

Citation : *Colby Cooper Inc., Re*, 2014 NBFCST 4

Date: 2014-05-27
Docket: SE-001-2013

IN THE MATTER OF THE *SECURITIES ACT*, S.N.B. 2004, c S-5.5

AND IN THE MATTER OF COLBY COOPER INC. and JOHN DOUGLAS LEE MASON
(Respondents)

DECISION AND ORDER
PURUSANT TO SUBSECTION 184(1.1)

BACKGROUND

1. On August 21, 2013, Staff ("Staff") of the New Brunswick Financial and Consumer Services Commission ("Commission") filed with the Registrar of the Financial and Consumer Services Tribunal ("Tribunal") an application for an order ("Application") pursuant to subsection 184(1.1) of the *Securities Act* ("Act") against the Respondents Colby Cooper Inc. and John Douglas Lee Mason.

2. Staff requests the following relief against the Respondents pursuant to paragraph 184(1.1)(c) of the *Act* :

- (a) pursuant to paragraph 184(1)(a) of the *Act*, any registration granted to John Douglas Lee Mason ("Mason") and Colby Cooper Inc. ("CCI"), collectively hereinafter, the "Respondents", under New Brunswick securities law shall be terminated;
- (b) pursuant to sub-paragraph 184(1)(c)(i) of the *Act*, trading in any securities by the Respondents cease permanently, or for such period as is specified by the Tribunal;
- (c) pursuant to sub-paragraph 184(1)(c)(ii) of the *Act*, acquisition of any securities by the Respondents is prohibited permanently, or for such period as is specified by the Tribunal;

- (d) pursuant to paragraph 184(1)(d) of the Act, any exemptions contained in New Brunswick securities law do not apply to the Respondents permanently, or for such period as is specified by the Tribunal;
- (e) pursuant to paragraph 184(1)(h) of the Act, Mason shall resign all positions that he holds as a director or officer of any issuer, registrant or mutual fund manager;
- (f) pursuant to paragraph 184(1)(i) of the Act, Mason be permanently prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager;
- (g) pursuant to paragraphs 184(1)(b) and (g) of the Act, the Respondents be permanently, or for such period as is specified by the Tribunal, prohibited from becoming or acting as a registrant, as a mutual fund manager or as a promoter;
- (h) pursuant to subsection 57(5) of the Act, the Respondents are permanently prohibited from:
 - i. calling at any residence in New Brunswick for the purpose of trading in securities, or
 - ii. telephoning from within New Brunswick to any residence within or outside New Brunswick for the purpose of trading in securities.
- (i) Mason be permitted to trade in or acquire, for the account of his personal Registered retirement savings plan and his registered pension plan as defined in the *Income Tax Act*, R.S.C. 1985, c.1, as amended ("*Income Tax Act*"), solely through a registered dealer or, as appropriate, a registered dealer in a foreign jurisdiction (which dealer must be given a copy of this Order)
 - i. any "exchange-traded security" or "foreign exchange-traded security" within the meaning of National Instrument 21-101 provided that he does not own beneficially or exercise control or direction over more than 5 percent of the voting or equity securities of the issuer(s) of any such securities; or
 - ii. any security issued by a mutual fund that is a reporting issuer.

3. The Tribunal issued a Notice of Application on September 24, 2013, which provided notice to the Respondents of Staff's Application and their right to be heard.

LAW & EVIDENCE

4. At the time the Application was filed, the relevant provisions of the *Act* were as follows:

184(1) On the application of the Commission, the Tribunal, if in its opinion it is in the public interest to do so, may make one or more of the following orders:

- (a) an order that the registration granted to a person under the New Brunswick securities law be suspended or restricted for such period as is specified in the order or be cancelled, or that terms and conditions be imposed on the registration;
- (b) an order that the recognition granted to a person under the New Brunswick securities law be suspended or restricted for such period as is specified in the order or be revoked, or that terms and conditions be imposed on the recognition;
- (c) an order that
 - (i) trading in or purchasing cease in respect of any securities or exchange contracts specified in the order, or
 - (ii) a person specified in the order cease trading in or purchasing securities or exchange contracts, specified securities or exchange contracts or a class of securities or class of exchange contracts;
- (d) an order that any exemptions contained in New Brunswick securities law do not apply to a person permanently or for such period as is specified in the order;

...

