

**IN THE MATTER OF
THE SECURITIES ACT, 1988, SS 1988, C S-42.2**

AND

IN THE MATTER OF BIGOPTION

AND

BIG MARKETS MU LTD

AND

MAHMUD AKBERALI KANJI

Hearing held: August 16, 2016

Before: Peter Carton (Chairperson), Howard Crofts, Hon. Larry Kyle (the "Panel")

Appearances: Brent Wawro, Investigator

Christina Meredith, for Staff, Securities Division

No appearances by BigOption, Big Markets MU Ltd or Mahmud Akberali Kanji or anyone on their behalf

Date of decision: September 21, 2016

Introduction

1. The allegations of Staff of the Financial and Consumer Affairs Authority ("Staff") against Big Markets MU Ltd, BigOption, and Mahmud Akberali Kanji (together, the "Respondents") are outlined in a Statement of Allegations, dated May 27, 2016. The actions that form the basis for the allegations took place from in or around October 2015 to in or around May 2016 (the "Relevant Time"). It is alleged that the Respondents contravened clauses 27(2)(a) and 27(2)(b) of *The Securities Act, 1988*, SS, 1988-89, c S-42.2 (the "Act") by acting as dealers and advisers in Saskatchewan while not registered to do so.

Facts

2. The Panel heard evidence from one witness, Mr. Brett Wawro. Mr. Wawro is an investigator employed with the Securities Division of the Financial and Consumer Affairs Authority (the "Authority").
3. Mr. Wawro's investigation and testimony at the hearing established the following:
 - a) that the investigation was prompted when a resident of Saskatchewan (the "Investor") contacted the Enforcement Branch of the Securities Division of the Authority about his online investment with the Respondents after he felt he had been taken advantage of by this online trading platform and lied to by his account manager about guaranteeing his trade;
 - b) that Mr. Wawro's investigation revealed that during the Relevant Time the Respondents maintained a web site at <http://www.bigoption.com> (the "Website");
 - c) that the Website offers Classic Binary options and advertises that the following benefits of trading in Classic Binary options with the Respondents:
 - Up to 85% return on investment per trade
 - Controlled Risk – You know the potential return of investment, as well as the amount you could lose before you start trading
 - Punctuality – Binary Options trading is available 24 hours a day, 7 days a week.
 - d) that in October 2015 the Investor visited the Website, entered his contact information and created a trading account; that the Investor provided the Respondents copies of his passport, driver's license, both sides of his credit card, and a utility bill in his name in order to finish setting up a trading account;
 - e) that after opening a trading account with the Respondents, the Investor approved a charge to his personal credit card of \$250.00 USD to fund his trading account, the purpose being to trade in "binary options" using the Respondents' services;
 - f) that the Investor did a handful of trades over the next month in his account on his own and he both won and lost some money and when his account balance was reduced to a few dollars he ceased actively trading;

- g) that the Investor accepted the Account Manager's offer and provided the Respondents with an Authorization to trade on behalf of a client, the Account Manager then placed an option trade, and won.
4. Following this win, the Account Manager convinced the Investor to deposit \$5,000 USD from the Investor's personal credit card into his trading account. On advice provided to the Investor by the Account Manager via Skype, the Investor agreed to place \$5,000 USD on a trade that was all but guaranteed.
 5. The Investor lost the trade, thereby losing all \$5,000 USD that he had placed on the trade.
 6. Mr. Wawro testified that none of the Respondents are registered with the Saskatchewan Corporations Branch, that none of the Respondents are registered in any capacity with the Authority under the Act, and that none of the Respondents are registered with the National Registration Database.

Analysis

7. The issues for determination for the Panel are: (i) whether the instruments offered for sale by Big Option were securities as defined by the Act; and (ii) did the respondent breach the Act by acting as a dealer and an adviser by engaging in the business of trading in and advising on securities or exchange contracts or holding itself out as engaging in the business of trading in and advising on securities or exchange contracts in Saskatchewan without being registered to do so, thereby contravening sections 27(2)(a) and 27(2)(b) of the Act.
8. Staff argued that the instruments offered for sale by the respondent were securities by virtue of being investment contracts.
9. During the Relevant Time, the definition of "security" under the Act included the following:

2(1) In this Act:

...
(ss) "security" includes:

...
(xiv) any investment contract;
(xvi) any item or thing not mentioned in sub clauses (i) to (xv) that is a futures contract or option but is not an exchange contract, whether any of the foregoing relate to an issuer or proposed issuer.
10. Binary options, when offered to retail investors for speculative or investment purposes are investment contracts, and are thus securities under clause 2(1)(ss)(xiv) of the Act.

