ALBERTA SECURITIES COMMISSION

DECISION

Citation: Peer Financial Ltd., Re, 2013 ABASC 422 **Date: 20130913**

Peer Financial Ltd., RBEE Capital Associates Ltd. and Ralph William Burgess

Panel:	Glenda A. Campbell, QC Maureen McCaw Fred R.N. Snell, FCA
Representation:	Natasha Bazant and Deanna Steblyk for Commission Staff Ralph Burgess for the Respondents
Date of Hearing:	3 September 2013
Date of Decision:	13 September 2013

I. INTRODUCTION

[1] This was a hearing before the Alberta Securities Commission (the **Commission**) regarding allegations made by staff (**Staff**) of the Commission against Peer Financial Ltd. (**Peer Financial**), RBEE Capital Associates Ltd. (**RBEE**) and Ralph William Burgess (**Burgess**) (collectively, the **Respondents**).

[2] In a 5 December 2012 notice of hearing, Staff alleged that Peer Financial and Burgess acted as unregistered advisors contrary to section 75(1)(b) of the *Securities Act* (Alberta) (the **Act**). Staff further alleged that the Respondents contravened section 92(4.1) by making statements that they knew or reasonably ought to have known were misleading, untrue or failed to state information required to make them not misleading, and would reasonably be expected to have a significant effect on the market price or value of a security. Finally, Staff alleged the Respondents acted contrary to the public interest through those breaches, and also by performing little, if any, due diligence relating to the securities for which they were providing investment advice and failing to disclose this fact to investors.

[3] The hearing into the merits of Staff's allegations was held on 3 September 2013. At that time, Staff and the Respondents provided the panel with a document containing agreed facts (the **Agreed Facts**), admissions from the Respondents as to contraventions of the Act (the **Admissions**), and a joint recommendation as to the appropriate sanction and costs in the circumstances (the **Joint Recommendation**). The Agreed Facts and the Admissions provided the evidentiary basis for the Joint Recommendation. No viva voce evidence was tendered to the panel.

[4] For the reasons discussed below, we accepted the Admissions and sustained the allegations against the Respondents. We also accepted the Joint Recommendation generally as representing appropriate sanction and cost-recovery orders in the circumstances. Our conclusions and orders are set out below.

II. BACKGROUND

A. General

[5] In the Agreed Facts and Admissions, Staff and the Respondents agreed, and the Respondents admitted, to among other things, the following, which we accept as truthful and accurate.

[6] At all material times, Peer Financial, an Alberta corporation wholly-owned by RBEE, engaged in and held itself out as engaging in the business of providing investment, financial, wealth management, estate planning and tax savings and planning advice, and promoting and offering for sale to its clients various financial products, including mutual funds and securities of select issuers.

[7] At all material times, RBEE, an Alberta corporation and the sole shareholder of Peer Financial, engaged in the business of raising capital on behalf of several issuers.

[8] At all material times, Burgess was a Calgary resident, the sole director and officer of Peer Financial and RBEE, and the sole voting shareholder of RBEE. As such, at all material times, he was the guiding mind of Peer Financial and RBEE, and he authorized, permitted or acquiesced in the conduct of those companies and of their employees and agents.

[9] None of the Respondents has ever been registered with the Commission in any capacity.

[10] On 6 April 1989 the Saskatchewan Securities Commission issued an order requiring Peer Financial and Burgess – both of which had apparently engaged in trading in, or acted as advisers respecting, securities of several companies – to cease trading in securities or commodity futures contracts, which order is apparently still in effect.

B. Advising

[11] Peer Financial and Burgess admitted that, between January 2007 and December 2009, they engaged in the business of advising Peer Financial clients in Alberta to purchase or sell securities of a select group of issuers, a number of which had engaged Peer Financial or RBEE to raise capital for them. In addition, a number of those select issuers were ones in which Burgess had an ownership interest or which he controlled or directed wholly or in part. Peer Financial and Burgess promoted many of these issuers to Peer Financial clients as offering low risk investments with high rates of return.

