BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re CAAS, 2017 BCSECCOM 296 Date: 20170925

CAAS Mining Corporation and Kenneth William Trociuk

Panel	Nigel P. Cave	Vice Chair
	George C. Glover, Jr.	Commissioner
	Gordon Holloway	Commissioner
Hearing Dates	June 12, 13 and August 4, 2017	
Submissions Completed	August 4, 2017	
Date of Findings	September 25, 2017	

Appearing

Shaneel Sharma	For the Executive Director
Patrick Sullivan Eric Bojm	For CAAS Mining Corporation and Kenneth William Trociuk

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

[2] In a notice of hearing issued December 9, 2016 (2016 BCSECCOM 408), the executive director alleged that:

a) CAAS Mining Corporation contravened section 61 of the Act with respect to a distribution of securities to one investor for $15,000;
b) Kenneth William Trociuk, as the sole director and officer of CAAS, authorized, permitted or acquiesced in CAAS' contravention of the Act and therefore, by virtue of section 168.2 of the Act, also contravened section 61 of the Act; and
c) Trociuk submitted to the executive director a document that had been altered to contain false information, thereby contravening section 168.1(1)(a) of the Act.

[3] During the hearing, the executive director called three witnesses, a Commission investigator, the investor (Investor A) and a third party (V); tendered documentary evidence and provided written and oral submissions. The respondents testified, tendered documentary evidence and provided written and oral submissions.

II. Background

[4] At all times relevant to the notice of hearing, Trociuk was a resident of British Columbia.

[5] CAAS was a company incorporated under the laws of British Columbia on January 13, 2010. Trociuk incorporated CAAS (or had it incorporated on his behalf). CAAS has never filed a prospectus under the Act. Trociuk was the sole director and officer of CAAS and its only registered shareholder. CAAS was dissolved on July 1, 2013 for failing to file annual reports.

[6] The securities of CAAS are now worthless.

[7] While it was active, CAAS acquired mineral tenures, with an emphasis on silver exploration, in British Columbia.

[8] On May 1, 2011, Investor A signed a subscription agreement to acquire shares of CAAS. The allegations in this case relate to the distribution of CAAS securities to Investor A contemplated by that subscription agreement and what happened to that document after it was signed by Investor A.

[9] The oral testimony of Investor A, Trociuk and V was not consistent on several issues that are relevant to our findings. As a consequence, a brief summary of their evidence is required.

Investor A

[10] Investor A is a resident of British Columbia. V is the spouse of Investor A's sister.

[11] Investor A was aware that V and Trociuk had been involved in several previous business ventures and was interested in investing in CAAS when V offered him the opportunity to do so.

[12] Investor A did not meet, or otherwise discuss the investment in CAAS, with Trociuk prior to his signing the subscription agreement to purchase CAAS shares.

[13] The subscription agreement provided that Investor A would purchase 100,000 CAAS common shares for a total purchase price of $15,000.

[14] Investor A testified that, although he signed the subscription agreement to purchase the shares of CAAS on May 1, 2011, he did not receive share certificates for the shares until late in 2015, after CAAS was already dissolved.

[15] Investor A received the unsigned subscription agreement from V. He testified that he signed the subscription agreement in the driveway of V's house and that only he and V were present when he signed the document. Investor A understood that, after he had signed the subscription agreement, it was to go to CAAS in order to be "finalized".

[16] Investor A testified that he did not make any marks on the subscription agreement next to any of the sections in the document which set out potential prospectus exemptions that a subscriber might qualify for.

[17] Investor A said that the first time that he spoke to Trociuk was in February 2014 when he was trying to determine the status of his investment in CAAS. He said that he did not consent to anyone completing parts of his subscription agreement that were not completed at the time that he signed the document.

[18] Investor A was asked about phone records of multiple calls between (to and from) Investor A's phone(s) and V's home phone during late April and early May of 2011. He testified that those calls may have been to or from his sister (V's wife) or Investor A's mother and that he did not have a call, during this time period, involving himself, V and Trociuk regarding his subscription agreement.

