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Citation: MOAG Copper Gold Resources Inc (Re), 2020 ONSEC 3
Date: 2020-01-15
File No. 2018-41

IN THE MATTER OF
MOAG COPPER GOLD RESOURCES INC.,
GARY BROWN and BRADLEY JONES

REASONS AND DECISION
(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)

Hearing:	November 4, 6 and 11, 2019	
Decision:	January 15, 2020	
Panel:	Timothy Moseley	Vice-Chair and Chair of the Panel
	M. Cecilia Williams	Commissioner
	Mary Anne De Monte-Whelan	Commissioner
Appearances:	Anna Huculak	For Staff of the Commission
	Peter Cooper	For MOAG Copper Gold Resources Inc.
	Bradley Jones appearing on his own behalf	
	No one appearing for Gary Brown	

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REASONS AND DECISION

I. OVERVIEW

[1] On October 13, 2015, a Director of the Ontario Securities Commission (the **Commission**) issued an order (the **Cease Trade Order**)[1] providing that all trading in securities of the respondent MOAG Copper Gold Resources Inc. (**MOAG**) was to cease for 15 days. The Cease Trade Order was imposed at the request of the respondent Gary Brown, MOAG's then president and CEO, because of his and MOAG's contention that MOAG's financial statements over the previous several years contained material misstatements.

[2] On October 26, 2015, the Director extended the Cease Trade Order pending any further order.[2] The Cease Trade Order remains in effect.

[3] Staff alleges that between October 2015 and February 2017, while the Cease Trade Order was in effect, MOAG violated that order by issuing and selling to 92 Taiwan residents approximately US$7.4 million of unsecured, convertible US dollar-denominated debentures (the **Debentures**).

[4] Staff alleges that the individual respondents (Brown, who was the president and CEO; and Bradley Jones, who was a director and officer) violated the Cease Trade Order by engaging in a variety of acts in furtherance of MOAG's trades.

[5] For the reasons set out below, we find that each of the respondents violated the Cease Trade Order and that they therefore contravened Ontario securities law.

[6] As we explain later in these reasons, we consider it unnecessary to address three additional allegations made by Staff:

a. that each of Brown and Jones, as an officer and/or director of MOAG, authorized, permitted or acquiesced in MOAG's violations of the Cease Trade Order;

b. that the respondents' conduct was contrary to the public interest; and

c. that the respondents should be deemed to be liable under s. 122 of the *Securities Act* (the **Act**).[3]

II. BACKGROUND

A. Respondents

[7] Prior to December 4, 2018, MOAG was a reporting issuer in Ontario, with its common shares listed on the Canadian Securities Exchange. It also has outstanding options, as well as convertible debentures of one- to two-year terms. MOAG holds itself out as engaging in the exploration and evaluation of mineral properties.

[8] Brown is a resident of British Columbia. He is a co-founder and significant shareholder of MOAG. Between September 2015 and December 2015, Brown acted as a director of MOAG and as its president and CEO.

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[1] (2015) 38 OSCB 8857
[2] (2015) 38 OSCB 9149
[3] RSO 1990, c S.5

[9] Jones is a resident of Ontario. He is MOAG's other co-founder and significant shareholder. At all times relevant to this proceeding, Jones acted in some capacity with respect to MOAG. Initially, he was a director and the CFO, then just a director, then a director and the CEO and CFO, and finally, just a consultant.

B. Cease Trade Order

[10] Paragraph 2 of s. 127(1) of the Act authorizes the Commission to order that trading in any securities of a company cease permanently or for such period as is specified in the order.

[11] Subsection 6(3) of the Act authorizes a quorum of the Commission to assign to any Director of the Commission various powers under the Act, including the power under s. 127(1)2 of the Act to issue a cease trade order. The term "Director" is defined in s. 1(1) of the Act to include "a person employed by the Commission in a position designated by the Executive Director for the purpose of this definition." By written designation dated March 4, 2010, the Executive Director designated each Manager in the Corporate Finance Branch of the Commission as a Director.[4] That designation was in effect at the relevant time.

