



Ontario
Securities
Commission

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Citation: Threegold Resources Inc. (Re), 2021 ONSEC 30

Date: 2021-12-15

File No.: 2019-42

**IN THE MATTER OF
THREEGOLD RESOURCES INC.,
VICTOR GONCALVES AND JON SNELSON**

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

Hearing: In Writing

Decision: December 15, 2021

Panel: Wendy Berman Vice-Chair and Chair of the Panel

Appearances: Alexandra Matushenko Staff of the Commission

No one appearing for
Threegold Resources Inc.

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REASONS AND DECISION

I. OVERVIEW

- [1] Staff of the Commission alleges that the respondent, Threegold Resources Inc., contravened Ontario securities law by issuing securities of Threegold, specifically convertible debentures. Staff alleges that by engaging in such activity, Threegold distributed securities without a prospectus and without an available exemption, engaged in the business of trading in securities without being registered and without an available exemption and breached a Commission order cease trading all securities of Threegold.
- [2] This proceeding relates only to the conduct of Threegold. The Commission approved a settlement agreement between Staff and the other respondents, Victor Goncalves and Jon Snelson, with respect to the allegations against them on February 8, 2021.
- [3] This decision concludes a proceeding that combines a merits hearing and a sanctions hearing, both in writing, pursuant to the Commission's order of March 15, 2021. That order waived the requirement to serve Threegold with the Notice of Hearing, Statement of Allegations and all future processes on the basis that Staff had exhausted all reasonable efforts to serve Threegold.
- [4] Threegold did not file any materials with respect to this proceeding. Section 7 of the *Statutory Powers and Procedures Act*¹ authorizes a tribunal to proceed in the absence of a party when that party has been given notice of the hearing.
- [5] I note that the Notice of Hearing and the Statement of Allegations were served on the other respondents (both of whom are former directors and officers of Threegold) and were publicly posted on the Commission's website. Threegold does not currently have any directors, officers or representatives and is not operational.
- [6] Given these circumstances and the waiver of service on Threegold, I am satisfied that I can proceed with the merits and sanctions hearing in the absence of Threegold.
- [7] For the reasons set out below, I find that Threegold contravened Ontario securities law by distributing debentures without a prospectus and in breach of a Commission cease trade order and that it is in the public interest to issue an order permanently prohibiting Threegold from trading in securities.

II. EVIDENCE

- [8] Staff filed an affidavit, with attached documents, from its witness Sherry Brown, a senior forensic accountant with the Commission's Enforcement Branch.² Ms. Brown's affidavit included affidavits from the respondent Mr. Goncalves, sworn on August 20, 2020,³ and the respondent Mr. Snelson, sworn on July 16, 2020. No further evidence was presented.

¹ RSO 1990, c. S.22

² Exhibit 1, Affidavit of Sherry Brown, sworn April 22, 2021 (**Brown Affidavit**)

³ Affidavit of Victor Goncalves, sworn August 20, 2020, Exhibit 1, Brown Affidavit, Exhibit A, Tab 2

III. BACKGROUND FACTS

- [9] Threegold is a reporting issuer in all provinces and territories in Canada. The securities of Threegold were listed on the NEX Exchange during the relevant time and subsequently delisted in April 2020.
- [10] During the relevant time, the individual respondents were directors and officers of Threegold. Mr. Goncalves was the president, CEO and director of Threegold, and Mr. Snelson was a director and the treasurer of Threegold. Mr. Snelson was also at various times a registered salesperson or dealing representative under the categories of mutual fund dealer and limited market dealer. Mr. Goncalves and Mr. Snelson resigned as executives and directors on May 17, 2016, and June 30, 2018, respectively. Since Mr. Snelson's resignation, Threegold has not had any directors or officers.
- [11] In May 2014, the Commission issued an order cease trading all securities of Threegold, because Threegold had failed to make required continuous disclosure filings, including failing to file audited annual financial statements for the year ended December 31, 2013. The cease trade order remained in effect during the relevant time.
- [12] Threegold is also the subject of cease trade orders by the Autorité des marchés financiers (Québec), British Columbia Securities Commission, Manitoba Securities Commission and Alberta Securities Commission, all of which were issued in 2014 and remained in effect during the relevant time.
- [13] From July to November 2015, and while the Commission cease trade order was in effect (as well as the cease trade orders of the other Commissions as indicated above), Threegold issued and distributed \$310,000 of debentures to 19 Ontario-resident investors.
- [14] The terms of the debentures were contained in written agreements which provided that the debentures were convertible into common shares of Threegold, had a maturity date of November 16, 2015, and an interest rate of 5%.
- [15] The investors have not received any payments of interest or principal related to the debentures and none of the debentures were converted into common shares.
- [16] Threegold does not currently have any directors, officers or representatives and is no longer operational.