[12] Peer Financial and Burgess advised Peer Financial clients to buy or sell securities of at least 11 issuers, including:

- shares issued by Orion Energy Resources Inc., Orion Resource Corp. and Orion Resources II Corp. (collectively, **Orion**);
- debentures issued by Daedalus Capital Corp. (**Daedalus**); and
- debentures issued by 1362275 Alberta Ltd. (**136 Alberta**).

[13] Peer Financial and Burgess admitted giving securities investment advice to Peer Financial clients without sufficient due diligence by Peer Financial and Burgess and with little – if any – consideration of the clients' best interests or the suitability of the recommended securities for those clients given their individual risk tolerances and investment objectives. They also admitted giving such advice without disclosure to Peer Financial clients of this insufficient due diligence.

[14] The Respondents received hundreds of thousands of dollars in commissions, referral fees and other compensation from advising investors to buy securities.

C. Misrepresentations

[15] The Respondents admitted making to investors or prospective investors – Peer Financial clients – verbal and written statements that they knew or reasonably ought to have known were misleading or untrue or which did not state a fact required or necessary to make the statements

not misleading. These admissions were made in relation to the securities of Orion, Daedalus and 136 Alberta.

[16] Peer Financial and Burgess admitted that they had no reasonable basis for advising certain Peer Financial clients between January 2007 and December 2009 that they could expect to receive up to a 300% return by buying Orion shares, a return comparable to that received by previous Orion investors (the **Orion Statements**).

[17] Peer Financial and Burgess admitted making statements to certain Peer Financial clients between January 2007 and December 2009 that the secured debentures offered by Daedalus held a first charge on the assets of Daedalus (which were to have included 260 BOE/day of production and 15 750 net acres with full operating facilities near Pembina, Alberta) (the **Daedalus Statements**). Peer Financial and Burgess also admitted that, contrary to the Daedalus Statements, Daedalus was in fact a start-up company with no assets at the time that could be pledged.

[18] The Respondents admitted making statements to certain Peer Financial clients between January 2008 and December 2009 that:

- the debentures offered by 136 Alberta were secured with a fixed rate of return;
- 136 Alberta would use all the proceeds realized from the sale of its debentures to purchase certain lands for development; and
- RBEE would monitor 136 Alberta's use of investment proceeds, approve all expenditures and advise investors if there were any material changes to the 136 Alberta investment (collectively, the **136 Alberta Statements**).

[19] Contrary to the 136 Alberta Statements, respectively, the Respondents admitted that:

- there was no security pledged for the debentures, or the security in place was insufficient to secure all investment funds;
- 136 Alberta used approximately one-half of the proceeds from the sale of its debentures for purposes other than purchasing the certain lands for development; and
- RBEE did not monitor 136 Alberta's use of investment proceeds, approve all expenditures and advise investors if there were any material changes to the 136 Alberta investment.

[20] The Respondents admitted that the Orion Statements, Daedalus Statements and 136 Alberta Statements would reasonably be expected to have a significant effect on the market price or value of the securities of Orion, Daedalus and 136 Alberta, respectively.

[21] It was also admitted that RBEE provided the 136 Alberta Statements to Peer Financial employees, knowing that the Peer Financial employees would use the 136 Alberta Statements in promoting the sale of 136 Alberta securities to Peer Financial clients.

