

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Shallow Oil & Gas Inc., Re, 2008 ABASC 610

Date: 20081029

**Shallow Oil & Gas Inc., Eric O'Brien, Abel Da Silva and Abraham Herbert
Grossman (also known as Allen Grossman)**

Panel: Kenneth B. Potter
Karen A. Prentice, QC

Appearing: Laura Burt
For Commission Staff

Dates of Hearing: 8 September and 8 October 2008

Date of Decision: 29 October 2008

I. INTRODUCTION

[1] This proceeding originated by a notice of hearing (the "Notice of Hearing") issued on 1 August 2008 by Staff ("Staff") of the Alberta Securities Commission (the "Commission"). The Notice of Hearing gave notice that Staff sought reciprocating orders under section 198(1.1) of the *Securities Act*, R.S.A. 2000, c.S-4 (the "Act") in respect of temporary orders issued by the Ontario Securities Commission (the "OSC") against four respondents (the "Respondents"): Shallow Oil & Gas Inc. ("Shallow"), Eric O'Brien ("O'Brien"), Abel Da Silva ("Da Silva") and Abraham Herbert Grossman, also known as Allen Grossman ("Grossman").

[2] Section 198(1.1) recognizes that capital market activity can transcend jurisdictional boundaries and sets out a mechanism for protecting Alberta investors and the Alberta capital market from market participants who have been found by another decision-maker or in another jurisdiction to have engaged in misconduct relating to securities, or who are (or have agreed to be) subject to restrictions imposed by another securities regulatory authority on their activities relating to securities. This mechanism generally obviates the need for multiple, comprehensive hearings into the circumstances giving rise to the original findings or restrictions.

II. THE STATUTORY PRECONDITIONS

[3] There are four situations in which section 198(1.1) might be used, if the requirements are met. Here, Staff's submissions were based on section 198(1.1)(c). As set out in that section and applied by previous decisions of the Commission, the two statutory preconditions to the use of section 198(1.1)(c) are: (i) that the respondents be given an opportunity to be heard; and (ii) that the respondents be subject to an order made by another securities regulatory authority imposing sanctions, conditions, restrictions or requirements on them.

A. Hearing and Opportunity to Be Heard

[4] This hearing was held over two days – 8 September 2008 and 8 October 2008. None of the Respondents appeared on either date. As noted above, respondents must be given an opportunity to be heard. Under section 29(a) of the Act, therefore, notice "of the time, place and purpose of the hearing shall be sent to the person or company that is the subject of the hearing". Section 217 of the Act provides for the manner of sending, communicating, delivering or serving documents, including by prepaid post or personal delivery.

[5] Staff tendered affidavit evidence indicating that each of O'Brien, Da Silva and Grossman (the "Individual Respondents") had been served in early August 2008 with the Notice of Hearing together with a supporting affidavit of Alan Currie sworn on 25 July 2008 (the "Currie Affidavit") by both registered mail and personal delivery. We are satisfied that each of the Individual Respondents was duly served with notice of the hearing.

[6] However, the initial affidavit evidence tendered by Staff on 8 September 2008 indicated that there was some difficulty in serving the Notice of Hearing and Currie Affidavit on Shallow. Therefore, the hearing against Shallow was set for 8 October 2008. At the resumption of the hearing on 8 October 2008, Staff tendered additional evidence with respect to service on Shallow and contended that service had been effected on Shallow on 2 October 2008 by serving O'Brien, as the sole director of Shallow, with the Notice of Hearing, the Currie Affidavit, a Supplemental Affidavit of Alan Currie sworn on 17 September 2008 (the "Supplemental Affidavit") and an

accompanying letter advising of the date for the resumption of the hearing. Staff further contended that Shallow had been personally served when a process server taped to the door at Shallow's registered office address the Notice of Hearing, the Currie Affidavit and a letter relating to the resumption of the hearing. Presumably because Staff also intended to make further submissions relating to Da Silva, Staff had the Supplemental Affidavit and a cover letter advising of the date of the resumption of the hearing personally delivered to Da Silva (on 18 September 2008).

[7] In the circumstances, we are satisfied that Shallow received notice of the hearing and an opportunity to be heard and that Da Silva received notice of the continuation of the hearing.

[8] Accordingly, we are satisfied that the first statutory precondition has been met for all the Respondents. We concluded that all Respondents were provided with an opportunity to be heard, and it was in order to proceed with the hearing in their absence.

B. The Ontario Order

[9] Staff based their application on a temporary order issued by the OSC (the "OSC Order") dated 16 January 2008, extended on 31 January 2008 (with written reasons dated 15 February 2008; the "OSC Decision"), further extended 31 March 2008, and extended on 19 June 2008 against these Respondents until a hearing on the merits in Ontario is concluded. Therefore, the OSC Order is a temporary or interim order which prohibits trading in Shallow securities and trading by, among others, the Respondents until the conclusion of the OSC hearing on the merits of the allegations against them. We are satisfied that the second statutory precondition has been met.