IV. ANALYSIS

A. Introduction

- [17] I turn now to my analysis of the three principal issues raised by Staff's allegations:
- a. Did Threegold distribute securities without a prospectus, and without any available exemptions from the prospectus requirement, contrary to s. 53(1) of the *Securities Act*⁴ (the **Act**)?
 - b. Did Threegold contravene Ontario securities law by distributing securities in breach of the terms of the cease trade order?

⁴ RSO 1990, c. S.5

- c. Did Threegold engage in the business of trading in securities without being registered and without any exemption from registration, contrary to s. 25(1) of the Act?

B. Did Threegold distribute the debentures without a prospectus, and without any applicable exemptions from the prospectus requirement?

- [18] A person or company must not distribute a security without a prospectus, unless an exemption applies.⁵ The prospectus requirement is a cornerstone of Ontario's securities regulatory regime designed to ensure that investors receive the necessary information to make an informed investment decision.⁶
- [19] The debentures were securities as defined in the Act.⁷ Threegold issued and sold \$310,000 in debentures to 19 investors. Each sale of a debenture constituted a trade in securities by Threegold.
- [20] The debentures were also previously unissued securities and accordingly the issuance of the debentures was a "distribution" as defined in the Act.⁸
- [21] No preliminary prospectus or prospectus was filed for the distribution of the debentures. Accordingly, I must consider whether Threegold was entitled to an exemption from the prospectus requirement.
- [22] Staff submits that no prospectus exemptions were available in respect of the Debentures as most of the investors were not accredited investors and there were no other applicable prospectus exemptions.
- [23] None of the documents prepared and delivered by Threegold in respect of the debenture offering expressly state any reliance on a prospectus exemption or allude to any reliance on a prospectus exemption. Further, none of these documents demonstrates any attempt to rely on any applicable prospectus exemptions for securities issued to individuals, including the accredited investor exemption or the offering memorandum exemption, by, for example, gathering the required investor financial information, placing restrictions on the resale of the debentures or requiring investors to complete the prescribed risk acknowledgement form.⁹
- [24] In addition, a company must file a report of exempt distribution with the Commission to rely on the accredited investor or offering memorandum exemption. Threegold did not deliver or file an offering memorandum to the Commission and did not file any reports of exempt distribution with the Commission.
- [25] Mr. Snelson and Mr. Goncalves testified that they initially believed that the debentures qualified as loans and were not securities. They both acknowledged, however, that Threegold ultimately distributed convertible debentures and that they facilitated the sale of these debentures from July to November 2015.

⁵ Act, s. 53(1)

⁶ *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40 (**Money Gate Merits**) at para 168

⁷ Act, s. 1(1) "security" definition at paras (a), (b) and (c)

⁸ Act, s. 1(1), "distribution" definition at para (a); *Limelight Entertainment Inc, Re*, 2008 ONSEC 4 at paras 139-140

⁹ National Instrument 45-106 – Prospectus Exemptions, ss. 2.3, 2.6.2, 2.9 and 2.10

- [26] The debentures were distributed to 19 individuals, all of whom were Ontario residents. Fifteen of the individual investors, approximately 80% of the investor group, were mutual fund clients of Mr. Snelson. Most of these individual investors, approximately 64%, did not meet the personal financial requirements for the accredited investor exemption or the offering memorandum exemption.
- [27] I am satisfied that the above evidence demonstrates that Threegold engaged in a distribution of securities without filing a preliminary prospectus or prospectus, and without an applicable exemption from the prospectus requirement, and therefore contravened s. 53(1) of the Act.

C. Did Threegold contravene Ontario securities law by distributing securities in breach of the terms of the cease trade order?

- [28] The cease trade order dated May 20, 2014, provided that all trading in the securities of Threegold, whether direct or indirect, cease until further order.¹⁰
- [29] The cease trade order forms part of “Ontario securities law” under the Act, which defines that term to include a decision of the Commission or of a Director.¹¹
- [30] To find that Threegold breached the cease trade order, I must be satisfied that Threegold traded in its own securities while the cease trade order was in effect.¹²
- [31] The debentures were securities of Threegold and Threegold issued and sold \$310,000 in debentures to 19 investors. Each distribution of a debenture constituted a trade in securities by Threegold while the cease trade order was in effect.
- [32] Accordingly, I find that the distribution of the debentures by Threegold breached the cease trade order and, as a result, Threegold contravened Ontario securities law.

