

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Regal Resources Inc., 2021 BCSECCOM 320

Date: 20210804

Regal Resources Inc. and Erika Gardner

Panel	Marion Shaw Judith Downes George C. Glover, Jr.	Commissioner Commissioner Commissioner
Hearing dates	June 10 and 11, 2021	
Date of Ruling	June 11, 2021	
Date of Reasons	August 4, 2021	
Appearing		
Patrick Sullivan	For Erika Gardner	
Thomas Clifford Vanessa Mensink	For Regal Resources Inc.	
Jennifer Whately Nazma Lee Gordon Smith	For the Executive Director	

Reasons for Decision

I. Introduction

- [1] In 2015, the Executive Director issued a cease-trade order (CTO) restricting trading in the shares of Regal Resources Inc. (Regal) as a result of Regal's failure to make required disclosure filings. The CTO remains in place.
- [2] Erika Gardner (Gardner) has rights under a convertible debenture agreement with Regal.
- [3] In February 2021, Gardner applied to have the Commission exercise its discretion under section 171 of the *Securities Act*, RSBC 1996, c. 418 (Act) to revoke the CTO in part to permit the conversion of debt owed to her under the convertible debenture agreement into units consisting of shares and warrants of Regal.
- [4] Gardner had also originally applied to the Commission for orders pursuant to section 114 of the Act requiring Regal to comply with certain disclosure and voting requirements in

respect of a proposed transaction involving Regal and Barksdale Resources Corp. (Barksdale), but withdrew that portion of her application before the hearing began.

- [5] Regal submitted that the Commission should dismiss Gardner's application.

II. Hearing and Decision

- [6] At a hearing on June 10 and 11, 2021, the Commission panel considered written submissions, documentary and oral evidence, and oral submissions from Gardner and Regal. The panel also considered written and oral submissions from the Executive Director, who expressly supported Gardner's application.
- [7] At the end of the oral hearing, the panel advised that it would grant the order sought by Gardner, in a form to be settled.
- [8] On July 6, 2021, the panel issued the partial revocation order (*Regal Resources Inc.*, 2021 BCSECCOM 274), with reasons to follow.
- [9] These are the reasons for the panel's decision to grant the order.

III. Background

- [10] Regal is a junior mineral exploration company based in Vancouver, British Columbia.
- [11] Regal is a reporting issuer in British Columbia and Ontario.
- [12] Regal's sole mineral property consists of 295 claims near Nogales, Arizona known as the Sunnyside Property.
- [13] The Sunnyside Property is adjacent to the down-dip extension of the Taylor zinc-lead-silver deposit that was acquired by South32 Limited for \$2.1 billion in 2018. David Shaw, an experienced professional geological engineer, testified that the geologic evidence is very consistent with the Sunnyside Property being the source of the Taylor deposit.
- [14] Gardner is a retired real estate agent with decades of experience managing her own affairs. She is a significant investor in Regal.
- [15] Gardner is the mother-in-law of Gregory Thomas (Thomas), who from 2010 to August 2020 was the President and Chief Executive Officer and a director of Regal. Thomas and his spouse and children reside with Gardner.
- [16] In August 2012, one week after Regal announced that it had made the final payment to acquire the Sunnyside Property, Gardner lent Regal \$150,000. In November 2012, Gardner lent Regal an additional \$750,000. Gardner obtained the funds she lent to Regal by mortgaging her home.

