DECISION OF A PANEL APPOINTED PURSUANT TO *THE FINANCIAL AND CONSUMER AFFAIRS AUTHORITY OF SASKATCHEWAN ACT*

IN THE MATTER OF

THE SECURITIES ACT, 1988, S.S. 1988, C.S-42.2

AND

IN THE MATTER OF

OPTIONRALLY

TCM INVESTMENTS LTD.

(collectively referred to as the Respondents)

Hearing Held: November 29, 2016

Panel: Gordon D. Hamilton (Chairperson)

L. Paul Robinson (Panel Member)

Mary Ann McFadyen (Panel Member)

Appearances: Christina Meredith (Counsel for Staff of the Financial and Consumer Affairs Authority of Saskatchewan)

Brett Wawro (Investigator for the Financial and Consumer Affairs Authority of Saskatchewan)

No Appearance by OptionRally or TCM Investments Ltd. or anyone on their behalf

Date of Decision: March 16, 2020

Note: This matter was heard on November 29, 2016, by a hearing panel appointed in accordance with Section 17(2) of *The Financial and Consumer Affairs Authority of Saskatchewan Act* (the "FCAA Act") and consisting of Gordon D. Hamilton, L. Paul Robinson and Mary Ann McFadyen. L. Paul Robinson left his position with the Authority after the hearing and took no part in the decision. Because quorum was maintained by the hearing panel in accordance with Section 17(6) of the FCAA Act, no other persons were appointed to the hearing panel, and the decision was rendered by the remaining panel members.

Introduction

1. In the Statement of Allegations by Staff of the Securities Division of the Financial and Consumer Affairs Authority of Saskatchewan, OptionRally and TCM Investments Ltd. (the "Respondents") were alleged to be engaging in the business of trading in securities or derivatives or holding themselves out as such in Saskatchewan. The allegations arose out of Section 27(2) of *The Securities Act, 1988* (the "Act"), which is the registration requirement.

2. A hearing was convened to give the Respondents the opportunity to respond to these allegations. The Respondents did not appear at the hearing.

3. The requested relief included an order that the Respondents cease their acquisition, trading and giving of advice in relation to securities or derivatives in Saskatchewan, and that none of the exemptions from registration apply to them. In addition, the Hearing Panel was asked to impose an administrative penalty as well as a compensation order for the benefit of any Saskatchewan investor who suffered a financial loss.

Preliminary Matters

4. The Respondents were sent the temporary cease trade order issued on March 21, 2016, which was subsequently extended until a decision is rendered. The notice for the hearing informed the Respondents of their right to raise any preliminary objections, including raising any issues around their availability, or lack thereof, for attendance at the hearing on the date specified. No request for an adjournment was received and no preliminary objections were raised by the Respondents.

5. The Hearing Panel examined the service of the relevant orders and notices in this matter in the normal course. No issues were identified by the Hearing Panel regarding the appropriateness of the service of the documents on the Respondents.

6. Accordingly, the Hearing Panel determined that the hearing should proceed in the absence of the Respondents.

Issues

7. Three issues were presented for determination by the Hearing Panel, namely:

    a) Is a binary option a security within the meaning of the Act?
    b) Did the Respondents act as dealers and/or advisers, or hold themselves out as such, without being properly registered and/or without having been granted an exemption contrary to Section 27(2)(a and b) of the Act?
    c) What is the appropriate Order of the Hearing Panel in the circumstances?

Facts

8. The Respondent, OptionRally, is related to the Respondent, TCM Investments Ltd., to the extent that it is the business or trade name used by TCM Investments Ltd. on its public website: www.optionrally.com (the "Website").

9. The Respondent, TCM Investments Ltd. is a corporate entity registered to deal in securities in the country of [redacted]. It has no business corporate registration in Canada and no known corporate offices in Canada. It owns the OptionRally Website, which had been previously owned by LFG Investments Ltd. from August 2013 until January 2016.