- (g) an order that a person be reprimanded;
- (h) an order that a person resign one or more positions that the person holds as a director or officer of an issuer, registrant or mutual fund manager;
- (i) an order that a person is prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager;

...

184(1.1) In addition to the power to make orders under subsection (1), the Tribunal, on the application of the Commission and after providing an opportunity to be heard, may make one or more of the orders referred to in paragraphs (1)(a) to (d) and (1)(g) to (i) against a person if the person

...

- (c) is subject to an order made by a securities regulatory authority or self-regulatory organization in Canada or elsewhere imposing sanctions, conditions, restrictions or requirements on the person, or
- (d) has agreed with a securities regulatory authority or self-regulatory organization in Canada or elsewhere to be subject to sanctions, conditions, restrictions or requirements.

5. On August 21, 2013, Staff filed with the Registrar the Application and the Affidavit of Brian Maude, legal counsel with the Commission (“Maude Affidavit”), in support of the Application. The Maude Affidavit outlines the Commission’s investigation into the activities of the Respondents and details the Ontario Securities Commission’s (“OSC”) enforcement proceedings against the Respondents and the settlement reached with the OSC.

6. The Maude Affidavit contains the following exhibits:

(a) Exhibit A – Settlement Agreement between OSC and the Respondents dated April 18, 2013; and

(b) Exhibit B – OSC Order issued on April 24, 2013 in the Matter of Colby Cooper Capital Inc., Colby Cooper Inc., Pac West Minerals Limited and John Douglas Lee Mason (“OSC Order”).

7. On November 27, 2013, Staff also filed two (2) Affidavits of Service sworn by Mr. Ronald Tanner (Tanner Affidavits of Service), which outline the service of the Notice of Application, Application and the Maude Affidavit (together the “Documents”) on the Respondents. The Panel was concerned about the adequacy of service evidenced by the Tanner Affidavits of Service. For example, the Tanner Affidavits of Service indicate that service was made on the parties on 21 October 2013; however, the Notice of Application had provided a deadline of 9 October 2013 for the Respondents to indicate that they wished to exercise their right to be heard.

8. Staff provided further documentation to address the Panel’s concerns regarding the adequacy of service. An Affidavit of Service sworn by Staff counsel Brian Maude was filed on 15 April 2014, which details difficulties and delays encountered in attempting to personally serve the Respondents, and evidences that along with the service outlined by the Tanner Affidavits of Service, the Respondents were also served via FedEx, and were given notice through correspondence contained in the FedEx package that they would be afforded 15 days from the date of service upon them of the Documents to exercise their opportunity to be heard. The FedEx package was signed for by the respondent “Mason” on 16 October 2013. The 15 April 2014 Affidavit of Service also provides evidence that Staff has not been contacted by the Respondents in the six months since they were served with the Documents.

9. As a result of the evidence provided by the Tanner Affidavits of Service and the 15 April 2014 Affidavit of Service, the Panel is satisfied that the Respondents received notice of the Application against them, notice of their opportunity to be heard and notice of how to exercise their opportunity to be heard with respect to the Application. Despite receiving notice, the Respondents did not contact Staff of the Commission or the Tribunal to request an appearance before the Tribunal, nor did they file written submissions with the Tribunal.

10. The Notice of Application advised that if no request for an opportunity to be heard was received, an Order may be issued without further notice to the Respondents.

ANALYSIS

11. The Panel reviewed the Application, Notice of Application, the Maude Affidavit and the three (3) Affidavits of Service filed by Staff.