- [17] On August 30, 2012, Regal announced by news release its intention to issue a convertible debenture to secure a loan of \$900,000.
- [18] To secure the repayment of the funds lent by Gardner, Regal executed in favour of Gardner a Debenture and Security Agreement dated October 19, 2012 (Debenture). The Debenture contains the following material terms:
- (a) Gardner would provide Regal with \$900,000;
 - (b) interest would accrue on the principal at the rate of 12% per annum;
 - (c) Regal would repay the principal and accrued interest (together, the Debt) by October 19, 2015;
 - (d) Gardner could at any time convert the Debt into units of Regal (Units) at a conversion price of \$0.10 per Unit;
 - (e) Regal could not prepay the Debt without Gardner's consent;
 - (f) each Unit would consist of one common share of Regal and one warrant entitling the holder to acquire a common share of Regal at an exercise price of \$0.20 for a period of two years from the date the warrant was issued; and
 - (g) Regal agreed to provide Gardner with security over the assets of its subsidiary, which held the rights to the Sunnyside Property.
- [19] On October 18, 2015, Regal and Gardner entered into an amending agreement to extend the repayment date under the Debenture to October 19, 2017.
- [20] On December 11, 2015, the Executive Director issued the CTO as a result of Regal's failure to file its audited financial statements and accompanying management's discussion and analysis (MD&A) for its fiscal year ended July 31, 2015. The CTO prohibits all trading in Regal's securities until Regal has filed the required records, completed in accordance with the Act and rules.
- [21] The effect of the CTO was to prevent any further extension of the repayment date under the Debenture, had the parties wished to do so.
- [22] In August 2017, Regal granted Barksdale an option (2017 Option) to acquire a 67.5% interest in the Sunnyside Property by making stipulated payments of cash and Barksdale shares to Regal and making stipulated expenditures on exploration and drilling work to advance the project. Barksdale has not met the requirements of the 2017 Option.
- [23] In the fiscal year ended July 31, 2018, Regal paid Gardner \$100,000 to obtain the release of her security against the assets of Regal's subsidiary.
- [24] In November 2019, Regal filed its outstanding annual financial statements for the fiscal years ended July 31, 2015 through July 31, 2019.
- [25] On August 6, 2020, Regal held its first annual general meeting of shareholders since 2015 (2020 Meeting). Thomas did not stand for re-election at the 2020 Meeting. Matthew Sauder (Sauder) and two close associates of Sauder were three of the five directors

elected at the 2020 Meeting. Immediately following the 2020 Meeting, Sauder replaced Thomas as President and Chief Executive Officer of Regal.

- [26] On August 10, 2020, Gardner advised Regal that she wished to convert the Debt into Units, and provided Regal with the required conversion form. Regal's counsel responded by asking Gardner to correspond directly with Regal and advised that, because of the CTO, Regal was prohibited from issuing securities at that time.
- [27] On November 5, 2020, Regal again advised Gardner that it could not issue securities while the CTO remained in place, adding that it intended to have the CTO lifted altogether. In response, Gardner reiterated her request to convert the Debt into Units and asked when the CTO would be lifted, given that the outstanding financial statements had already been filed, leaving only the outstanding MD&A to be prepared and filed.
- [28] On February 8, 2021, hearing nothing further from Regal, Gardner applied to the Executive Director to revoke the CTO in part to allow the conversion of the Debt into Units.
- [29] On February 23, 2021, Gardner wrote to Regal to advise that she had applied for the partial revocation of the CTO. Regal did not respond.
- [30] On March 10, 2021, counsel for Regal sent submissions to the Executive Director in which it objected to the partial revocation of the CTO on a number of grounds, none of which it had previously advanced in response to Gardner's requests for conversion of the Debt into Units.
- [31] On April 23, 2021, the Executive Director referred the matter to the Commission for its decision on the application for partial revocation of the CTO. Following a hearing management meeting on May 7, 2021, the matter was set down for hearing on June 10 and 11, 2021.
- [32] Under its new management, Regal filed its annual financial statements for the fiscal year ended July 31, 2020 in May 2021, but has not filed the required MD&A for the fiscal years ended July 31, 2015 through July 31, 2020 and has not sought the full revocation of the CTO.
- [33] On May 12, 2021, Regal announced that it had entered into an agreement with Barksdale under which Barksdale would acquire 100 percent of the Sunnyside Property (the Barksdale Transaction). The Barksdale Transaction requires the approval of Regal's shareholders by a special majority.
- [34] On May 13, 2021, counsel for Regal wrote to Gardner providing a cheque for \$1,435,765 in payment of the Debt owing under the Debenture, which Regal now described as having "matured", on the conditions that she enter into a release and discontinue her application for the partial revocation of the CTO.