[12] On October 25, 2013, pursuant to s. 6(3) of the Act, the Commission assigned to each Director (and therefore, by extension, to each Manager in the Corporate Finance Branch) the power under s. 127(1)2 of the Act to issue a cease trade order in respect of an issuer, under certain circumstances.[5] That assignment, which was in effect at the relevant time, specifies those circumstances as follows:

a. where the making of the order is not contested on its merits; and

b. where the order relates to securities of a reporting issuer that has failed to file various continuous disclosure documents required to be filed by Ontario securities law, or whose financial statements filed with the Commission were not prepared in accordance with generally accepted accounting principles.

[13] On October 13, 2015, a Manager in the Commission's Corporate Finance Branch issued the original Cease Trade Order in respect of securities of MOAG. Both of the conditions set out in paragraph [12] above were met, in that the order was made on MOAG's request, and it recited that MOAG had failed to meet various continuous disclosure requirements.

[14] None of the respondents in this proceeding contests the validity of the Cease Trade Order.

[15] As contemplated by s. 127(5) of the Act, the Cease Trade Order was temporary. Therefore, pursuant to s. 127(6) of the Act, it was to expire on October 28, 2015 (fifteen days after its making), unless extended by the Commission. On October 26, 2015, two days before its expiry, a Deputy Director of the Commission (and therefore a "Director" as defined in s. 1(1) of the Act) extended the Cease Trade Order until further order. None of the respondents contests the validity of the extension of the Cease Trade Order. It remains in effect.

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[4] (2010) 33 OSC 2069
[5] (2013) 36 OSCB 10876

[16] The Cease Trade Order forms part of "Ontario securities law", by virtue of s. 1(1) of the Act, which defines that term to include a decision of the Commission or of a Director.

III. PARTICIPATION IN THIS PROCEEDING

A. MOAG

[17] MOAG was not represented by counsel at the merits hearing. Peter Cooper, the current CEO of MOAG, participated in the hearing by teleconference on behalf of MOAG. MOAG called no evidence at the hearing.

B. Brown

[18] At preliminary attendances in this proceeding up to and including the attendance on October 4, 2019, Brown appeared through counsel, who participated by teleconference. On October 15, 2019, Brown's counsel brought a motion to be removed as counsel. The Commission made an order to that effect on October 17, 2019.[6]

[19] On October 24, 2019, Brown sent an email to the Registrar, advising that he needed an additional 90 days to prepare for the merits hearing, which was scheduled to begin on November 4, 2019. The Commission treated Brown's request as a motion, which was heard on October 28, 2019, with Brown participating by teleconference.

[20] At that hearing, the Commission dismissed Brown's motion, for reasons delivered orally at that time. Brown replied: "…don't bother sending me anything. I'll just go as it is. I don't want to talk about this anymore. Do whatever you want. Thank you very much. Good bye."[7] Brown then hung up. He did not rejoin the call.

[21] Neither Brown nor anyone on his behalf appeared at the merits hearing.

[22] The *Statutory Powers Procedure Act* provides that where a party has been given proper notice of a hearing but does not attend, the tribunal may proceed in the party's absence and the party is not entitled to any further notice in the proceeding.[8] We were satisfied that Brown had proper notice of the merits hearing. We proceeded in his absence.

C. Jones

[23] Jones attended the merits hearing in person. Jones had been represented by counsel in the preliminary stages of this proceeding, was assisted by counsel in drafting an agreed statement of facts (referred to in more detail beginning at paragraph [26] of these Reasons), and was self-represented at the hearing.

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[6] (2019) 42 OSCB 8427

[7] *Hearing Transcript*, October 28, 2019 at 27 lines 7-10

[8] RSO 1990, c S.22, s 7(1). See also *Ontario Securities Commission Rules of Procedure and Forms*, (2019) 42 OSCB 6528, r 21(3)

IV. ANALYSIS

A. Evidentiary matters

1. Standard and burden of proof

[24] The standard of proof applicable to Commission proceedings is the balance of probabilities. Staff must prove, on the basis of clear, convincing and cogent evidence, that it is more likely than not that the alleged events occurred.[9]

[25] If Staff fails to do so, or if a respondent presents an alternative explanation that is as likely as the explanation asserted by Staff, then Staff will not have met its burden.[10]

2. Staff's evidence

[26] Prior to the hearing, Staff and Jones filed their agreed statement of facts. Jones submitted no further evidence at the hearing.