[19] Investor A has lost all of the $15,000 he invested in CAAS.

V

[20] V testified that Trociuk and V first met in 1995 and subsequently worked together on several business opportunities related to mining. Both he and Trociuk gave testimony that V had the geological mining expertise that Trociuk lacked for these projects.

[21] Trociuk and V had several discussions, going back to 2008, about a possible business venture involving the assembling of silver properties for resale. Those discussions were not specific to CAAS, which at the time, was not incorporated.

[22] V testified about his role in CAAS as follows:

> Q: …, what was your role with CAAS Mining?
>
> A: I was a consultant, a contractor and an advisor.
>
> Q: And what work did you do specifically for CAAS?
>
> A: I reviewed property submissions, I held and managed the silver mining claims in British Columbia, and I advised on exploration activities.

[23] V testified that it was Trociuk who negotiated the terms of the first transaction to acquire properties within CAAS and that this occurred prior to V's becoming directly involved with CAAS. V then assisted CAAS and Trociuk by closing this first acquisition and was later involved in more land acquisitions.

[24] V held legal title, in his name, to all mineral titles that CAAS beneficially owned. V said that it was easier for him to hold the tenures in trust (in this case, prior to entering into any form of trust agreement) as he had a free miner's certificate and CAAS did not.

[25] V testified that, in his view, Trociuk was the founder of CAAS. However, V said that he and Trociuk were working together to grow the business and that he and Trociuk had complementary skills to do so (he, the mining technical skills and Trociuk, the general business and finance acumen). V testified that he was involved in all of the strategic decisions relating to CAAS' mining claims.

[26] V was not paid for his services to CAAS.

[27] V also helped raise money for CAAS. He was responsible for introducing three investors (or groups of investors) to CAAS. One of these was Investor A.

[28] V testified that Investor A did not sign his subscription agreement at his house and that Investor A delivered the subscription agreement to him already signed along with a cheque for $15,000. V said that he was aware that when Investor A delivered his subscription agreement it was incomplete (in that Investor A's signature had not been witnessed).

[29] V testified that he was the one who discussed CAAS with Investor A (not Trociuk). V also told Investor A that he was setting up the company with Trociuk.

[30] V testified that Investor A often called V's house and spoke with V's wife or his wife's mother when he did so. V did not recall any call between V, Investor A and Trociuk that occurred during late April or early May of 2011 relating to Investor A's subscription for shares in CAAS.

[31] V testified that under a trust agreement, signed on July 15, 2011 (which was after he acquired title (in trust) to the CAAS silver properties), he was to receive 1.5 million shares in CAAS which were to be issued at $.01 per share.

[32] V also invested $22,500 in CAAS. V did not own any shares in CAAS as of May of 2011 and did not receive any share certificates until 2014 or 2015 (after CAAS had been dissolved).

Trociuk

[33] Trociuk's testimony and that of V were largely consistent with respect to the history and background of CAAS and their respective roles in the operations of the company. He testified that V was "the other half of the business" and that he and V met about three to four times a week to deal with CAAS and its business.

[34] Trociuk testified that, prior to CAAS' dissolution, he was the only shareholder of CAAS. The other shares that were to be issued by CAAS under the various subscription agreements entered into with investors (including Investor A) and under the trust agreement with V were not issued until 2014 as part of winding up CAAS and its tax affairs in order to allow the investors to claim capital losses on their investments in CAAS.

[35] Trociuk testified that only he and V were to receive "founder's shares" (i.e. the shares of CAAS to be issued at $.01 per share) and that these shares were to be issued to compensate them for their respective, otherwise unpaid, roles in developing the assets and business of the company.

