

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF
SHALLOW OIL & GAS INC., ERIC O'BRIEN, ABEL DA SILVA,
GURDIP SINGH GAHUNIA also known as MICHAEL GAHUNIA, and
ABRAHAM HERBERT GROSSMAN also known as ALLEN GROSSMAN**

**REASONS AND DECISION
(Section 127 of the *Securities Act*)**

Hearing: January 31, 2008

Decision: February 15, 2008

Panel: James E. A. Turner - Vice-Chair and Chair of the Panel
David L. Knight, FCA - Commissioner

Counsel: Matthew Boswell - For the Ontario Securities
Commission

Abraham Herbert Grossman - For himself

No one appeared for Shallow Oil & Gas Inc., Eric O'Brien, Abel Da
Silva or Gurdip Singh Gahunia

REASONS AND DECISION

I. Overview

A. Background

[1] This was a hearing before the Ontario Securities Commission (the “Commission”) pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) to consider whether it is in the public interest to extend a temporary cease trade order against the respondents Shallow Oil & Gas Inc. (“Shallow Oil”), Eric O’Brien (“O’Brien”), Abel Da Silva (“Da Silva”), Gurdip Singh Gahunia, also known as Michael Gahunia (“Gahunia”), and Abraham Herbert Grossman, also known as Allen Grossman (“Grossman”) (collectively the “Respondents”).

[2] A Statement of Allegations has not yet been issued in this matter. On January 16, 2008, an *ex parte* temporary cease trade order (the “Temporary Order”) was issued by the Commission pursuant to subsections 127(1) and (5) of the Act, which ordered:

(i) pursuant to clause 2 of subsection 127(1) of the Act that all trading in securities by Shallow Oil cease and that all trading in Shallow Oil securities shall cease;

(ii) pursuant to clause 2 of subsection 127(1) of the Act that O’Brien, Da Silva, Gahunia and Grossman cease trading in all securities; and

(iii) pursuant to subsection 127(6) of the Act that the Temporary Order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by order of the Commission.

[3] A Notice of Hearing was issued on January 18, 2008 giving notice that a hearing would be held before the Commission on January 30, 2008 to consider whether it is in the public interest for the Commission:

(i) to extend the Temporary Order pursuant to subsection 127 (8) of the Act until the conclusion of the hearing or until such further time as considered necessary by the Commission; and

(ii) to make such further orders as the Commission considers appropriate.

[4] On January 30, 2008, a hearing to extend the Temporary Order was held before Vice-Chair Turner. Only Staff of the Commission (“Staff”) and Grossman, who was unrepresented, appeared at the hearing. Grossman contested the extension of the Temporary Order on a number of grounds. Since the extension of the Temporary Order was contested, the matter was adjourned to January 31, 2008 to be heard before a Panel of Commissioners.

[5] During the hearing on January 31, 2008, we received evidence from Staff and oral and written submissions from Staff and Grossman with respect to the extension of the Temporary Order. At the conclusion of the hearing, we ordered that the Temporary Order

be extended to March 31, 2008 with respect to all Respondents including Grossman. At that time, we indicated that we would provide written reasons for that decision. These are our reasons for our decision in this matter.

B. The Conduct at Issue

[6] The Temporary Order relates to the conduct of the Respondents in connection with Shallow Oil, a private Ontario corporation whose sole director is O'Brien.

[7] The Temporary Order indicates that it appears that the Respondents engaged in acts that perpetrated a fraud on investors, and that constituted unregistered trading in securities, illegal distributions of securities and prohibited representations regarding securities. Specifically, the Temporary Order states that it appears that:

- (i) the Respondents are not registered with the Commission in any capacity;
- (ii) shares of Shallow Oil have been offered for sale and sold to members of the public, in Ontario and elsewhere in Canada, by representatives of Shallow Oil;
- (iii) Shallow Oil appears to be merely a shell company with no assets;
- (iv) based on information collected by Staff during their investigation in this matter it appears that O'Brien, Da Silva, Gahunia and Grossman have traded in shares of Shallow Oil or have acted in furtherance of trades in Shallow Oil;
- (v) representatives of Shallow Oil have made representations about the future listing of the shares of Shallow Oil in order to effect sales in those shares contrary to section 38 of the Act;
- (vi) no prospectus has been filed by Shallow Oil to qualify the distribution of Shallow Oil securities contrary to section 53 of the Act;
- (vii) no exemption from the registration and prospectus requirements under the Act applies to the shares of Shallow Oil or to O'Brien, Da Silva, Gahunia and Grossman; and
- (viii) false or misleading information appears to have been posted on the Shallow Oil website in furtherance of the sale of shares contrary to section 126.1 of the Act. The sale of Shallow Oil shares to the public appears to have perpetrated a fraud on the members of the public who purchased the shares.

