properly details of material agreements with related parties;
- to identify a promoter or director and executive officer, and certain of his securities regulatory history;
- describe or update properly ROG's use of funds, its business and its short- and long-term objectives;
- to disclose properly certain prior debenture sales;
- to disclose properly debenture-servicing obligations and funding thereof; and
- to include, in some instances, certain required financial statements.

[16] The Rogers Admissions declared that owing to the admitted omissions from the seven OMs, they failed, in a material respect and at the time and in light of the circumstances of their issuance, to state facts required to make the OMs not misleading.

V. ANALYSIS

[17] It is clear from the uncontradicted evidence – and we therefore find – that ROG distributed securities and did so using deficient and misleading OMs. Prospective ROG investors were thereby denied their fundamental right under the OM Exemption to receive prescribed information – without misrepresentation (by commission or by omission) – that might assist them in making informed investment decisions. An essential condition to reliance on the OM Exemption was thus unsatisfied. We find, in consequence, that the OM Exemption was not available for the distributions. No other exemption having been cited (or shown to have been available), we find that no exemption was available.

[18] It follows, and we find, that ROG distributed securities without a prospectus or an available prospectus exemption and thereby contravened section 110 of the Act.

[19] By depriving investors of the reliable information to which they were entitled by law, ROG impaired its investors' ability to make informed investment decisions, thereby in turn exposing them to unforeseen risks of financial harm from ill-informed investments. This is incompatible with the protection of investors, and with capital-market fairness and efficiency. Moreover, such conduct jeopardizes confidence in the capital market, even among those not directly affected. We therefore find ROG's illegal distributions also to have been contrary to the public interest.

[20] ROG's misconduct, and the harm to which it exposed investors and the capital market, was serious. It recurred or persisted over several years. In our view, this warrants protective sanctions in the public interest.

[21] In some circumstances, appropriate sanctions include a combination of market-access restrictions and direct monetary orders. Here, Staff sought no monetary order, in part at least from a concern that such an order could impede recovery efforts by innocent ROG investors. We think that a valid concern.

[22] We are satisfied, in all the circumstances, that the public interest will be sufficiently served by permanently denying ROG any further access to the capital market using exemptions. Among other things, this would mean that ROG could never again raise money from investors except through full compliance with the Prospectus Requirement (without a future demonstration that the public interest would not be prejudiced by a variation of the sanction here ordered).

VI. CONCLUSION

[23] For the reasons given, we order in the public interest under section 198(1)(c) of the Act that all of the exemptions under Alberta securities laws do not apply to ROG, permanently.

3 January 2014

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Fred Snell, FCA