D. Specific Admissions

[22] The Respondents specifically admitted to contravening Alberta securities laws during the material times in the following ways:

(a) Peer Financial and Burgess acted as advisors without being registered to do so in accordance with Alberta securities laws, contrary to section 75(1)(b) of the Act, and this conduct was also contrary to the public interest;

(b) the Respondents variously made the Orion Statements, Daedalus Statements and 136 Alberta Statements that they knew or reasonably ought to have known were misleading or untrue or did not state a fact required to be stated to make the statements not misleading and which would reasonably be expected to have a significant effect on the market price or value of, respectively, the securities of Orion, Daedalus or 136 Alberta, contrary to section 92(4.1), and this conduct was also contrary to the public interest; and

(c) the Respondents' failure to conduct reasonable due diligence relating to the securities which they were advising Peer Financial clients to buy or sell and the Respondents' failure to disclose this lack of due diligence to their clients was conduct contrary to the public interest.

[23] The Respondents also admitted that their actions led to at least 100 Peer Financial clients buying in excess of $11 million of securities of Orion, Daedalus and 136 Alberta. Most, if not all, of this money has been lost, with these investors having little prospect for return of any of their investment money.

III. ANALYSIS

A. Illegal Advising

1. The Law

[24] For most of the material time (until 28 September 2009), section 75(1)(b) of the Act prohibited a person or company from acting as an "advisor" if not registered as an advisor with the Executive Director of the Commission. From 28 September 2009, the prohibition is against acting as an "adviser" without being registered in accordance with Alberta securities laws.

[25] An "advisor" was (until 28 September 2009) defined in section 1(a) of the Act as "a person or company engaging in or holding out the person or company as engaging in the business of advising others with respect to investing in or the buying or selling of securities or exchange contracts". From 28 September 2009, "adviser" is defined (section 1(a)) as "a person or company engaging in or holding itself out as engaging in the business of advising in securities or exchange contracts", while "advising in securities or exchange contracts" is defined

(section 1(a.1)) to include "giving, offering or agreeing to give advice to another person or company about investing in or buying or selling securities or exchange contracts".

[26] For purposes of the circumstances here, we discern between the two definitions no substantive differences that would affect our findings. We use the term "advisor" in this decision because the majority of the alleged misconduct occurred while that definition was in force.

[27] The broadly-defined term "security" includes "any bond, debenture, note or other evidence of indebtedness, share, stock, . . ." (section 1(ggg)(v) of the Act).

2. Advising in Securities

[28] The Respondents acknowledged that the shares of Orion, the debentures of Daedalus and 136 Alberta, and the relevant products of the other specified issuers were securities under the Act (securities as defined in section 1(ggg)(v)). The evidence is clear that Peer Financial and Burgess were, as admitted, in the business of advising in securities, namely advising others – Peer Financial clients – with respect to buying or selling securities – shares or debentures – of certain specified issuers, for which Peer Financial and Burgess received payments of commissions, referral fees or other compensation. Consistent with the act of giving advice in these circumstances, Peer Financial and Burgess also, as admitted, opined to Peer Financial clients that many of the securities recommended were low risk investments with high rates of return.

[29] For these reasons, we find, as admitted, that Peer Financial and Burgess, who were not registered in any capacity at the time, contravened section 75(1)(b) of the Act.

B. Misleading or Untrue Statements

1. The Law

[30] Section 92(4.1) of the Act states:

> No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,
> (i) is misleading or untrue, or
> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
>
> and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security . . . .

2. Misleading or Untrue Statements

[31] We find, consistent with the Agreed Facts and Admissions, that the Orion Statements, Daedalus Statements and 136 Alberta Statements were misleading or untrue (or both). We also find that Burgess knew or reasonably ought to have known that the Orion Statements, Daedalus Statements and 136 Alberta Statements were misleading or untrue (or both) or did not state a fact required to be stated to make the statements not misleading – and, because Burgess was the admitted guiding mind of Peer Financial and RBEE, those entities are also fixed with such

knowledge. We further find that the Orion Statements, Daedalus Statements and 136 Alberta Statements would reasonably be expected to have a significant effect on the market price or value of the Orion, Daedalus and 136 Alberta securities, and that the Respondents knew or reasonably ought to have known this. As this Commission stated in *Re Marcotte*, 2011 ABASC 77 (at para. 98):

> [The misleading or untrue representations] would obviously be expected to have a significant effect on the price that an investor would pay for the investment offered, and so be reasonably likely to affect significantly the attractiveness, and value, of an investment in the relevant parcel of land. These representations were thus materially misleading or untrue (or both), and Marcotte reasonably ought to have known this.