Support for this view is found in *In the Matter of The Securities Act, 1988, SS 1988, c S-42.2; And In the Matter of RTG Direct Trading Group Ltd and RTG Direct Trading Limited* (a decision of the Authority dated February 19, 2016) [*“RTG Direct Trading”*]. Similar to the within matter, *RTG Direct Trading* concerned a binary contract arrangement that involved a contract between an offshore entity running an investment platform marketed to speculative investors.

11. In *RTG Direct Trading*, the Authority determined that binary options satisfy the test for an investment contract as established by the Supreme Court of Canada in *In the Matter of the Securities Act, RSO 1970, c 426 and Amendments thereto; And in the Matter of Pacific Coast Coin Exchange of Canada Limited*, [1978] 2 SCR 112 (SCC) [*“Pacific Coast Coins”*] As such, the Authority held that binary options are securities within the meaning of the Act.
12. The test for an investment contract has been established by the Supreme Court of Canada in *Pacific Coast Coins*.
13. The elements of an investment contract, as set out in *Pacific Coast Coins* at, can be summarized as follows:
 - a) the advancement of money by an investor;
 - b) with an intention or expectation of profit;
 - c) in a common enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those who solicit the capital or third parties; and
 - d) where the efforts made by those other than the investors are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.
14. Staff argued that the Binary options available on the Big Option website meet the *Pacific Coast Coins* test for an investment contract. The first two elements are easily met: there is a requirement that the money be advanced by the investor before any investment can be made and there is a clear intention on the part of an investor to achieve a profit.
15. In *Pacific Coast Coins*, when determining whether the common enterprise element of the test was satisfied, the Supreme Court of Canada found that Pacific Coast's customers were dependent upon Pacific Coast for the success of their investment and for the existence of a market on which to realize upon their investment. Customers of Pacific Coast could look to no one but Pacific Coast to realize on their contracts. As such, it was clear that the fortunes of the investor were entirely dependent upon those of the seller.

16. With the trading platform present on the Big Option website, the relationship between the platform and the investor is similarly one of economic interdependence. The investor is dependent upon the Respondents to provide credit to fund the margin purchases and to honour the trades. The platform is dependent upon the investor for the success of its enterprise. The platform's commissions, spreads, and interest earned on margin accounts are directly proportional to the degree of trading undertaken by investors.
17. With respect to whose efforts are the 'undeniably significant ones', the Supreme Court of Canada in *Pacific Coast Coins* held that "the key to the success of the venture is the effort of the promoter alone." In the present matter the determination of whether, and in what amount, an investor will be paid is entirely within the Respondents' control. The Respondents maintains their own website, issues the options, exercises the options, and control all payments to appropriate parties. The facts show that all 'managerial efforts in these transactions are undertaken by the Respondents.
18. The Panel concluded that the binary options present in the within matter are investment contracts, and are thus securities under subclause 2(1)(ss)(xiv) of the Act.
19. Based on the evidence before it, the Panel determined that the Respondents engaged in the business of trading in and advising on securities in Saskatchewan while not registered to do so by soliciting, advertising, and offering advice on the sale of binary options. The Respondents solicited, advertised, and offered advice to at least one Saskatchewan resident investor through the Big Option Website, via email, by Skype and via telephone. An investment transaction took place, and the Panel determined that the Respondents were clearly soliciting for business
20. The Panel also heard evidence that the Respondents have never been registered with the Authority in any capacity and as such, when they engaged in the business of trading in and advising on securities in Saskatchewan, they did so while not registered as a dealer or adviser, in direct contravention of clauses 27(2)(a) 27(2)(b) of the Act. Based on the evidence before it the Panel has determined that Big Option breached clauses 27(2)(a) and 27(2)(b) of the Act.