II. Preliminary Issues

A. Grossman was Unrepresented

[8] Grossman was present at the hearing but was not represented by counsel. At the outset of the hearing, Grossman expressly requested that the hearing proceed notwithstanding that he did not have the assistance of counsel. We explained the steps of the hearing process to Grossman to ensure that he understood the process and had a fair

opportunity to participate and to be heard. We cautioned Grossman that our explanations did not constitute legal advice to him.

B. The Failure of the Other Respondents to Appear

[9] No one appeared on behalf of Shallow Oil, O'Brien, Da Silva or Gahunia at the hearing.

[10] Subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "SPPA") provides that a party is entitled to notice of an oral hearing; however, a tribunal may proceed in the absence of a party when that party has been given adequate notice (see also *Re Allen* (2005), 28 O.S.C.B. 8541 at para. 9).

[11] Staff served all of the Respondents with copies of the Temporary Order and the Notice of Hearing as evidenced by two affidavits of Wayne Vanderlaan ("Vanderlaan"), the lead investigator with the Commission assigned to this matter, sworn on January 24 and 29, 2008, and two affidavits of Diana Page, a litigation secretary at the Commission, both sworn on January 21, 2008. Accordingly, we found that Shallow Oil, O'Brien, Da Silva and Gahunia were given adequate notice of the hearing to extend the Temporary Order and that we could proceed in their absence.

[12] Pursuant to subsection 127(8) of the Act, the Commission may extend a temporary order for such period as it considers necessary if satisfactory information is not provided by the Respondents to the Commission within the fifteen-day period following the issuance of the order. Since Shallow Oil, O'Brien, Da Silva and Gahunia did not appear and did not provide satisfactory information to the Commission, the Temporary Order was extended against them until March 31, 2008, based on Staff's evidence.

III. The Issue

[13] Therefore, the sole issue to be determined was whether the Temporary Order should be extended against Grossman.

III. Evidence and Submissions

A. Staff

[14] Staff provided affidavit evidence to support their request that we extend the Temporary Order against Grossman. Specifically, Staff tendered two affidavits from Vanderlaan:

- (i) an affidavit sworn January 18, 2008, accompanied by 19 exhibits; and
- (ii) an affidavit sworn January 28, 2008.

[15] Staff informed us that the evidence gathered to date shows telephone solicitations and sales of shares by Shallow Oil to investors in several Canadian provinces. In particular, Staff stated that investors were told that Shallow Oil shares would be listed on a stock exchange in the near future and the value of the shares would then significantly

increase. It also appears from this evidence that Shallow Oil was actively soliciting investors across Canada and that telephone sales representatives of Shallow Oil were receiving commissions for their sales of shares that were 25% of the amount invested by each investor.

[16] With respect to Shallow Oil's website, Staff's investigation so far has revealed that the office location listed on the website is a "virtual office", maintained by Regus Business Centre, and the registered address of Shallow Oil is the residential address of a woman who claims to have no knowledge of the company. Staff's investigation has also revealed that a significant portion of the Shallow Oil website is copied from the website of an American company.

[17] It is Staff's position that the evidence gathered to date is sufficient to justify the extension of the Temporary Order. Staff submitted that the extension of the Temporary Order is necessary to aid Staff in continuing its investigation and that during the course of Staff's investigation it is necessary to protect investors by preventing the Respondents from continuing their conduct, which conduct, in Staff's view, is contrary to the public interest.

B. Grossman

[18] Grossman chose not to submit evidence by affidavit and did not testify on his own behalf. Grossman, however, did elect to cross-examine Vanderlaan on the veracity of his affidavits. Grossman also submitted to us a document entitled "Evidence Brief of Allen Grossman", which we reviewed. The material in that document was not treated by us as evidence and we note that Staff did not have an opportunity to cross-examine Grossman with respect to that document.

[19] During his cross-examination of Vanderlaan, Grossman raised the issue of hearsay. In particular, Grossman took issue with Vanderlaan's affidavit of January 18, 2008, which referred to investors and their views, knowledge and experience with Shallow Oil. Grossman pointed out that the investors were not present to testify on their own behalf and that transcripts of the interviews with the investors were not made available by Staff to Grossman prior to the hearing.

[20] Grossman made oral and written submissions on his own behalf. While not formally submitting evidence, Grossman argued that he was only a consultant to Shallow Oil, was permitted temporary use of an office at Shallow Oil in that capacity and that there was no evidence whatsoever that he had participated in any sales of securities. Grossman took the position that Staff did not provide sufficient evidence to link him to the securities-related activities of Shallow Oil and to extend the Temporary Order against him. Grossman requested, among other things, that the Commission remove his name from documents on the Commission website with respect to Shallow Oil and compensate him financially.