- [35] On May 18, 2021, Gardner rejected Regal's offer and reiterated her request that the Debt be converted into Units.
- [36] On May 31, 2021, counsel for Regal offered Gardner \$2,535,765 (including shares in Barksdale with a deemed value of \$1,200,000) in full settlement of the Debt, on the conditions that Gardner enter into a release and an agreement to vote her Regal shares in support of the Barksdale Transaction when the matter was put to Regal shareholders for approval.
- [37] On June 2, 2021, counsel for Gardner rejected that offer on her behalf, reiterated Gardner's request that the Debt be converted into Units, and advised that Gardner had concerns about the Barksdale Transaction.
- [38] In an effort to effect the conversion of the Debt into Units, Gardner offered to abstain from voting on the Barksdale Transaction the shares of Regal she would receive on the Debt conversion. Regal did not respond to that offer.
- [39] On June 9, 2021, Regal filed a management information circular for a shareholder meeting scheduled for July 7, 2021 (Special Meeting), at which Regal shareholders were to vote on the Barksdale Transaction. The record date for the determination of shareholdings eligible to be voted at the Special Meeting was June 3, 2021.

IV. Issue

- [40] Section 171 of the Act states:

If the commission...considers that to do so would not be prejudicial to the public interest, the commission...may make a decision revoking in whole or in part or varying a decision the commission, the executive director or the designated organization, as the case may be, has made under this Act....

- [41] The issue before the panel was whether it considered that it would not be prejudicial to the public interest to grant Gardner's application for the partial revocation of the CTO.

V. Analysis

- [42] As was noted by the Executive Director, the situation in this case is rare. Typically, the applicant for a partial revocation order is the issuer itself, which needs to raise financing to allow it to complete the filings in respect of which the cease-trade order was issued. In this case, the applicant was a creditor applying for relief to exercise a contractual right to acquire securities of a cease-traded issuer, and that is the context in which we were required to consider the public interest.
- [43] Gardner argued that the partial revocation of the CTO to allow her to exercise her conversion right would not result in any prejudice to the public interest and, accordingly, her application should be granted.
- [44] Gardner cited the recent decision of the Commission in *Axion Ventures Inc.*, 2021 BCSECCOM 161 (*Axion*), one part of which involved an application to revoke a cease-

trade order in part to allow, but not to order, the transfer of shares the beneficial ownership of which was disputed. Gardner acknowledged that here, as in that case, the dispute may ultimately have to be resolved in court, but argued that it was appropriate for the Commission to remove the impediment to conversion posed by the existence of the CTO, so that once the exercise of the conversion right is agreed by the parties or ordered by the court, it may take place without further recourse to the Commission.

- [45] The Executive Director was of the same view and recommended that the panel grant Gardner's application.
- [46] Regal, which had not previously disclosed in its public filings or in discussions with Gardner any reason to oppose the conversion of the Debt into Units, other than the existence of the CTO, raised a number of objections to Gardner's application.
- [47] The thrust of Regal's arguments was that Thomas is a bad actor, the shareholders of Regal are better off without him in management, Gardner in seeking to convert the Debt into Units is acting at Thomas's direction or in cahoots with him to restore him to a management position in Regal, and the public interest requires that that outcome be averted.
- [48] Regal sought to put in question Gardner's business sophistication and ability to make her own decisions, and suggested that she was acting at Thomas's behest. Gardner flatly denied that that was the case, insisting that she can and does make investment decisions independently, and the panel found no reason to doubt her.
- [49] Regal argued that the requested conversion of the Debt into Units was a ploy to re-install Thomas in management of Regal. Again, Gardner flatly denied that that was the case. Gardner gave evidence that she wants shares in Regal so that she can participate in what she sees as the considerable upside potential of the Sunnyside Property, a view that was supported by the evidence of a professional geological engineer. The panel found no reason to doubt her.
- [50] Regal argued that Gardner and Thomas were acting jointly or in concert to procure the ability through additional share ownership in Regal to block any matter requiring shareholder approval, including the Barksdale Transaction. The panel found no credible evidence that that was the case. Moreover, since the record date for the Special Meeting had already passed by the time of the hearing of this matter, Gardner could not have voted at the Special Meeting any additional Regal shares acquired as part of the Units.
- [51] In its submissions before us, and in material sent to Regal's shareholders, Regal asserted that Gardner had engaged in wrongful conduct. We found no credible evidence of any improper behaviour by Gardner.
- [52] Regal argued that if the partial revocation order is granted, it will prejudice other creditors of Regal who might wish to convert their debt to shares, as well as Regal's new directors and officers, who have not had access to share-based compensation while the