Conclusion

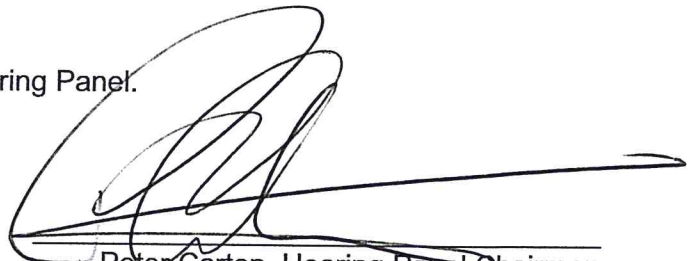
21. In evaluating the appropriate considerations in assessing sanctions, the Panel was directed to the criteria set out in a previous decision of the Saskatchewan Financial Services Commission, the predecessor to the Financial and Consumer Affairs Authority, and dated October 31, 2000: *In the Matter of The Securities Act, 1988 and in the Matter of Darcy Lee Bergen* ["*Bergen*"]. The hearing panel outlined a non-exhaustive list of factors that would influence the imposition of sanctions on a respondent:
- a) the seriousness of the respondent's conduct;
 - b) the harm suffered by investors as a result of the respondent's conduct;
 - c) the damage done to the integrity of the capital markets in the province by the respondent's conduct;
 - d) the extent to which the respondent was enriched;
 - e) factors that mitigate the respondent's conduct;
 - f) the respondent's past conduct;
 - g) the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of the province;
 - h) the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to investors;
 - i) the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to capital markets;
 - j) the need to deter those who participate in the capital markets from engaging in inappropriate conduct; and
 - k) orders made by the Commission in similar circumstances in the past.
22. Staff drew the Panel's attention to three previous decisions by Panels of the Authority: *In the Matter of The Securities Act, 1988, SS 1988, c S-42.2 and In The Matter of RBOptions* (a decision of the Authority dated February 19, 2016) ["*RBOptions*"]; *In the matter of the securities Act, 1988, SS, c42.2 and in the matter of AAOption* (a decision of the Authority dated June 8, 2016) ["*AAOption*"]; and *RTG Direct Trading*. The comparisons between these matters are strikingly similar. In *RBOptions*, *AAOption* and *RTG Direct Trading* the companies provided an online trading platform accessible by Saskatchewan residents, to trade binary options. The investors opened trading accounts, deposited funds, made initial investments that were successful. Then deposited more funds that eventually were purportedly lost through unsuccessful purchases of binary options. In *RBOptions*, *AAOption* and *RTG Direct Trading* a strong message was sent to the respondents that the integrity of the capital markets in the province must be preserved. The respondents were permanently banned from participation in the securities industry in Saskatchewan, were each assessed an administrative penalty of \$25,000 and

required to pay the costs related to the hearing. The Panel feels strongly that should attempt to promote consistency by considering orders made by other panels in similar circumstances in the past and that the penalties assessed in *RBOptions*, *AAOption* and *RTG Direct Trading* are appropriate in this matter.

23. Accordingly, the Panel will issue consequential Orders in due course, that reflects the following determinations on sanctions in a manner consistent with the public interest:

- a) Pursuant to subsection 134(1)(a) of the Act, all of the exemptions in Saskatchewan securities law do not apply to the Respondents, permanently;
- b) Pursuant to subsection 134(1)(d) of the Act, the Respondents shall cease trading in any securities, including derivatives, in Saskatchewan, permanently;
- c) Pursuant to subsection 134(1)(d.1) of the Act, the Respondents shall cease acquiring securities, including derivatives, for and on behalf of residents of Saskatchewan, permanently;
- d) Pursuant to subsection 134(1)(e) of the Act, the Respondents shall cease giving advice respecting securities, including derivatives, for and on behalf of residents of Saskatchewan, permanently
- e) Pursuant to section 135.1 of the Act, the Respondents shall pay an administrative penalty to the Financial and Consumer Affairs Authority of Saskatchewan in the amount of \$25,000;
- f) Pursuant to section 161(1) of the Act, the Respondents shall pay the costs of or relating to the hearing in this matter


24. This is the unanimous decision of the Hearing Panel.



Peter Carton, Hearing Panel Chairman



The Honourable L. A. Kyle
Hearing Panel Member



Howard Crofts
Hearing Panel Member