[27] Staff called two witnesses:

a. Matthew Au, Senior Accountant in the Corporate Finance Branch of the Commission; and

b. Peter Cho, Senior Forensic Accountant in the Enforcement Branch of the Commission.

[28] Au's and Cho's testimony was largely hearsay evidence. Section 15 of the *Statutory Powers Procedure Act* provides that a panel may admit as evidence any relevant oral testimony or document even if not given under oath or affirmation, or admissible in court. This extends to hearsay evidence.

[29] The respondents neither contradicted nor challenged the reliability of Staff's evidence, including the hearsay evidence. We found Au and Cho to be credible and their testimony to be reliable. We accept their evidence and we give all of it full weight.

3. Respondents' evidence

[30] As noted above, Jones submitted an agreed statement of facts but no further evidence. Neither MOAG nor Brown submitted any evidence.

B. Substantive Issues

[31] Staff's allegations present two principal issues:

a. Did MOAG trade in securities in breach of the Cease Trade Order?

b. If the trades in MOAG's securities did violate the Cease Trade Order, did Jones or Brown engage in acts in furtherance of those trades?

[32] We address each of these issues in turn.

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[9] *FH v McDougall*, 2008 SCC 53 at paras 40, 46, 49; *Al-Tar Energy Corp (Re)*, 2010 ONSEC 11, (2010) 33 OSCB 5535 at paras 32-34

[10] A. Bryant, S. Lederman & M. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018) at 97

1. Did MOAG trade in securities in breach of the Cease Trade Order?

(a) Introduction

[33] In order to establish its allegation against MOAG, Staff must prove that MOAG: (i) traded; (ii) in its own securities; (iii) while the Cease Trade Order was in effect.

[34] Staff submits, and we agree, that the Debentures are securities. The Act defines a "security" to include all of the following, all of which apply to the Debentures in this case:

a. any document, instrument or writing commonly known as a security;

b. any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company; and

c. a bond, debenture, note or other evidence of indebtedness.[11]

[35] A "trade" includes any sale or distribution of a security for valuable consideration and any acts in furtherance of a trade.[12]

[36] The debenture analysis prepared by Cho shows that from October 2015 to February 2017, while the Cease Trade Order was in effect, MOAG issued and sold, in 140 transactions, to 92 Taiwan residents approximately US$7.4 million of unsecured, convertible debentures including:

a. approximately US$3.6 million that were issued for cash (the **New Debentures**); and

b. approximately US$3.8 million that were issued to holders of maturing debentures as rollovers (the **Rolled Debentures).**

(b) New Debentures

[37] With respect to the New Debentures, Cho testified that he had reviewed, among other documents:

a. subscription agreements,

b. Debenture certificates showing the name of the investor, amount invested, date of issuance and date of maturity, and

c. MOAG bank records showing:

(a) receipt of funds for the Debentures; and

(b) commission payments by MOAG to its Taiwanese agent, H&W International Ltd. (**H&W**).

[38] The New Debentures are securities, and by issuing them, MOAG traded them. MOAG did so while the Cease Trade Order was in effect. Those trades violated the order.

[11] s. 1(1), "security" definition, (a), (b) and (e)
[12] s. 1(1), "trade" or "trading" definition, (a) and (e)

(c) Rolled Debentures

[39] We now turn to consider whether MOAG's issuance of the Rolled Debentures constituted "trading". While both MOAG and Jones admitted this conclusion, we wish to address the issue in some detail, particularly in the apparent absence of any previous Commission decision that explicitly deals with the question.

[40] Cho testified that for the Rolled Debentures, he reviewed, among other documents:

a. consent agreements signed by investors to rollover the maturing debentures;

b. newly-issued Debenture certificates showing the name of the investor, the amount represented by the certificate, and new dates of issuance and maturity; and

c. MOAG bank records showing payment of commissions to H&W for these transactions.