[36] Trociuk testified that he received Investor A's subscription agreement from V and that, when he reviewed that document, he determined that it was incomplete. In particular, he says that the prospectus exemption that Investor A relied upon had not been circled and that there were problems with the signature blocks of the document. Trociuk admitted that he was not present when Investor A signed the subscription agreement.

[37] Trociuk admitted that it was he who, after receiving the document, altered Investor A's original subscription agreement by

- adding a date,
- circling two prospectus exemptions, and
- altering the signature block by signing his name to appear that Trociuk had witnessed Investor A's signature.

[38] Trociuk testified that he and V telephoned Investor A from V's house and spoke to Investor A to seek his consent (with one exception, discussed in paragraph 39 below) to make the alterations to complete the subscription agreement.

[39] Trociuk testified that he circled one of the prospectus exemptions on Investor A's behalf (the "accredited investor" exemption) by mistake. He said that he told all investors that CAAS was going to remain a private company and that he always circled a section of the subscription agreement that contained this intention and that, in this case, he mistakenly circled the wrong section of the agreement.

[40] Trociuk testified that he believed he had the authority to make these changes as the subscription agreement contained a provision granting CAAS and its representatives a limited power of attorney to make changes to the agreement on behalf of the investor and that Investor A had approved of the changes.

[41] Trociuk's evidence was that once Investor A's subscription agreement was completed, he kept the original agreement with his records and that, years later, when Commission staff asked for certain documents pertaining to Investor A's investment in CAAS, he simply provided the document that he had in his records. He says that he did not alter the subscription agreement in response to the Commission's request for documents.

III. Analysis and Findings

A. Applicable Law

Standard of Proof

[42] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held:

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[43] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

[44] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

Prospectus Requirements

[45] The relevant provisions of the Act are as follows:

a) Section 1(1) defines "trade" to include "(a) a disposition of a security for valuable consideration" and "(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)".

b) Section 1(1) defines "security" to include "(a) a document, instrument or writing commonly known as a security", "(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person", "(d) a bond, debenture, note or other evidence of indebtedness, share, stock..." and "(l) an investment contract."

c) Section 1(1) defines "distribution" as "a trade in a security of an issuer that has not been previously issued".

d) Section 61(1) states "Unless exempted under this Act, a person must not distribute a security unless…a preliminary prospectus and a prospectus respecting the security have been filed with the executive director" and the executive director has issued receipts for them.

[46] Section 1.10 of the companion policy to *National Instrument 45-106 – Prospectus Exemptions* (NI 45-106) states that the person distributing securities is responsible for determining, given the facts available, whether an exemption from the prospectus requirement, set out in section 61(1), is available.

[47] One of the exemptions from the prospectus requirement is the "private issuer exemption". That exemption is found in section 2.4 of NI 45-106, which sets out that

> (2) The prospectus requirement does not apply to a distribution of a security of a private issuer to a person who purchases the security as principal and is
>
> …
>
> (d) a parent, grandparent, brother, sister, child or grandchild of the spouse of a director, executive officer, founder or control person of the issuer,

[48] Section 1.1 of NI 45-106 contains the following definition

> "founder" means, in respect of an issuer, a person who,
>
> a) acting alone, in conjunction, or in concert with one or more persons, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of the issuer, and
>
> b) at the time of the distribution or trade is actively involved in the business of the issuer;

[49] Section 1 of the Act contains the following definition

> "control person" means
>
> a) a person who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, or
>
> b) each person in a combination of persons, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer,
>
> and, if a person or combination of persons holds more than 20% of the voting rights attached to all outstanding voting securities of an issuer, the person or combination of persons is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer;

[50] In *Solara Technologies Inc. and William Dorn Beattie*, 2010 BCSECCOM 163, the Commission confirmed that it is the responsibility of a person trading in securities to ensure that the trade complies with the Act. The Commission also said that a person relying on an exemption has the onus of proving that the exemption is available. The Commission said:

> 37 The determination of whether an exemption applies is a question of mixed law and fact. Many of the exemptions are not available unless certain facts exist, often known only to the investor. To rely on those facts to ensure the exemption is available, the issuer must have a reasonable belief the facts are true.
>
> 38 To form that reasonable belief, the issuer must have evidence. For example, if the issuer wishes to rely on the friends exemption, it will need representations from the investor about the nature of the relationship…

Liability under section 168.2

[51] Section 168.2(1) of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is an employee, officer, director or agent of the company

also contravenes the same provision of the Act, if the individual "authorizes, permits, or acquiesces in the contravention".