[10] In the OSC Decision, the OSC noted that Grossman appeared, unrepresented, before the OSC, but neither testified nor submitted evidence. The other Respondents did not appear before the OSC. Consequently, the only evidence before the OSC at that time was the OSC staff's uncontroverted evidence. The OSC noted (OSC Decision at paras. 23, 39):

... At such an early stage in the proceeding, it is obvious that [the OSC staff] is not yet in a position to prove its case. In the circumstances, we are prepared to admit and rely on [the OSC staff's] affidavit evidence although, in doing so, we are sensitive not to give such evidence undue weight.

...

This matter appears to involve potentially very serious conduct by [Shallow], O'Brien, Da Silva... and Grossman, which appears to contravene key provisions of the [Ontario *Securities Act*] intended to protect investors. We have affidavits stating that an investigation into this matter has revealed sales of securities without registration, without a prospectus being filed and without appropriate exemptions from the registration and prospectus requirements under the [Ontario *Securities Act*]. Further, it appears that prohibited representations have been made to investors to effect trades in securities.

III. PUBLIC INTEREST CONSIDERATIONS

[11] Satisfaction of the two preconditions discussed above does not automatically lead to the imposition of reciprocal sanctions under the Act. The Commission has stated that it will make a

reciprocal order only when it considers that such order would serve a protective purpose in Alberta (see *Re Oslund*, 2006 ABASC 1295 at para. 20, citing both *Re O'Connor*, 2005 ABASC 987 and *Re Mitton*, 2006 ABASC 1197).

[12] The factual background to this proceeding is primarily drawn from the Currie Affidavit, the Supplemental Affidavit and the OSC Decision. According to this uncontested affidavit evidence and that decision, it appears that:

- Shallow is an Ontario-based corporation of which O'Brien is the sole director;
- the Commission received at least one complaint from an Alberta resident with respect to being solicited to purchase securities of Shallow;
- the OSC compiled and provided to Staff a list of shareholders of Shallow indicating that at least 33 Alberta-resident investors purchased securities in Shallow between November 2007 and 15 January 2008;
- Shallow has not filed a preliminary or final prospectus with the Commission nor did an exemption apply to the sales of Shallow securities;
- none of the Respondents have been registered under the Act to trade in securities;
- there were two bosses at Shallow, being Grossman and Da Silva; and
- Da Silva was involved in direct sales using the alias "Wayne Mathews" and was also involved in directing the sale of securities of Shallow by other salespersons.

[13] We conclude, for the following reasons, that there is prima facie evidence that Alberta investors and the Alberta capital market require protection from these Respondents at this time:

- Alberta residents were solicited to purchase securities of Shallow and sales of securities of Shallow were made to 33 Alberta residents without a receipted prospectus, without Shallow or the persons making such sales being registered under the Act, and without exemptions from such requirements apparently being available;
- there is sufficient evidence of the Individual Respondents' involvement in sales of Shallow securities to justify a protective order being issued, namely:
 - O'Brien – O'Brien is the sole director of Shallow and accordingly bears significant responsibility for supervising Shallow's business and affairs, including its compliance with applicable laws. O'Brien has previously been active in the Alberta capital market and is subject to an existing order;
 - Da Silva – the Supplemental Affidavit states that the investigations conducted by the OSC indicate that Da Silva was one of the bosses of Shallow and was involved in the sale of securities of Shallow, both by directing the sales by others and through direct sales under an assumed name; and
 - Grossman – although Grossman argued in the proceedings before the OSC that there was no evidence that he participated in the sale of securities of Shallow, the OSC concluded there was "sufficient credible evidence to link Grossman to [Shallow] and its allegedly illegal activities" (OSC

Decision at para. 40). Grossman has previously been active in the Alberta capital market and is subject to an existing order.

[14] While the evidence in respect of the involvement of Grossman and Da Silva is hearsay and does not indicate any direct involvement in Alberta, the evidence before us is clear that significant sales were made in Alberta. In our view, there is sufficient credible, prima facie evidence of their involvement in directing the activities of Shallow and sales of its securities to raise a reasonable possibility of risk to Alberta investors from any continued activities in Alberta by Grossman and Da Silva. This risk justifies a protective order and we are of the view that reciprocal orders would serve such protective purposes.

IV. SCOPE OF ORDERS SOUGHT

[15] As noted, the OSC Order is temporary in nature and orders the following, among other things, until the conclusion of the OSC hearing on the merits of the allegations against the Respondents:

- trading cease in all securities of Shallow; and
- the Respondents cease trading in all securities.

[16] Staff sought orders which would go beyond the OSC Order by also ordering that all purchasing of securities of Shallow cease and that the Respondents cease purchasing all securities. Although we clearly have the power to depart from a strict parallel with the order of another jurisdiction if we consider it to be in the public interest (see, for example, *Re Sulja Bros. Building Supplies, Ltd.*, 2007 ABASC 603 at para. 17, citing portions of *Re Oslund* at paras. 22, 24 and 26), we decline to expand the reciprocal order in this case.

V. ORDERS

[17] For the reasons given, under section 198(1.1)(c) of the Act, we order that, for so long as the OSC Order (as from time to time amended) remains in effect:

- under section 198(1)(a), all trading in securities of Shallow must cease; and
- under section 198(1)(b), the Respondents must cease trading in all securities.

[18] This proceeding is concluded.

29 October 2008

For the Commission:

"original signed by"
Kenneth B. Potter

"original signed by"
Karen A. Prentice, QC