[41] Staff submits that the valuable consideration received by MOAG for the Rolled Debentures was the investors' forbearance of repayment on the maturity date of the existing debentures. Staff relies on *Cook (Re),* a decision of the British Columbia Securities Commission (the **BCSC**), in which the BCSC determined that the rollover of a series of promissory notes constituted trades in securities. The BCSC stated:

> In this case, a new security was issued every time an interest bearing promissory note was renewed. It is clear that in each case, the new interest bearing promissory note was issued in satisfaction of repayment of its predecessor interest bearing promissory note. In other words, there was clearly an issuance of (or trade in) a security for valuable consideration (in this case, forbearance of repayment on the maturity date of the previously issued note) every time a new interest bearing promissory note was issued.[13]

[42] This Commission reciprocated the BCSC's order in that case.[14]

[43] The Alberta Securities Commission has also determined that the rollover of a debt investment (wholly or partly) at maturity into a comparable new investment for a new term constituted a sale of a new security, and therefore a trade.[15]

[44] MOAG investors who chose to rollover their maturing debentures received new debenture certificates, which were indistinguishable in form from the certificates issued for New Debentures. Certificates for the Rolled Debentures reflected new and different issue and maturity dates.

[45] The consent agreements executed by investors to rollover their maturing debentures stated that: "[o]n the maturity date of the present US Dollar debenture the investor principle [*sic*] will be deemed to be payment for the new

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[13] *Cook (Re)*, 2017 BCSECCOM 136 at para 128.

[14] *Cook (Re)*, 2018 ONSEC 6, (2018) 41 OSCB 1497 (***Cook***), at para 4 (reciprocated with minor variances due to BC legislative references to "exchange contracts"). The definition of a "distribution" under s.1(1) of the Act includes trades in newly issued securities.

[15] *Johnston (Re)*, 2013 ABASC 376 at para 85.

USD debenture."[16] Each consent agreement showed a handwritten figure, which amount would be deemed to be payment for the new US dollar debenture.

[46] We have no hesitation concluding that MOAG's issuances of Rolled Debentures were trades. In return for an investor's forbearance of MOAG's obligation to pay out a maturing debenture, MOAG issued to the investor a different debenture, with a different maturity date. Concluding that those issuances were trades is consistent with the definition of "trade" and with the investor protection purpose of the Act.

[47] MOAG traded the Rolled Debentures while the Cease Trade Order was in effect. Those trades violated the order.

2. Did Jones or Brown engage in acts in furtherance of MOAG's trades?

(a) Jones

[48] Any act in furtherance of a trade is itself a trade.[17] Any act in furtherance of MOAG's improper trades would therefore be a violation of the Cease Trade Order, and a contravention of Ontario securities law.

[49] Jones, who was at various times a director, officer and/or consultant of MOAG, admitted that his conduct as described in the agreed statement of facts was contrary to the public interest. However, Jones did not admit to having contravened Ontario securities law. Staff submits, and we conclude, that Jones did contravene Ontario securities law.

[50] Jones's agreed statement of facts included the following facts relevant to this allegation:

a. between October 13, 2015 and December 18, 2015, when Jones was a director of MOAG:

   i. MOAG issued and sold US$610,000 of New Debentures to seven investors for cash;

   ii. Jones encouraged Brown to pay H&W the commissions owing to it;

   iii. Jones prepared, printed and signed the Debenture certificates and accompanying cover letters;

   iv. Jones sent out the Debenture certificates and accompanying cover letters to the investors;

   v. Jones updated MOAG's Debenture records, including files containing materials such as copies of investors' identification and executed subscription agreements (the activities referred to in (iii), (iv) and this subparagraph (v) are collectively referred to as the **Trading Activities**); and

   vi. Jones was aware that the trading was in breach of the Cease Trade Order;

[16] Exhibit 8, Investor Documents at 5
[17] s. 1(1), "trade" or "trading" definition, (e)

b. between December 19, 2015 and January 16, 2017, when Jones was a director and CEO and CFO of MOAG:

   i. MOAG issued and sold:

      (a) US$3.8 million of Rolled Debentures to 39 holders of maturing debentures; and

      (b) US$2.8 million of New Debentures to 64 investors;

   ii. Jones engaged in the Trading Activities and paid H&W's commissions with respect to those sales; and

   iii. Jones was aware that the trading was in breach of the Cease Trade Order; and

c. between January 17, 2017, and February 10, 2017, when Jones had become a consultant to MOAG after ceasing to be a director, CEO and CFO of the company:

   i. on January 23, 2017 and February 10, 2017, Jones arranged for MOAG to issue and sell US$210,000 of Debentures to two investors;

   ii. Jones engaged in the Trading Activities and paid H&W's commissions with respect to those sales; and

   iii. Jones was aware that the trading was in breach of the Cease Trade Order.