[21] Grossman stated that this matter is a "malicious prosecution levied against him, abuse of power by [Staff] in bringing this matter forth with no supporting evidence and as

a result [Staff has] clearly violated [Grossman’s] Charter rights in numerous and various areas”. Grossman also made statements alleging bias on the part of the Commission.

IV. Analysis

A. Hearsay

[22] Subsection 15(1) of the SPPA provides that hearsay evidence may be admissible in proceedings before administrative tribunals. As noted in *Re Cornwall* (2007), 30 O.S.C.B. 10063 at para. 45, subsection 15(1) of the SPPA applies to Commission hearings:

Subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 governs the admission of evidence in proceedings before the Commission. It provides that the Panel may admit any relevant oral testimony, document or other thing as evidence at a hearing “whether or not [it would have been] admissible as evidence in a court.” This permits the Panel to admit hearsay evidence, subject to considerations of relevance and reliability.

[23] We concluded that Staff’s hearsay evidence in this matter is admissible. This is an interlocutory matter at an early stage of the proceeding. A temporary cease trade order is an important legal mechanism that the Commission uses to protect investors where it has identified circumstances that give rise to serious concerns that breaches of the Act may have occurred. Staff’s investigation has just recently commenced and is still ongoing, and Staff is in the process of interviewing and working with investors to gather information. At such an early stage in the proceeding, it is obvious that Staff is not yet in a position to prove its case. In the circumstances, we are prepared to admit and rely on Staff’s affidavit evidence although, in doing so, we are sensitive not to give such evidence undue weight.

[24] During cross-examination, Vanderlaan noted that disclosure of the interview transcripts of investors was not made because such transcripts were not available at the time Staff provided their written submissions and materials to the Respondents and the Commission; however, a copy of the transcripts did become available the day before the hearing and they could be made available if the Panel considered this necessary. In our view, copies of these transcripts were not necessary for us to determine this matter. Vanderlaan is an experienced investigator, his knowledge of the investigation and his conversations with investors are relevant to this matter, and his sworn affidavit is sufficiently credible for us to rely on it.

B. The Commission’s Power to Issue a Temporary Order

[25] Subsection 127(1) of the Act authorizes the Commission to make one or more of the orders set out therein “if in its opinion it is in the public interest”, provided a hearing is held pursuant to subsection 127(4). Clause 2 of subsection 127(1) of the Act provides for an order that “trading in any securities by or of a person or company cease permanently or for such period as is specified in the order”.

[26] Despite the requirement to hold a hearing as provided in subsection 127(4) of the Act, the Commission may, pursuant to subsection 127(5), make a temporary order where in its opinion, “the length of time required to conclude a hearing could be prejudicial to the public interest”. According to subsection 127(6), the temporary order takes “effect immediately and expires on the fifteenth day after its making unless it is extended by the Commission”.

[27] Subsection 127(7) of the Act authorizes the Commission to extend a temporary order “until the hearing is concluded if a hearing is commenced within the fifteen day period.”

[28] Notwithstanding subsection 127(7), subsection 127(8) provides that in the case of a cease trade order made under clause 2 of subsection 127(1), “The Commission may extend a temporary order for such period as it considers necessary if satisfactory information is not provided to the Commission within the fifteen-day period.”

[29] The Commission’s mandate, which is set out in section 1.1 of the Act, is:

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets.

[30] The Supreme Court of Canada has recognized that the “primary goal of securities legislation is the protection of the investing public” and the Commission is accorded “a very broad discretion to determine what is in the public interest” in achieving this goal (*Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4th) 385 (S.C.C.) at pp. 406, 408). This broad discretion allows the Commission to intervene even where there is no specific breach of the Act (*Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 at 931).

[31] Further, in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. The Queen in right of Quebec et al.*, [2001] 2 S.C.R. 132, the Supreme Court of Canada noted that the legislature clearly intended the Commission to have a very wide discretion in exercising its powers pursuant to subsection 127(1), stating that the “permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case” (at para. 39).

[32] In *Re Canadian Tire Corp.*, *supra* at 931, the Commission recognized that the dynamism and innovation of capital markets can, and does, lead to abuse. Accordingly, a “regulatory agency charged with oversight of the capital markets must have the capacity to move quickly to stop transactions which it considers to be injurious to the capital markets”.

[33] The authority of the Commission to issue and extend temporary cease trade orders is directly related to its goal of protecting investors. It is essential that the Commission be able to act quickly, at an early stage of an investigation, to protect investors from ongoing harm. In doing so, the Commission must consider the public interest in the particular

circumstances. We recognize that issuing a cease trade order is an extraordinary remedy and one which should not be exercised lightly. Where, however, there is credible evidence of harm to investors, the Commission must be able to act to prevent further harm. In our view, it is clear as a legal matter that a temporary cease trade order may be extended based on sufficient evidence of conduct that may be harmful to the public interest (see *Re Watson et al.* (2008), 31 O.S.C.B. 705).