10. The Website includes an online trading platform for use by the public. The Website describes its platform as follows:

> *The OptionRally binary options trading platform is operated by TCM Investments Ltd which is authorized and regulated by the Belize International Financial Services Commission under IFSC license number: IFSC/60/422/TS/15.*

11. In addition to the trading platform, the Website provides education on how to trade binary options and assists investors with the trading of binary options. The Website further states:

> *Our binary options trading expertise makes financial trading in shares, commodities, indices and Forex easy to learn, practice and trade. Our online binary options trading platform lets you trade financial markets from anywhere in the world 24 hours a day. Our financial trading forums and financial trading blogs offer you all the insight you need to succeed in trading binary options. We deliver exceptional personal service and support to help all our traders understand financial training, review their binary options investment strategies and decide how to seize the opportunity of binary options trading in shares, equities and Forex.*

12. In August 2015, a Saskatchewan investor (the "Investor") came across the Website. He decided to open a trading account. As a part of the account opening procedure, he provided the Respondents with a copy of his passport, driver's license and credit card. He deposited $250 USD into his trading account, and began trading with the assistance of an account manager assigned to his account. The Investor had never traded in binary options previously, and exclusively relied upon the information contained on the Website or provided by his account manager.

13. The Investor, in order to access a $1000 USD bonus made available to him by his account manager, deposited an additional $2000 USD into his trading account with the

Respondents. On the advice of his account manager, the Investor patterned his trades after other binary option traders' activities. Those trading activities were provided to the Investor by the Respondents.

14. In September 2015, the Investor attempted to withdraw funds from his trading account. His request was denied in October 2015 on the basis that his account contained bonus funds. A second attempt to withdraw funds was made in early 2016, which the Respondents' account manager confirmed would be processed, but which was not. Thereafter, all attempts by the Investor to communicate with the Respondents were unsuccessful, as no replies or responses were received.

15. The Hearing Panel was provided with evidence that the Respondents have never been registered in any capacity in Saskatchewan, nor have they ever been granted an exemption, for the trading in and advising on securities, either as dealers or advisers.

Arguments of the Parties

16. Legal counsel for the Staff argued that the material facts supported a finding that the Respondents were engaged in the business of trading in and advising on securities in Saskatchewan, and in holding themselves out as traders in and advisers on securities. It was argued that the facts confirmed that the Respondents owned and/or maintained a website available to Saskatchewan investors. The website contained a binary options trading platform, operated by the Respondents, through which a Saskatchewan investor traded binary options with the assistance and advice of representatives working on behalf of the Respondents. Regardless of whether the binary option trades were real or fake (which cannot be determined with any certainty without information from the Respondents), it was argued that the Respondents clearly held themselves out as engaging in the business of trading and advising on securities.

17. The Hearing Panel was directed to previous decisions under the Act which concluded that binary options were investment contracts, and therefore constituted a security under the Act. In support of this assertion, legal counsel for the Staff cited the Supreme Court of Canada decision of *Pacific Coast Coin Exchange of Canada Limited*[1] as the foundational case. Legal Counsel also referenced several decisions issued under *The Securities Act, 1988*, including *RTG Direct Trading*[2], *Zulutoys Limited and RBOptions*[3], and *AAoption, Galaxy International Solutions and David Eshel*[4], as authorities in support of its argument.

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[1] *Pacific Coast Coin Exchange v. Ontario Securities Commission*, 1977 CanLII 37 (SCC), [1978] 2 SCR 112

[2] *In the Matter of RTG Direct Trading Group Ltd. and RTG Direct Trading Limited,* (February 19, 2016), Decision of the Financial and Consumer Affairs Authority of Saskatchewan.

[3] *In the Matter of Zulutoys Limited and RBOptions* (February 19, 2016), Decision of the Financial and Consumer Affairs Authority of Saskatchewan.

[4] *In the Matter of AAoption, Galaxy International Solutions Ltd., and David Eshel* (February 19, 2016), Decision of the Financial and Consumer Affairs Authority of Saskatchewan.

18. Legal counsel for the Staff indicated that the relevant provisions of the Act included Subsections 2(1)(n), 2(1)(ss), 2(1)(vv), 27(2)(a) and 27(2)(b) with respect to determining whether the Respondents were in breach of the Act. With respect to the authority of the Hearing Panel to fashion an appropriate remedy, the Hearing Panel was directed to its powers set out in Subsection 134(1), 135.1, 135.6 and 161 of the Act. The request for costs pursuant to Section 161 was later withdrawn prior to the issuance of this decision.

19. In responding to the alleged breaches of the Act, the Hearing Panel was reminded of its obligations with respect to the public interest, the value of deterrence, and the list of factors set out in *Bergen*[5].