[32] Accordingly, in all the circumstances, we find that the Respondents, as admitted, contravened section 92(4.1) of the Act.

C. Conduct Contrary to the Public Interest

[33] Registration of those who advise on securities is a key component of Alberta securities laws. Registration of advisors serves an important gate-keeping function, whereby investors only receive advice on securities from those who meet education and conduct standards and who are subject to ongoing monitoring and compliance requirements.

[34] Illegal advising is serious capital-market misconduct, which can have significant financial and other repercussions to the particular investor and the Alberta capital market generally. Peer Financial and Burgess admitted that they gave advice to Peer Financial clients with little, if any, consideration of the clients' best interests or the suitability of recommended investments for them, given their individual risk tolerances and investment objectives. Peer Financial and Burgess also admitted that they had conducted insufficient due diligence on the promoted investment products, meaning they did not themselves know enough about such products to give proper advice. They compounded that harm by failing to disclose that fact to Peer Financial clients. These failures by Peer Financial and Burgess demonstrated a general disdain for this fundamental element of Alberta securities laws and removed a key protection from Peer Financial clients to which they were entitled under Alberta securities laws.

[35] The Respondents' misleading or untrue statements made to Peer Financial clients also comprised serious misconduct. The Respondents lied to some of their clients, reassuring them with false statements and promises about certain issuers' levels of success, how the invested money was to be used, and the security of the investments.

[36] The Respondents failed to provide the requisite high standard of fairness through the honest and responsible business conduct that is expected of participants in the Alberta capital market. In the result, the Respondents harmed identifiable investors – Peer Financial clients – and the integrity of the Alberta capital market. The Respondents' misleading or untrue statements clearly comprised conduct contrary to the public interest.

[37] For these reasons, we conclude that the Respondents – through their breaches of the Act, as well as the failure of Peer Financial and Burgess to perform reasonable due diligence on the

investments for which they were providing advice and to disclose that failure to Peer Financial clients – engaged in conduct contrary to the public interest.

IV. FINDINGS

[38] We find that Peer Financial and Burgess contravened section 75(1)(b) of the Act. We further find that all of the Respondents contravened sections 92(4.1) of the Act. Finally, we find that all of that conduct, as well as the failure by Peer Financial and Burgess to conduct reasonable due diligence and to disclose that failure, was conduct contrary to the public interest.

V. SANCTION AND COSTS

A. General Sanctioning Principles

[39] The Commission administers Alberta securities laws. A key component of the Commission's public interest mandate is the protection of Alberta investors and the Alberta capital market from misconduct by capital market participants. In exercising our authority to order sanctions in the public interest under sections 198 and 199 of the Act, we are not to punish or remedy capital market misconduct but are to act prospectively to protect from future harm Alberta investors and the efficiency and integrity of our capital market (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). Specific and general deterrence are important considerations in determining what, if any, protective and preventative orders to make (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62).

[40] In determining what sanctions may be appropriate in the public interest against a particular respondent in a particular case, we also consider the factors identified at para. 11 of *Re Lamoureux*, [2002] A.S.C.D. No. 125 (affirmed on other grounds 2002 ABCA 253), as restated at para. 43 of *Re Workum and Hennig*, 2008 ABASC 719 (affirmed 2010 ABCA 405):

- the seriousness of the findings against the respondent and the respondent's recognition of that seriousness;
- characteristics of the respondent, including capital market experience and activity and any prior sanctions;
- any benefits received by the respondent and any harm to which investors or the capital market generally were exposed by the misconduct found;
- the risk to investors and the capital market if the respondent were to continue to operate unimpeded in the capital market or if others were to emulate the respondent's conduct;
- decisions or outcomes in other matters; and
- any mitigating considerations.

