ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Carruthers, 2020 ABASC 177 **Date: 20201117**

Timothy Ray Carruthers

Panel:	Kari Horn Tom Cotter
Representation:	Yasifina Somji for Commission Staff
Submissions Completed:	May 11, 2020
Decision:	November 17, 2020

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I. INTRODUCTION

[1] In a notice of hearing (**NOH**) issued on May 11, 2020, Alberta Securities Commission (**ASC**) staff (**Staff**) seek orders that would permanently prohibit Timothy Ray Carruthers (**Carruthers**) from participating in Alberta's capital market. Staff rely on section 198.1(2)(a) of the *Securities Act* (Alberta) (the **Act**), which provides that an order may be made under section 198(1)(a) to (h) of the Act against a person who has been convicted of an offence arising from a course of conduct relating to securities.

[2] On February 7, 2019 Carruthers pled guilty to 22 counts of fraud over $5,000 contrary to section 380(1)(a) of the *Criminal Code* (Canada), and convictions on these counts were entered in the Court of Queen's Bench of Alberta (the **Court**).

[3] In support of the orders sought, Staff adduced affidavit evidence from an ASC securities investigator (the **Staff Affidavit**) and written submissions. The Staff Affidavit included copies of an Agreed Statement of Facts signed by Carruthers (the **Statement**) and the transcript of the Court's sentencing decision (the **Sentencing Decision**).

[4] Affidavit evidence satisfies us that Carruthers was served with the NOH. Although section 198.1(2) does not require that a respondent be provided with an opportunity to be heard, Carruthers was given that opportunity and elected not to adduce evidence or make submissions within the time stipulated in the NOH.

[5] For the reasons that follow, we find that Carruthers was convicted of an offence arising from a course of conduct related to securities, and that it is in the public interest to make the orders sought by Staff.

II. FACTS

A. Statement

[6] Carruthers admitted to knowingly carrying out a fraudulent joint venture scheme from which he obtained more than $5 million from investors. None of that money was used in the manner he described to investors; rather, the funds were used to finance his lifestyle and to further his fraudulent investment scheme. The Statement describes Carruthers' fraudulent scheme, the company he used, and the particulars of each of the 22 counts of fraud. Summarized below are pertinent admissions from the Statement.

[7] From January 23, 2009 to June 30, 2017 (the **Relevant Period**), Carruthers was a shareholder, the sole director and the directing mind of Wakina Consulting Inc. (**Wakina**), a company he incorporated on August 20, 2001 and later revived on May 22, 2008. Wakina's office was in Edmonton, Alberta until 2016 when Carruthers closed it to avoid the investors he had defrauded.

[8] In 2009 and continuing through the Relevant Period, Carruthers induced investors – many of whom were acquaintances, neighbours, relatives and past co-workers – to participate in an investment involving bridge mortgage financing. He told investors that the investment was a joint venture as he would also be investing, that the loan would be for a period of less than one year and would be financed by Wakina using funds provided by the investor and Carruthers (through Wakina). He also told investors that the investment would be secured by caveats or

liens registered on the title of both the home being sold and the home being purchased by the borrower.

[9] Carruthers told investors that they would receive returns based on their *pro-rata* share of the administration fee and monthly interest the borrowers paid to Wakina.

[10] Carruthers provided investors with joint venture agreements containing false representations, including: the names and addresses of purported borrowers and the addresses of the properties they were buying and selling; the share of the investment purportedly being provided by Carruthers in the joint venture; the names of the law firms who provided legal services to the borrowers; and statements that the loans were registered on the title of the properties being bought and sold by the borrowers.

[11] Carruthers provided many investors with copies of forged land titles certificates showing caveats registered on the properties referenced in the joint venture agreements. To create an appearance of legitimacy to the joint venture and to encourage investors to roll over their investments into more joint ventures, Carruthers provided investors with forged profit and loss statements and T5 tax slips, despite there being no legitimate investment.

[12] When the scheme began to fall apart, several investors sought legal advice and some pursued claims against Carruthers and Wakina. In one instance, the investors' lawyer filed liens on all of the properties purported to be part of the joint ventures and named the owners of these properties as defendants in the investors' lawsuit. The result of this was that approximately 20 innocent parties whose names and addresses had been fraudulently used by Carruthers in the scheme had to contend with lawsuits and liens on their properties.

[13] Carruthers knew from the beginning that the joint venture scheme was fraudulent. He never had any intention of investing the funds obtained, either by him or Wakina, from the investors; instead those funds were used for his personal gain. As the directing mind of Wakina, Carruthers controlled all payments to and from Wakina during the Relevant Period.