C. The Evidentiary Basis for Extending a Temporary Order

[34] Subsection 127(8) of the Act authorizes an extension of a temporary cease trade order where “satisfactory information is not provided to the Commission”. We agree that in determining whether satisfactory information has been submitted, we must consider the apparent strength of the evidence put forward by Staff as well as any evidence put forward by the Respondent. As stated in *Re Valentine* (2002), 25 O.S.C.B. 5329 at 5331:

In exercising its regulatory authority, the Commission should consider all of the facts including, as part of its sufficiency consideration, the seriousness of the allegations and the evidence supporting them. The Commission should also consider any explanations or evidence that may contradict such evidence. This will allow it to weigh the threat to the public interest against the potential consequences of the order.

[35] In *Re Rodney Gold Mines Ltd.* (1972), 7 O.S.C.B. 159 (S.C.), the Court considered the predecessor to subsection 127(8) of the Act and held that there is a reverse onus on the party against whom a temporary cease trade order is made to provide the Commission with information to show cause as to why a temporary order should not be made permanent. As stated at page 160 of *Re Rodney Gold Mines Ltd.*:

We are of the opinion that the words “where satisfactory information is not provided to the Commission within the fifteen day period” places a burden on the party against whom the order is made to provide the Commission with information.

[36] Accordingly, where Staff has provided credible evidence of conduct that may be harmful to the public interest, the onus is then on the respondent to provide the Commission with satisfactory information that the temporary cease trade order should not be extended. Absent satisfactory information from the respondent, the Commission is justified in extending a temporary cease trade order.

D. There is Sufficient Evidence to Extend the Temporary Order against Grossman

[37] In determining this matter, we have considered the public interest as well as fairness to Grossman. Fairness requires that a respondent have the right to know the case which is being made against him, the right to submit contrary or explanatory evidence or information and the right to make argument and submissions. Grossman was given these opportunities. On the critical question of whether there is contrary evidence or

information that explains his involvement with Shallow Oil, Grossman elected not to submit affidavit evidence or to testify. As a result, the only evidence before us is the uncontroverted evidence of Staff. During the course of the hearing, we explained the hearing process to Grossman and gave him the opportunity to put his case before the Commission. Grossman did make submissions and he did cross-examine Vanderlaan. However, Grossman elected not to give or tender evidence.

[38] In *Re Mithras Management Inc.* (1990), 13 O.S.C.B. 1600 at 1610, the Commission emphasized the nature of the role of the Commission in protecting the public interest:

[...] the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out.

[39] This matter appears to involve potentially very serious conduct by Shallow Oil, O'Brien, Da Silva, Gahunia and Grossman, which appears to contravene key provisions of the 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 Act. Further, it appears that prohibited representations have been made to investors to effect trades in securities.

[40] Vanderlaan testified that Grossman was found occupying an office on the premises of Shallow Oil. Vanderlaan testified that inquiries of employees of Shallow Oil during the onsite investigation, as well as subsequent interviews with four employees, indicated that Grossman was “in charge” of the office from which sales of Shallow Oil shares took place and that Grossman was the individual responsible for the hiring and the day-to-day running of the business. In our view, there is sufficient credible evidence to link Grossman to Shallow Oil and its allegedly illegal activities.

[41] Although Grossman challenged the weight and adequacy of Staff's evidence, the onus is on him to provide the Commission with satisfactory information as contemplated by subsection 127(8) of the Act. Grossman has not provided any such information, and he has accordingly failed to discharge the onus upon him. We are therefore of the view that

the Temporary Order should be extended against Grossman, in addition to the other Respondents, until March 31, 2008.

[42] Grossman made numerous oral allegations that Staff's actions in this matter constitute malicious prosecution, abuse of power and bias, and have breached his Charter rights. These are serious allegations. However, there does not appear to us to be any credible grounds for those allegations. Staff appears to us to be acting in good faith with a view to the protection of the interests of investors. Accordingly, we deny Grossman's various requests for relief, including his request for financial compensation. These reasons in no way preclude Grossman from raising these issues before the Commission in the future, whether by motion or at the commencement of any future hearing in this matter. At this early stage of the investigation, however, we do not believe that these sorts of unsubstantiated allegations should form the basis for refusing to extend the Temporary Order to protect the interests of investors.

V. Conclusion

[43] For the reasons stated above, in our view, the public interest is best served by extending the Temporary Order against all the Respondents, including Grossman, until March 31, 2008 or until further order of the Commission. If Grossman has any information that he wishes to tender to Staff and the Commission to demonstrate that the Temporary Order should not be extended after March 31, 2008, he will have ample opportunity to do so.

Dated at Toronto on this 15th day of February, 2008.

"James E. A. Turner"

James E. A. Turner

"David L. Knight"

David L. Knight, FCA