D. Did Threegold engage in, or hold itself out as engaging in, the business of trading in securities?

- [33] A person or company must be registered under Ontario securities law to engage in the business of trading in securities unless an exemption applies.¹³
- [34] The registration requirement is a cornerstone of the securities regulatory regime designed to ensure that those who engage in the business of trading related to securities are proficient and solvent, and that they act with integrity. Unregistered trading or advising defeats some of these necessary legal protections and undermines investor protection and the integrity of the capital markets.¹⁴
- [35] Staff submits that Threegold engaged in, or held itself out as engaging in, the business of trading securities without being registered to do so, and where no exemption from registration was available.

¹⁰ Order dated May 20, 2014, Exhibit 1, Brown Affidavit, Exhibit A, Tab 15

¹¹ Act, s. 1(1)

¹² *MOAG Copper Gold Resources Inc (Re)*, 2020 ONSEC 3 at para 33

¹³ Act, s. 25(1)

¹⁴ *Money Gate Merits* at para 140; *Al-Tar Energy Corp (Re)*, 2010 ONSEC 11 (***Al-Tar Energy Corp***) at para 81

- [36] Threegold was never registered in any capacity under the Act. In addition, neither of the senior executives who were involved in the sale of the debentures, Mr. Snelson and Mr. Goncalves, was registered to trade or advise in respect of the sale of debentures during the relevant time.
- [37] Therefore, the only question I must determine is whether Threegold engaged in the business of trading securities. To do so, I am required to determine whether Threegold's conduct constituted "trading", and if so, whether that conduct was carried out for a business purpose.
- [38] As outlined above, I have concluded that Threegold's actions in distributing the debentures constituted "trading" in securities of Threegold within the meaning of the Act and that each sale of a debenture constituted a trade in a security. Accordingly, I turn now to consider whether in distributing the debentures, Threegold was engaged in, or held itself out as engaging in, the business of trading securities.
- [39] Guidance on the factors that are relevant in determining whether a company is engaged in the business of trading, commonly described as the "business trigger", is provided in Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103CP)*. The Companion Policy sets out factors to be considered in determining whether the trading activities are for a business purpose. The factors include, among other things:
- a. engaging in activities similar to those of a registrant;
 - b. carrying on the activity with repetition, regularity, or continuity, whether or not the activity is the sole or even primary endeavour;
 - c. receiving, or expecting to receive, compensation for the activity; and
 - d. directly or indirectly soliciting securities transactions.
- [40] The Commission has previously relied on the business trigger factors in NI 31-103CP to determine whether the conduct was carried out for a business purpose.¹⁵ These factors are useful but ultimately, I must take a holistic view to determine whether Threegold was acting like a securities dealer in the business of trading securities or was seeking to raise capital for the advancement of an underlying business.

1. Engaging in activities similar to a registrant with repetition and regularity

- [41] Staff submits that Threegold's activities were similar to those of an exempt market dealer and that the sale of the debentures by Threegold constituted engaging in the business of trading. Staff submits that Threegold engaged in regular and continuous solicitation of investors to purchase the debentures over a four-month period.
- [42] Staff also submits that the admissions by Mr. Goncalves and Mr. Snelson that they engaged in the business of trading in securities without being registered as contained in the settlement agreement between them and Staff can be relied on as evidence to conclude that Threegold engaged in the business of trading.

¹⁵ *Money Gate Merits* at paras 144-145; *Merharchand (Re)*, 2018 ONSEC 51 at para 111

[43] I disagree. Mr. Goncalves and Mr. Snelson did not make these admissions on behalf of Threegold. At best these admissions are some evidence relating to the determination of whether Threegold engaged in the business of trading but are not conclusive. I must consider all the evidence in this proceeding to assess the activities of Threegold, including the activities undertaken by representatives of Threegold to facilitate the debenture offering, and determine whether such conduct satisfies the components of the business purpose test.

[44] In my view, the evidence clearly establishes that Threegold engaged in the following activities through its executives:

- a. Ongoing efforts to solicit investors to purchase debentures over a four-month period, which included approaching a number of individuals to discuss and recommend participation in the debenture offering and facilitating the sale of debentures to investors;
- b. Preparation of documents setting out the terms of the debentures and use of proceeds for the debenture offering and delivery of these documents to investors;
- c. Receipt of funds from investors and delivery of executed documents evidencing the debentures, including agreements and use of proceeds documents; and
- d. Issuance of a news release which announced, among other things, the total funds of \$310,000 raised in the debenture offering and additional funds from a loan of \$500,000, with such funds to be used to advance exploration work on its mining property and for general and administrative purposes.