[14] Carruthers and Wakina received $5,277,500 from 22 investors in at least 175 joint ventures. Carruthers or Wakina paid $1,775,798 to investors, purportedly representing returns of investment capital or periodic payments from the joint ventures. However, all of these payments were made using funds from other investors.

B. Sentencing Decision

[15] The Court considered the Statement, 19 victim impact statements and the submissions of counsel, heard on March 8, 2019, before delivering the Sentencing Decision on March 13, 2019.

[16] In characterizing Carruthers' fraud as a Ponzi scheme, Justice Ackerl noted the deceitful nature of the investment scheme and that "[a]ny money returned to investors was from the money pool funded solely by them." He further observed that Carruthers' criminal conduct ". . . was orchestrated and multi-faceted", ". . . prolonged, considered and intricate", and that "[a]t all times and for all investors, [Carruthers] occupied a position of trust".

[17] From the victim impact statements, Justice Ackerl noted the physical, financial and emotional costs incurred as a result of Carruthers' fraud, describing his conduct as "relentlessly predatory, selfishly indulgent, undoubtedly shameless and shameful."

[18] The Court sentenced Carruthers to six years imprisonment, ordered him to pay restitution for the net financial loss incurred by each investor, and ordered a lifetime prohibition against Carruthers seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity, that involves having authority over the real property, money or valuable security of another person.

C. Staff Affidavit

[19] The Staff Affidavit included an Alberta Corporate Registry search for Wakina confirming a registered and records address in Alberta. The affidavit also referred to other searches which indicated that Carruthers was an Alberta resident for some of the Relevant Period and that more than half of the victims had Alberta addresses.

III. ANALYSIS

[20] Section 198.1(2)(a)(i) of the Act establishes the basis upon which an order may be made by the ASC under section 198(1). It is ". . . an efficient means for furthering investor protection and the fair operation of Alberta's capital market, and confidence in that market, on the basis of a finding already made [by a Court]" (*Re Braun*, 2007 ABASC 694 at para. 12).

[21] In considering Staff's application for protective orders, we must first determine whether Carruthers' conviction arises from a transaction, business or course of conduct related to securities or derivatives. If it does, we then consider whether it is in the public interest, and warranted in the circumstances, to make protective orders.

A. Transaction, Business or Course of Conduct Related to Securities

[22] We are satisfied from the admissions made in the Statement that Carruthers' fraudulent investment scheme constituted a course of conduct over more than seven years. The next issue is whether the course of conduct related to securities or derivatives within the meaning of the Act.

[23] Neither the Statement nor the Sentencing Decision characterized the joint venture agreements as "securities", however Staff argued that these agreements fall under the following two parts of the definition of security in the Act:

> 1 In this Act,
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> . . .
>
> (ggg) "security" includes
>
> . . .
>
> (v) any bond, debenture, note or other *evidence of indebtedness*, share, stock, unit, unit certificate, participation certificate, certificate of share or interest . . . [emphasis added];
>
> . . .

(xiv) any investment contract;

[24] We first consider whether the joint venture agreements are investment contracts. While "investment contract" is not defined in the Act, the term has been construed to mean an investment of money in a common enterprise with an expectation of profit derived significantly from the effort of others (*Pacific Coast Coin Exchange v. O.S.C.*, [1978] 2 S.C.R. 112).

[25] It is self-evident that the joint venture agreements involved the investment of funds with an expectation of profit. Carruthers' told investors that they could expect a share of both the administration fee and the monthly interest payments from the borrowers – the expected profit – and the return of their capital.

[26] The investors' only involvement in the joint ventures was to contribute the capital they expected would be used to fund the bridge loans. Carruthers (through Wakina) was also to contribute capital, arrange and administer the loans, and manage the receipt and distribution of returns to investors. It was only through the supposed efforts of Carruthers that the investors were to derive profits.

[27] With respect to the common enterprise part of the investment contract test in *Pacific Coast Coin*, the Court held (at pp. 129-30) that:

> . . . such an enterprise exists when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter). . . . the "commonality" necessary for an investment contract is that between the investor and the promoter. There is no need for the enterprise to be common to the investors between themselves.

The necessary commonality is evident here, as the joint venture contemplated that the interest payments and the administration fees from borrowers would be shared *pro-rata* between each investor and Carruthers. Accordingly, we find that the joint venture agreements were investment contracts and thus securities within the meaning of the Act.

[28] As we have found that the joint venture agreements are investment contracts within the meaning of section 1(ggg)(xiv) of the Act, we need not consider whether they are also an "evidence of indebtedness" under section 1(ggg)(v) of the Act.

[29] For the foregoing reasons, we find that Carruthers' conviction arose from a course of conduct relating to securities.