B. General Cost-recovery Principles

[41] Ordering a respondent to pay "costs" is not a sanction, but a way of recovering costs incurred during the course of Commission enforcement proceedings. It is considered appropriate for a respondent who has contravened Alberta securities laws or acted contrary to the public interest to pay at least a portion of such costs. A contribution made by a respondent to the efficiency of the investigation and hearing process is a factor in determining an appropriate cost-recovery order.

C. Joint Recommendation of the Parties

[42] The Joint Recommendation of Staff and the Respondents is that the imposition of the following sanction and cost-recovery orders would be in the public interest:

(a) Peer Financial and RBEE cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to them, permanently;

(b) Burgess cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to him, for 20 years, with the exception of trades made by Burgess in a personal registered retirement savings account (**RRSP**), provided such trades are made through a registrant;

(c) Burgess resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, for 20 years;

(d) the Respondents are prohibited from advising in securities or exchange contracts, permanently;

(e) the Respondents are prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently;

(f) the Respondents, jointly and severally, pay an administrative penalty of $150 000; and

(g) the Respondents pay the amount of $40 000 towards costs of the investigation and hearing.

D. Appropriate Sanctions and Cost-recovery

[43] We now turn to an application of the sanctioning principles and factors and the cost-recovery principles based on the particular circumstances here, including the Joint Recommendation.

[44] We consider whether the sanctions set out in the Joint Recommendation are within the parameters of acceptability to achieve the Commission's public interest objective of protection through deterrence; we do not consider what sanctions this panel would have imposed after a contested enforcement hearing. While we must reach our own conclusion as to the appropriate sanctions to order for the misconduct found in light of the sanctioning principles and factors, we gave significant weight in these circumstances to the Joint Recommendation.

[45] The Respondents' contraventions of the Act and conduct contrary to the public interest are very serious matters, causing harm to investors and the reputation and integrity of the Alberta capital market. Significant consequences must follow. The Respondents acknowledged receiving considerable financial benefits through their misconduct. Peer Financial and Burgess,

with their history of unregistered advising and sanctions in Saskatchewan, knew or ought to have known that advising on securities without registration was illegal. This is an aggravating factor. Given all of the circumstances, it is important that the sanctions imposed on the Respondents be significant enough to deter them and others from engaging in similar misconduct in the future.

[46] We note that the Respondents, by agreeing to the Agreed Facts, Admissions and Joint Recommendation, have shown a recognition of their misconduct, cooperated with Staff and saved the time and expense associated with a contested enforcement hearing.

[47] In all the circumstances we are of the view that, overall, the sanctions and costs proposed in the Joint Recommendation are within an acceptable range of appropriateness for these Respondents in these circumstances and will thus provide the requisite protection through deterrence.

VI. ORDERS

[48] For the foregoing reasons, we order the following:

- under sections 198(1)(b) and (c) of the Act, Peer Financial and RBEE cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to them, permanently;

- under sections 198(1)(b) and (c), Burgess cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to him, for 20 years to and including 13 September 2033, except that these orders do not preclude him from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in one RRSP for his own benefit;

- under sections 198(1)(d) and (e), Burgess resign from all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, for 20 years to and including 13 September 2033;

- under section 198(1)(e.1), the Respondents are prohibited from advising in securities or exchange contracts, permanently;

- under section 198(1)(e.3), the Respondents are prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently;

- under section 199, the Respondents pay, jointly and severally, an administrative penalty of $150 000; and

- under section 202, the Respondents pay, jointly and severally, $40 000 of the costs of the investigation and hearing.

[49] This proceeding is concluded.

13 September 2013

For the Commission:

"original signed by"
Glenda A. Campbell, QC

"original signed by"
Maureen McCaw

"original signed by"
Fred R.N. Snell, FCA