[45] By carrying out these activities, Threegold regularly and continuously engaged in extensive efforts over a four-month period to raise capital and succeeded in selling debentures to 19 investors for total proceeds of \$310,000.

2. Receiving or expecting to receive compensation for trading

[46] Staff submits that Threegold expected to receive, and did receive, a financial benefit from the sale of the debentures, being the funds received from investors for the preservation of Threegold's business.

[47] Staff also submits that the expectation of compensation and/or receipt of compensation by the Threegold executives involved in the solicitation and sale of the debentures satisfies the compensation aspect of the business purpose test. Staff relies on the fact that Threegold recorded management fee expenses of approximately \$180,000 owing to Mr. Goncalves and Mr. Snelson during the relevant time and Mr. Goncalves received salary compensation that was at least partly related to his efforts in soliciting and selling debentures.

[48] In soliciting and distributing the debentures, Threegold expected to receive and did receive a financial benefit, being the funds from investors.

[49] Given Mr. Goncalves's executive position and that some of his time was devoted to facilitating the distribution of the debentures, I find that at least a portion of his remuneration was attributable to the sale of the debentures. Although Mr. Snelson received no compensation, commissions or fees related to the sale of the debentures, he acknowledged that he had an expectation of financial gain.

3. Soliciting securities transactions

- [50] Any entity that seeks capital investment through the distribution of securities is soliciting securities transactions. By distributing the debentures and accepting investor funds for the purchase of debentures, Threegold engaged in soliciting and trading in securities.
- [51] I must determine whether the activities of Threegold crossed the line between permissible capital raising and the business of trading.¹⁶ In doing so, I must consider the surrounding circumstances of the debenture offering, including the extent to which Threegold's efforts were devoted to capital raising as opposed to any underlying business during the relevant time.
- [52] At the relevant time, Threegold was experiencing financial difficulties and lacked sufficient funds to conduct its ongoing business activities as a mineral exploration company. Accordingly, it engaged in efforts to raise capital for the stated purposes of advancing one of its exploration projects (the Lotus mining project) and completing its audited financial statements.
- [53] Based on various documents filed by Staff, including Threegold's unaudited quarterly financial statements for the period ending September 30, 2015, Threegold continued to engage in business activities related to its mineral exploration projects during the relevant time. In fiscal 2015, Threegold incurred approximately \$20,000 in mining project-related expenses, \$36,000 in professional and consultant fees and \$140,000 in promotional expenses. Threegold also made payments to external legal advisors, an external auditing firm, and an engineering consultant during the relevant time.
- [54] Mr. Snelson and Mr. Goncalves both testified about their involvement in facilitating the sale of the debentures. Mr. Goncalves testified that he was involved as a director and officer of Threegold in facilitating the sale of the debentures to 19 investors. He further testified that he drafted the debenture documents.
- [55] Mr. Snelson stated that he recommended and sold the debentures as an officer and director of Threegold. In particular, he solicited investors, many of whom were also his mutual fund clients at the time, to discuss the debenture investment and facilitated the sale of the debentures to 19 individuals including signing the debenture documents as an authorized signatory on behalf of Threegold.
- [56] In terms of Threegold's mineral exploration business activities, Mr. Snelson testified that Threegold was seeking to raise funds for one of its exploration projects through the sale of the debentures. Also, neither Mr. Snelson nor Mr. Goncalves stated that the debenture offering constituted the primary or sole business activity of Threegold or that there were no ongoing mineral exploration activities or other business activities of Threegold.
- [57] In my view, the evidence falls short of establishing that Threegold's activities crossed the line from capital raising into the business of trading securities. To the contrary, Threegold was pursuing a strategy to further its mineral exploration

¹⁶ *Blue Gold Holdings Ltd (Re)*, 2016 ONSC 24 at para 20; *Money Gate Merits* at para 143

business activities and the capital raising through the debenture offering was ancillary to these activities.

[58] Accordingly, I conclude that Threegold was not engaged in the business of trading in securities and that there was no breach of s. 25(1) of the Act.

V. SANCTIONS

[59] I will now address the applicable sanctions against Threegold.

A. Overview

[60] Staff seeks the following sanctions against Threegold for its breaches of Ontario securities law:

- a. an order that trading in any securities of Threegold cease permanently;
- b. an order that trading in any securities or derivatives by Threegold cease permanently;
- c. an order that Threegold be prohibited from acquiring any securities permanently; and
- d. an order that the exemptions contained in Ontario securities law do not apply to Threegold permanently.