[52] There have been many decisions which have considered the meaning of the terms "authorizes, permits or acquiesces". In sum, those decisions require that the respondent have the requisite knowledge of the corporate contraventions and have the ability to influence the actions of the corporate entity (through action or inaction).

Section 168.1(1)(a)

[53] Section 168.1(1)(a) states a person must not:

> Make a statement in evidence or submit or give information under this Act to the commission, the executive director or any person appointed under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading.

[54] In *Re Nuttall* 2011 BCSECCOM 521, at paragraph 44, the Commission said the following regarding materiality:

> The materiality threshold in section 168.1(1)(a) measures the degree to which the information given is false or misleading – how far it departs from the truth – not its relevance to the investigation.

[55] Section 168.1(2) provides that a person does not contravene subsection (1) if the person

> a) did not know, and
> b) in the exercise of reasonable diligence, could not have known that the statement or information was false or misleading.

B. Analysis

Positions of the parties

[56] The executive director submits that CAAS contravened section 61 of the Act in its distribution of securities to Investor A. In particular, he says that V was neither a "founder" nor a "control person" of CAAS and was merely a contractor providing mining technical services to the company. As a consequence, the exemption from the prospectus requirement set out in section 2.4 of NI 45-106 does not apply to CAAS' distribution of securities to Investor A.

[57] The executive director submits that Trociuk was the sole director and officer of CAAS and, by virtue of section 168.2 of the Act, that he also contravened section 61 of the Act when CAAS carried out its distribution of securities to Investor A without a prospectus and without an exemption for so doing.

[58] Finally, the executive director submits that Trociuk altered the subscription agreement that Investor A completed, that he did so without the consent of Investor A and that he did so in a manner that led to the subscription agreement containing false information.

Therefore, when Trociuk provided the altered subscription agreement to the executive director, he contravened section 168.1(1)(a) of the Act.

[59] The respondents submit that in May of 2011 V was either (or both) a "founder" or a "control person" of CAAS for the purposes of NI 45-106 and that CAAS' distribution of securities to Investor A was exempt from the prospectus requirements pursuant to section 2.4 of NI 45-106 (as Investor A's sister is V's spouse).

[60] Trociuk submits that if CAAS is found not to have contravened section 61 then the allegation that he contravened section 61, pursuant to section 168.2 of the Act, also fails.

[61] Trociuk acknowledges that he altered the subscription agreement after he received it from Investor A. However, he submits that he did so shortly after he received the agreement because it was incomplete and that he had Investor A's authority to make such alterations (both expressly during a telephone call and pursuant to the power of attorney given to him pursuant to the terms of the subscription agreement). He further submits that one of the ways in which he altered the subscription agreement, which he acknowledges is not correct, was done in error.

[62] Trociuk submits that the subscription agreement was not altered in response to the demand from the executive director to produce it, rather, that he was merely submitting CAAS' copy of the subscription agreement that Trociuk had in his records. Alternatively, he says that he has a due diligence defence to the allegation that he contravened section 168.1(1)(a). As a consequence, he submits that he should not be held liable for a contravention of section 168.1(1)(a) of the Act.

Section 61 contravention

[63] The parties agree that CAAS distributed securities to Investor A in return for $15,000 and that it did so without a prospectus.