CTO is in place. In that regard, we note that it has been and is in Regal's power to file the outstanding MD&A disclosure and seek to have the CTO revoked in its entirety and, in the meantime, to seek a partial revocation of the CTO to allow it to settle with any of its other creditors. We also note that of those various constituencies, only Gardner has an existing contractual right to receive shares of Regal.

- [53] Regal also argued that to allow Gardner to convert the Debt into Units would put her ahead of other shareholders. We fail to see how that could be so. Gardner, like all other shareholders of Regal, would be unable to trade her shares until the CTO is lifted. If Regal's point is that other shareholders would be prejudiced by suffering dilution of their equity interest as a result of the conversion of the Debt, that is the result of the terms of the Debenture, from which Regal benefitted at the time, and not the result of the partial revocation of the CTO. Moreover, Regal, and by extension its other shareholders, would benefit from the extinguishment of significant indebtedness as a result of the conversion.
- [54] Finally, Regal raised questions about possible past mismanagement of Regal by Thomas. In our view, that was not a matter we needed to consider on this application.
- [55] It appears to the panel that in choosing not to take steps to seek to have the CTO revoked in its entirety by filing the outstanding MD&A, and in arguing against Gardner's application for the partial revocation of the CTO, Regal is seeking to use the Commission's processes to frustrate the conversion of the Debt into Units. Indeed, Sauder admitted as much in cross-examination. That is not the purpose of a CTO and we will not permit it to be used in that way.
- [56] As was recently stated by the Commission in a similar situation in *Axion*, "cease-trade orders [are] not intended to interfere with rights under private contract, and should not function as an excuse for non-performance."
- [57] The Executive Director issued the CTO against Regal as a result of Regal's failure to file required financial disclosure. The CTO was intended to prevent a situation where the public could be harmed by trading in Regal's shares without the benefit of the required disclosure. In this case, the proposed conversion of the Debt held by Gardner, who is well aware of Regal's business affairs, poses no such risk.
- [58] Much of the evidence and submissions we heard in the course of the hearing was irrelevant to the issue before us.
- [59] For the purposes of this application, the panel did not need to settle the dispute regarding Gardner's contractual rights under the Debenture, consider whether Thomas breached his fiduciary duties as a director and officer of Regal, or decide whether the Barksdale Transaction is a good or bad deal for Regal. The Commission tribunal is not the proper venue for Regal to litigate those issues, none of which relates to the reasons the CTO was imposed.

[60] Our role in this matter was to determine in all the circumstances whether the partial revocation of the CTO to permit the conversion of the Debt into Units would be prejudicial to the public interest. We determined that it would not be prejudicial to the public interest.

[61] The effect of our decision is not to require the conversion of the Debt but simply to allow the dispute over conversion of the Debt into Units to be resolved either by agreement of the parties or by order of the court.

VI. Conclusion

[62] For the foregoing reasons, we issued the partial revocation order sought by Gardner.

August 4, 2021

For the Commission:

Marion Shaw
Commissioner

Judith Downes
Commissioner

George C. Glover, Jr.
Commissioner