[61] Staff seeks these sanctions as Threegold continues to exist as a corporate entity and could be reactivated. Staff does not seek any financial sanctions or costs order against Threegold as it is no longer operational.

B. Legal Framework for Sanctions

[62] The Commission may impose sanctions under s. 127(1) of the Act where it finds that it is in the public interest to do so. The Commission must exercise this jurisdiction in a manner that is consistent with the Act's purposes, which includes investor protection and the fostering of fair and efficient capital markets.¹⁷

[63] The sanctions available under s. 127(1) of the Act are protective and preventative and intended to prevent future harm to investors and the capital markets.¹⁸

[64] Sanctions must be proportionate to the respondent's conduct in the circumstances.¹⁹ The Commission has identified a non-exhaustive list of factors to be considered with respect to sanctions generally, including the seriousness of the misconduct, whether the misconduct was isolated or recurrent, the size of the profit made from the misconduct, any mitigating factors, and the likely effect that any sanction would have on the respondent as well as on others.²⁰

¹⁷ *Borealis International Inc (Re)*, 2011 ONSEC 11 at para 16 (**Borealis**); *Money Gate Mortgage Investment Corporation (Re)*, 2021 ONSEC 10 (**Money Gate Sanctions**) at paras 7-8

¹⁸ *Money Gate Sanctions* at para 9; *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42 to 43; *Bradon Technologies Ltd (Re)*, 2016 ONSEC 9 (**Bradon**) at paras 26-27.

¹⁹ *Borealis* at para 20; *Bradon* at paras 28

²⁰ *Bradon* at paras 28; *Re Cartaway Resources Corp*, 2004 SCC 26 at para 60; *Money Gate Sanctions* at para 9

C. Appropriate Sanctions

- [65] Threegold's misconduct was serious. In contravention of Ontario securities law, Threegold engaged in a course of conduct over a four-month period to solicit and distribute debentures to 19 investors for total proceeds of \$310,000. All the investors lost their invested funds, and none received any of the interest payments due under the terms of the debentures.
- [66] Threegold violated prospectus requirements, which are a cornerstone of Ontario's regulatory regime designed to ensure that investors have sufficient information to properly assess the risks of an investment in a security and make informed decisions.²¹
- [67] Threegold also distributed the debentures while the cease trade order was in effect. The requirement that persons and companies subject to cease trade orders abide by the terms of those orders is essential to the Commission's ability to achieve the purposes and objectives of the Act. Breaching a Commission order is a very serious misconduct.²²
- [68] Threegold's misconduct was recurring, it extended over four months and it affected many investors. The funds obtained by Threegold over a short period were significant. By its misconduct, Threegold caused investors to suffer harm and compromised the integrity of Ontario's capital markets.
- [69] Importantly, the cease trade order did not deter Threegold from capital raising activities and distribution of the debentures.
- [70] Participation in the capital markets is a privilege, not a right.²³ A permanent trading ban is a severe sanction and accordingly I must ensure it is necessary as protective and preventative.
- [71] I have considered the serious nature of the misconduct, the financial harm caused by the misconduct and the failure to abide by the terms of the cease trade order. In my view, only a permanent removal from the capital markets would be proportionate to the type of misconduct in this case and would be sufficient to protect Ontario investors by deterring Threegold (and any individual who might resurrect it) from engaging in similar or other misconduct, and by acting as a general deterrent to other like-minded persons.

VI. CONCLUSION

- [72] For the reasons set out above, I find that Threegold:
- a. distributed securities without a prospectus, and without any applicable exemptions from the prospectus requirement, contrary to s. 53(1) of the Act; and
 - b. contravened Ontario securities law by trading in its own securities in breach of the terms of the cease trade order.
- [73] I shall issue an order that provides:

²¹ *Bradon* at para 32

²² *Al-Tar Energy Corp* at para 341; *MOAG Copper Gold Resources Inc (Re)*, 2020 ONSC 29 (**MOAG Sanctions**) at para 15

²³ *Borealis* at para 51; *MOAG Sanctions* at para 36

- a. pursuant to paragraphs 2 and 2.1 of s. 127(1) of the Act, that:
 - i. trading in the securities of Threegold shall cease permanently;
 - ii. trading in any securities or derivatives by Threegold shall cease permanently; and
 - iii. the acquisition of any securities by Threegold is prohibited permanently.
- b. pursuant to paragraph 3 of s. 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Threegold permanently.

Dated at Toronto this 15 day of December, 2021.

"Wendy Berman"

Wendy Berman