Analysis (including the relevant law)

20. In *RTG Direct Trading Ltd.,*[6] a hearing panel of the Financial and Consumer Affairs Authority examined the test for investment contracts under the Supreme Court of Canada decision in *Pacific Coast Coin Exchange of Canada Limited*.[7] The Supreme Court indicated that in applying the operative legislation, such as the *Securities Act, 1988*, each specific legislative provision "must be construed broadly, and it must be read in the context of the economic realities to which it is addressed. Substance, not form, is the governing factor."[8]

21. The substance of the Respondents' activities involved promoting an online trading platform, assisting with the set-up of a trading account, and advising investors on how to make trades as well as what trades should be made. The Investor was heavily reliant upon the guidance and information provided by the Respondents through their account representative. It was the Investor's funds which were funneled through the trading account with the Respondent for the sole purpose of trading on the Respondents' online trading platform.

22. The necessary components of an investment contract set out by the Supreme Court of Canada in *Pacific Coast Coin Exchange of Canada Limited* were summarized in *RTG Direct Trading Ltd.* as:
    i) The advancement of money by an investor,
    ii) with an intention or expectation of profit,
    iii) in a common enterprise in which the fortunes of an investor are interwoven with and dependent upon the efforts and success of those who solicit the capital or third parties, and

[5] *In the Matter of Darcy Lee Bergen* (October 31, 2000), Decision of the Saskatchewan Financial Services Commission.
[6] *Supra note 2*.
[7] *Supra note 1*.
[8] *Supra note 1*, p 127

iv) *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.*[9]

23. Given the above findings of facts, all four components are evident so as to conclude that an investment contract existed. Subsection 2(1)(ss)(xiv) recognizes that an investment contract is a security within the meaning of the Act.

24. The first issue is therefore answered in the affirmative: A binary option is a security under the Act.

25. The findings of fact are clear. The Respondents offered an online trading platform. They helped the Investor open a trading account and solicited the Investor's funds to invest in binary options. The investment funds were deposited by the Investor in a trading account set up by the Respondents for the sole purpose of trading through the online website. The Investor knew nothing about binary options before, and the Respondents provided him with advice on what to trade and when.

26. A "dealer" is defined under the Act in Subsection 2(1)(n) as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in securities or derivatives as principal or agent." The Respondents held themselves out as engaging in the business of trading to the Investor who placed his investment funds into one of the Respondents' trading accounts. Their website touted the Respondents' "binary options trading expertise".

27. An "adviser" is defined under the Act in Subsection 2(1)(a.1) as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising another as to the investing in or buying or selling of securities or derivatives." The Respondents advised the Investor on what trades to make, given that the Investor had never heard of binary options before. In addition to the "personal service" advice from the Respondents' account representative, the online trading platform included forums and blogs to provide supplementary advice and information to the Investor to "help all our traders understand financial trading".

28. Under Subsection 2(1)(vv) of the Act, a "trade" is defined as including:

(i) any transfer, sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in subclause (iv), a transfer, pledge, mortgage or encumbrance of securities for the purpose of giving collateral for a bona fide debt;

(…)

[9] *Supra note 2*, par 19

(ii) participation as a trader in a transaction in a security made on or through the facilities of an exchange or reported through the facilities of a quotation and trade reporting system;

(…)

(iii) any receipt by a registrant of an order to buy or sell a security or an order to buy, sell, enter into, amend, terminate, assign or novate a derivative;

(…)

(v) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of anything mentioned in subclauses (i) to (iv);

30. The findings of facts set out above confirm that the activities of the Respondents involved a trade on behalf of the Investor, within the meaning of Subsection 2(1)(vv) of the Act. Section 27(2) of the Act requires that parties who engage in the trading in or advising on securities must be registered. It states:

27(2) No person or company shall:

(a) act as a dealer or underwriter unless the person or company:

(i) is registered as a dealer; or

(ii) is registered as a representative of a registered dealer and is acting on behalf of the dealer;

(b) act as an adviser unless the person or company:

(i) is registered as an adviser; or

(ii) is registered as a representative of a registered adviser and is acting on behalf of the adviser;

31. The facts presented to the Hearing Panel confirmed that the Respondents were not registered as a dealer or as an adviser. On that basis, the second issue is answered in the affirmative.