[64] The parties also agree that, because Investor A was the brother of V's spouse at the relevant time, if V was a "control person" or "founder" of CAAS in May of 2011, then the exemption in section 2.4 of NI 45-106 was applicable to the distribution of securities to Investor A and CAAS did not contravene section 61 of the Act.

[65] Therefore, the only issue regarding the illegal distribution allegation is whether V was either a "founder" or "control person" of CAAS at the time of the distribution.

[66] We find that V was not a "control person" of CAAS in May of 2011. The evidence is clear that Trociuk was the only shareholder of CAAS at this time. At most, V had rights to acquire securities of CAAS during the relevant time. He therefore did not hold either 20%, or such other sufficient number, of the voting rights attached to all outstanding voting securities of CAAS to affect materially the control of the issuer at the time of the distribution of securities of CAAS to Investor A.

[67] There also is not sufficient evidence to establish that there was an agreement or an arrangement between Trociuk and V with respect to the voting of the shares of CAAS held by Trociuk to find that V was a control person within the meaning of that term under the Act. Neither Trociuk nor V gave evidence that they ever discussed the manner in which the shares of CAAS held by Trociuk were to be voted.

[68] The more difficult question is whether V was a founder of CAAS. In May of 2011 V was actively involved in the business of CAAS. That aspect of the definition of founder was clearly made out.

[69] The question is whether V was a person who "acting alone, in conjunction, or in concert with one or more persons, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of" CAAS.

[70] We were not directed to any decisions of this Commission or elsewhere considering the meaning of these words. Nor is there any guidance in the Companion Policy to NI 45-106 as to how the definition is to be interpreted.

[71] The meaning of these words must be interpreted within the context of their use in NI 45-106. The purpose of section 2.4 of NI 45-106 is to provide an exemption from the prospectus requirement for a distribution of securities to an investor who has a close familial relationship to an individual with intimate knowledge (or access to obtain that knowledge) of the business and affairs of an issuer. The underlying assumption for this exemption is that such an investor does not require the investor protection provisions of a prospectus. Whether an investor avails himself or herself of the opportunity to access this knowledge is not relevant to the availability of the exemption.

[72] The executive director says that the following factors suggest that V was not a founder of CAAS:

- it was Trociuk who incorporated CAAS and was its sole director, officer and shareholder;
- Trociuk considered himself to be a founder of CAAS;
- Trociuk negotiated the terms of the first acquisition of mining tenures;
- V described himself as a consultant; and
- Trociuk's testimony during the hearing, describing V's role in the affairs CAAS, expanded considerably from statements he made in a prior interview with Commission investigators.

[73] However, viewed through the purposive lens described in paragraph 71, we find that V was a "founder" of CAAS.

[74] We do not view the title (that of being a consultant) that V applied to his role in CAAS as determinative of the question whether he was a "founder" for the purposes of securities laws. Nor do we view the fact that it was Trociuk who incorporated CAAS and was its sole director, officer and shareholder, as determinative.

[75] Further, it is obvious from the definition that there could be more than one "founder" of CAAS.

[76] Both Trociuk and V testified that:

- they had worked together on several previous mining related ventures;
- they had had discussions regarding a business plan (i.e. acquiring silver mining claims in the province) that was ultimately adopted by CAAS going back several years prior to the incorporation of CAAS;
- they had complementary skills and that V had the mining technical knowledge and that Trociuk had the general business knowledge;
- V had the authority to raise capital independently of Trociuk (i.e. V solicited three investors (or groups of investors) and was the only person that those investors dealt with in receiving their information regarding CAAS);
- V held legal title to all of the mineral tenure claims (which were CAAS' only material assets) and did so without there being a legal trust agreement to govern this arrangement;
- V's efforts were unpaid; and
- V had strategic input on the mineral tenure claims, which were CAAS' only material assets.