12. With respect to the requirements for an order to be issued under subsection 184(1.1) of the Act, the Panel is satisfied that the Respondents were provided with an opportunity to be heard, and that the Respondents are subject to the OSC Order, which is an order made by a securities regulatory authority in Canada imposing sanctions, conditions, restrictions or requirements on the Respondents.

13. The OSC Order was issued pursuant to a Settlement Agreement entered into between the Respondents (and others, as noted in the OSC Order) wherein the Respondents agreed to the sanctions noted in the OSC Order. The OSC was of the opinion that it was in the public interest to approve the Settlement Agreement and issue the OSC Order.

14. The Respondents agreed in the OSC Settlement Agreement that they breached securities laws by engaging in fraudulent conduct by making misrepresentations to investors and misappropriating investor funds, by trading in securities without registration and without the required prospectus or an appropriate exemption, by failing to keep proper books and records and by failing to meet Know Your Client obligations. The Respondents also agreed in the OSC Settlement Agreement that they acted in a manner that was contrary to the public interest.

15. Due to the contents of the OSC Settlement Agreement and the OSC Order, the Panel finds it in the public interest to grant the order requested by Staff under section 184(1.1) of the Act, reciprocating the OSC Order.

16. Further, the Panel reviewed the Maude Affidavit, which included the OSC Settlement Agreement and the OSC Order, and is satisfied that there is a real and substantial connection between the Respondents and the originating jurisdiction, Ontario, as required by the Commission in the *Shire International Real Estate Investment Ltd. et al.* decision, issued on May 14, 2010.

ORDER

17. Based on the evidence presented by Staff, the Panel accepts Staff's submission that it is in the public interest to issue the following order, pursuant to subsection 184(1.1) of the Act, consistent with the intent of the OSC Order upon which the Application is based:

(a) pursuant to paragraph 184(1)(a) of the Act, any registration granted to John Douglas Lee Mason ("Mason") and Colby Cooper Inc. ("CCI"), collectively hereinafter, the "Respondents", under New Brunswick securities law shall be cancelled;

(b) pursuant to sub-paragraphs 184(1)(c)(i) and (ii) of the Act, trading in and purchasing of any securities by the Respondents shall cease permanently with the sole exception that Mason may trade in or purchase, for the account of his personal Registered retirement savings plan and his registered pension plan as defined in the *Income Tax Act*, R.S.C. 1985, c.1, as amended ("*Income Tax Act*"), solely through a registered dealer or, as appropriate, a registered

dealer in a foreign jurisdiction (which dealer must be given a copy of this Order)

- iii. any "exchange-traded security" or "foreign exchange-traded security" within the meaning of National Instrument 21-101 provided that he does not own beneficially or exercise control or direction over more than 5 percent of the voting or equity securities of the issuer(s) of any such securities; or
 - iv. any security issued by a mutual fund that is a reporting issuer;
- (c) pursuant to paragraph 184(1)(d) of the *Act*, any exemptions contained in New Brunswick securities law shall not apply to the Respondents permanently;
- (d) pursuant to paragraph 184(1)(h) of the *Act*, Mason shall resign all positions that he holds as a director or officer of any issuer, registrant or mutual fund manager;
- (e) pursuant to paragraph 184(1)(i) of the *Act*, Mason shall be prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager; and
- (f) Pursuant to paragraph 184(1)(b) of the *Act*, the Respondents be prohibited from becoming or acting as a registrant, as a mutual fund manager or as a promoter.

18. The order above reflects the relief requested by Staff in their Application, amended to reflect the terminology of the New Brunswick *Securities Act* rather than the Ontario *Securities Act*, with the exception of the reliefs requested in paragraphs 1(i) and 1(j) of the Application.. The Panel declines to include the relief requested at paragraph 1(i) of the Application as the Respondents have not been granted an exemption under subsection 57(5) of the *Act*.

DATED this 27th day of May 2014.

"original signed by"
Monica L. Barley, Panel Chair

"original signed by"
Don Moors, Panel Member

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