B. Public Interest

[30] Having found that the necessary conditions of section 198.1(2)(a)(i) are met, we must also be satisfied that it is in the public interest for us to make protective orders against Carruthers under section 198(1) of the Act (*Re Leemhuis*, 2008 ABASC 585 at para.12).

[31] The ASC recently considered and issued protective orders under section 198(1) in relation to a criminal conviction for securities-related fraud in *Re LaFramboise* (2020 ABASC 12). There, the panel referred to *Braun* at para. 17 (citing *Re O'Connor*, 2005 ABASC 987 at para. 26) for the principle that making such orders is in the public interest ". . . only when doing so would provide protection to Alberta investors and the Alberta capital market."

[32] ASC decisions, including *LaFramboise* (at para. 20), have consistently emphasized the seriousness of fraud. For example, in *Re TransCap Corporation*, 2013 ABASC 201 at para. 155, an ASC panel observed that it is ". . . self-evident that conduct that perpetrates a fraud on Alberta investors is wholly inconsistent with the welfare of investors and the integrity of our capital market". Accordingly, where Staff seeks reciprocation of a criminal conviction for securities-related fraud, particularly where that fraud was perpetrated on Alberta investors, it is difficult to conceive of a circumstance when orders under section 198(1) would not be considered to be in the public interest.

[33] Carruthers committed the fraud while resident in Alberta, his fraudulent scheme involved purported bridge financing for purchases and sales of real estate in Alberta, and most of his victims were Alberta residents. We are satisfied that making protective orders against Carruthers is in the public interest.

C. Orders Sought

[34] We now consider whether the orders sought by Staff appropriately address the deterrence and protection called for in these circumstances. We have considered the factors relevant to sanction as set out in *Re Homerun International Inc*., 2016 ABASC 95 at para. 20, being the seriousness of the respondent's misconduct, the respondent's pertinent characteristics and history, any benefit sought or obtained by the respondent, and any mitigating or aggravating circumstances.

[35] Fraud is one of the most serious securities law contraventions due to its harmful effects on investors and the capital market. We agree with Staff's submission that fraud involving a Ponzi scheme is especially serious as it necessarily involves a substantial degree of deceit and dishonesty – there is "a pernicious aspect to the payments" made to investors in a Ponzi scheme in that they give "a comforting impression that the investments made were sound and otherwise as represented" (*TransCap* at para. 108).

[36] Carruthers' complex scheme affected 22 victims, and the overall fraud exceeded $5 million. While some of the funds were used to continue the fraud as noted above, most of the money raised was misappropriated for personal use, including luxury vacations, a diamond ring worth more than $40,000, payment of his daughters' credit card bills, and almost $500,000 in pay cheques to his wife who did not work for him or Wakina. Carruthers filed for his third bankruptcy after the inevitable collapse of his Ponzi scheme.

[37] We found Carruthers' conduct in relation to several investors particularly odious: he defrauded his daughter-in-law's grandmother causing her to lose $150,000; he convinced a woman who cleaned his office building to invest her $20,000 inheritance; and he defrauded a family of $50,000 of life insurance proceeds from the death of their child. This egregious conduct requires protective orders aimed at preventing Carruthers from engaging in similar behaviour in the future.

[38] Justice Ackerl noted multiple aggravating factors, including: Carruthers' position of trust in relation to each investor; the devastating impact of Carruthers' conduct on each victim; the "magnitude, complexity, duration and degree of planning" involved in the fraud; and that

Carruthers was motivated by self-indulgence and greed. Carruthers' early guilty plea and the associated efficiency of the proceedings was the only factor considered mitigating by the sentencing judge.

[39] Based on the Statement, Sentencing Decision and the sanctioning factors considered above, we are persuaded that the orders sought by Staff are reasonable and proportionate to the seriousness of Carruthers' misconduct, and are necessary to protect Alberta investors and the Alberta capital market from the risk of further harm posed by Carruthers. In short, Carruthers should be precluded from all future participation in the Alberta capital market.

D. Sanctions Ordered

[40] Accordingly, we order in the public interest with permanent effect:

- under sections 198(1)(b) and (c) of the Act, Carruthers must cease trading in securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to Carruthers;

- under sections 198(1)(d) and (e), Carruthers must immediately resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator; and

- under sections 198(1)(c.1), (e.1), (e.2) and (e.3), Carruthers is prohibited from engaging in investor relations activities, advising in securities or derivatives, becoming or acting as a registrant, investment fund manager or promoter, and acting in a management or consultative capacity in connection with activities in the securities market.

[41] This proceeding is concluded.

November 17, 2020

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Tom Cotter