[51] We find that these activities were acts in furtherance of MOAG's improper trading and that they were in breach of the Cease Trade Order. As a result, Jones's conduct contravened Ontario securities law.

(b) Brown

[52] As noted above in paragraph [50](a)(i), between October 13, 2015 and December 18, 2015, MOAG issued US$610,000 of New Debentures while Brown was a director and the president and CEO.

[53] Brown asked the Commission to issue the Cease Trade Order. He was aware that H&W continued to sell Debentures after the Cease Trade Order had been issued. Brown monitored the funds from the Debenture sales coming into MOAG's bank account online. He took on the obligation to pay H&W the commissions owing to it and he wired those commission payments to H&W. Brown corresponded with H&W about the payment of their commissions and spoke with H&W representatives about their commissions.

[54] We find that Brown's conduct constituted acts in furtherance of MOAG's improper trading and that those acts were in breach of the Cease Trade Order. As a result, Brown's conduct contravened Ontario securities law.

3. Staff's additional allegations

[55] Staff makes three additional allegations that we consider unnecessary to address fully. Some explanation and comments are in order, however.

(a) Indirect liability of Jones and Brown

[56] The first is with respect to Jones's and Brown's involvement with MOAG's improper trading. As an alternative to Staff's submission that Jones and Brown were responsible as principals for that improper trading, Staff submits that they are indirectly liable because they authorized, permitted or acquiesced in MOAG's improper trading. Because we have found that Jones and Brown were responsible as principals, we need not address the alternative submission as to indirect liability. We comment below, at paragraph [61], about the section of the Act relied on by Staff for this allegation.

(b) Conduct contrary to the public interest

[57] The second allegation we consider unnecessary to address fully is that the respondents' conduct was contrary to the public interest. Having found that the conduct contravened Ontario securities law, we need not go further.

(c) Section 122 of the Act

[58] Finally, we address Staff's allegations that the respondents should be deemed to be liable under s. 122 of the Act. These allegations rely on two provisions within s. 122:

a. clause 122(1)(c), which provides that every "person or company that… contravenes Ontario securities law… is guilty of an offence"; and

b. subsection 122(3), which provides that directors or officers of a company who authorize, permit or acquiesce in the commission of an offence by the company are themselves guilty of an offence.

[59] With respect to the first of those two, we have already found that all three respondents contravened Ontario securities law. We see no merit in this case in going further and considering s. 122(1)(c). Staff has proved the contravention, and we cannot find a party to be guilty of an offence. Nothing is gained by resorting to s. 122(1)(c) as well.

[60] With respect to the second of the two provisions (s. 122(3)), we addressed above the merits of Staff's allegation regarding indirect liability. We found Jones and Brown liable as principals. It is therefore unnecessary to consider Staff's alternative allegation that they are indirectly liable as well.

[61] Even though we have found it unnecessary to consider Staff's allegations under s. 122(1)(c) and (3), we wish to record our uncertainty as to whether those allegations are properly brought in an enforcement proceeding before the Commission, as opposed to in a prosecution before the Ontario Court of Justice. We raised this question briefly with Staff during closing submissions; however, because we did not receive full submissions from Staff and from opposing parties, we make no finding regarding the issue. The Commission may need to consider the question more thoroughly in a future case.

V. CONCLUSION

[62] Staff has established that:

a. MOAG contravened Ontario securities law by issuing the Debentures to 92 investors in breach of the Cease Trade Order; and

b. Jones and Brown contravened Ontario securities law by engaging in acts in furtherance of MOAG's improper trades.

[63] The parties shall contact the Registrar on or before January 31, 2020, to arrange a first attendance in respect of a hearing regarding sanctions and costs. That first attendance is to take place on a date that is mutually convenient, that is fixed by the Secretary, and that is no later than February 14, 2020.

[64] If the parties are unable to present a mutually convenient date to the Registrar, then each respondent and Staff may submit to the Registrar, for consideration by a panel of the Commission, a one-page written submission regarding a date for the first attendance. Any such submission shall be submitted on or before January 31, 2020.

Dated at Toronto this 15th day of January, 2020.

"Timothy Moseley"
Timothy Moseley

"M. Cecilia Williams"
M. Cecilia Williams

"Mary Anne De Monte-Whelan"
Mary Anne De Monte-Whelan