32. In the event that the Respondents were held to be in breach of the registration requirements in the Act, the Hearing Panel was requested to consider the following sanctions:
    a. All of the statutory exemptions in Saskatchewan securities laws do not apply to the Respondents, pursuant to Subsection 134(1)(a);
    b. The Respondents shall cease trading in any securities or derivatives in Saskatchewan, pursuant to Subsection 134(1)(d);
    c. The Respondents shall cease acquiring any securities or derivatives for and on behalf of residents of Saskatchewan, pursuant to Subsection 134(1)(d.1);

d. The Respondents shall cease giving advice respecting any securities, trades or derivatives in Saskatchewan, pursuant to Subsection 134(1)(e);
e. The Respondents shall pay an $25,000 administrative penalty to the Authority, pursuant to Subsection 135.1;
f. The Respondents shall pay financial compensation to each person or company found to have sustained financial loss as a result, in whole or in part, of the Respondents' contravention of the Act in such amount as to be determined, pursuant to Subsection 135.6.

33. All of the requested sanctions have been approved in previous cases with comparable factual circumstances involving a Saskatchewan investor who invested his funds with an online binary options trading platform which was in breach of the registration requirements of Subsection 27(2). For example, in *AAOption,*[10] *RTG Direct Trading*[11], and *RBOptions*[12], other hearing panels accepted that sanctions similar to those sought in this instance were appropriate. Those precedential decisions relied upon the public interest considerations expressed in Subsection 134(1) of the Act and in *Bergen*[13]*,* which highlighted, *inter alia*, the importance of deterrence of future inappropriate conduct, the harm to a Saskatchewan investor, the enrichment of the Respondents, the risk to other investors if the Respondents are permitted to continue with their unregistered conduct, and the integrity of the capital markets in relation to the proper and consistent registration of traders and advisers.

34. The legitimate motivation behind sanctions was best expressed by the Ontario Securities Commission in *Lehman Cohort Global Group Inc. et al.*[14]

> *The Commission's objective when imposing sanctions is not to punish past conduct, but rather to restrain future conduct that may be harmful to investors or Ontario's capital markets. This objective was described in Re Mithras Management Ltd. as follows:*
>
> > *... 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*

[10] *Supra note 4*
[11] *Supra note 2*
[12] *Supra note 3*
[13] *Supra note 5*
[14] *In the Matter of Lehman Cohort Global Group Inc., et al,* (2011) 34 OSCB 2999, par 24, Decision of the Ontario Securities Commission.

> *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.*

35. The Hearing Panel adopts the Ontario Securities Commission's approach for the imposition of sanctions, which are consistent with the objectives of *The Securities Act, 1988*. For those reasons, the requested sanctions are determined to be appropriate, with the exception of the compensation order. There was no evidence presented which would confirm that, but for the failure to register, the Investor lost his investment funds as a result of the Respondents' failure to register. Rather the evidence suggested that the Investor lost his funds as a result of the refusal of the Respondents to continue to communicate with the Investor and provide him with a refund of the funds in his investment account. The failure and/or refusal of the Respondents to participate in the hearing or respond to any correspondence in regards to the allegations against them suggest a larger ethical issue than simply the failure or refusal to register under Subsection 27(2).

Conclusion

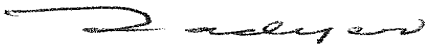
36. Accordingly, the Hearing Panel has concluded that OptionRally and TCM Investments Ltd., the Respondents, were engaging in the business of trading in securities and holding themselves out as such in Saskatchewan, in such a manner that was contrary to and in breach of Section 27(2) of *The Securities Act, 1988*.

37. The Hearing Panel has also determined that it is in the public interest that the appropriate sanctions against the Respondents shall be as follows, with the appropriate order to follow:
    a. All of the statutory exemptions in Saskatchewan securities laws do not apply to the Respondents;
    b. The Respondents shall cease trading in any securities or derivatives in Saskatchewan;
    c. The Respondents shall cease acquiring any securities or derivatives for and on behalf of residents of Saskatchewan;
    d. The Respondents shall cease giving advice respecting any securities, trades or derivatives in Saskatchewan; and
    e. The Respondents shall pay a $25,000 administrative penalty to the Financial and Consumer Affairs Authority.

38. This is the unanimous decision of the Panel.

Dated in Regina, Saskatchewan, this 16th day of March, 2020.

Gordon D. Hamilton (Chairperson)



Mary Ann McFadyen (Panel Member)