[77] In totality, although there were differences in the evidence, it was agreed that V's role in CAAS was significant and provided V with an intimate knowledge and understanding of the business of CAAS. V also had frequent access to Trociuk. V was integral to the development of the business. He had title to, strategic input into, and full knowledge of the mineral titles which were CAAS' only material assets. He was also able to raise funds from investors without Trociuk's input. We find that both Trociuk and V were founders of CAAS at the time of the distribution of securities to Investor A.

[78] We note that the parties argued this case on the narrow grounds of whether V was either a founder or control person of CAAS. However, it appears that the facts would also have supported a finding that V was a *de facto* executive officer of CAAS on the analysis provided in *Re Malone*, 2016 BCSECCOM 257. Such a finding would also provide the basis for an exemption from the prospectus requirement in connection with the distribution of CAAS securities to Investor A under section 2.4 of NI 45-106.

[79] Therefore, we dismiss the allegations that:

a) CAAS contravened section 61 of the Act in its distribution of securities to Investor A; and
b) Trociuk, by virtue of section 168.2 of the Act, contravened section 61 of the Act in respect of CAAS' illegal distribution.

Section 168.1(1)(a) contravention

[80] The parties agree that Trociuk filed a document (i.e. Investor A's subscription agreement) with the executive director or an investigator appointed under the Act.

[81] The evidence is also clear that the copy of the subscription agreement filed by Trociuk contained errors inserted into the document by Trociuk after it had been signed by Investor A in two respects:

- a circle indicating that Investor A qualified for the "accredited investor" exemption; and
- Trociuk's signature as a witness to Investor A's signature.

[82] Trociuk says that the first of these was simply an error and that the second alteration was authorized by Investor A. In the alternative, he says he has a due diligence defence to this allegation pursuant to section 168.1(2) or under the common law.

[83] The executive director said that if we accepted Trociuk's evidence with respect to having obtained Investor A's consent, via a telephone call, to his alteration of the subscription agreement, then this allegation would fail.

[84] The evidence with respect to the call is conflicting. Trociuk was very specific in his recollection about a call to Investor A having taken place from V's residence in the days following May 1, 2011. Investor A was equally specific in saying that such call did not occur. V said he did not remember such a call.

[85] The phone records in evidence suggest a call may have occurred. However, there were several calls to and from V's residence and Investor A's phone(s) during the relevant time period that could have been the call to which Trociuk referred. Investor A testified that those calls may have involved his sister and/or mother.

[86] Given all of this, we find it difficult to make a finding that one version of events is more likely than the other.

[87] However, we accept Trociuk's evidence that the alterations that he made (whether they were authorized in a call to Investor A or not) to the subscription agreement were made in May of 2011. We also accept that when he provided the subscription agreement to the Executive Director (in response to his request for documents), he simply submitted the copy of the subscription agreement that he had on file. The Executive Director did not present any evidence to contradict Trociuk's evidence that he altered the agreement in 2011 and, given that Investor A also had a copy of the agreement, we see no reason why Trociuk would alter it after the Executive Director's request.

[88] Section 168.1(1)(a) sets out that it is a contravention of the section to submit or give information that "in a material respect and at the time and in light of circumstances under which it is made" is false and misleading.

[89] As set out in *Re Nuttall*, the concept of materiality in this section can be a measure of the extent to which the information is false or misleading. But it is also a measure of the significance of the information that is false or misleading. We find this allegation fails the materiality aspect of this provision on the second measure.

[90] The circling of a second prospectus exemption (which Trociuk says was done in error) is not significant in these circumstances. As we have found, there was an available exemption for the distribution of securities to Investor A and it was therefore not relevant if another exemption was available or not. The circling of that exemption is not false or misleading in a material respect.

[91] There is no dispute that Investor A signed the subscription agreement. It is not significant whether Trociuk witnessed that signature or not. The addition of Trociuk's name and signature is not false or misleading in a material respect.

[92] Therefore, we dismiss the allegation that Trociuk contravened section 168.1(1)(a) of the Act.

September 25, 2017

For the Commission

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Gordon Holloway
Commissioner