

August 18, 2009

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: TRICLEAN ENTERPRISES INC.

**REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION**

Panel:

Acting Chair: Ms. L.M. McCarthy
Commission Members: Mr. G.L. Lillies
Mr. G.S. Posner

Appearances:

Ms. K.G.R. Laycock) Counsel for the Commission
) No appearance on behalf of the Respondent

Background

This matter with respect to Triclean Enterprises Inc. (Triclean) first came before the hearing panel on December 17, 2008 pursuant to a Notice of Hearing and Statement of Allegations both dated October 6, 2008. Triclean was unrepresented at that time as well as at the hearing that began on June 1, 2009. An interim denial of exemptions order, Order No. 5827, was issued following that appearance, and is in effect until the completion of the hearing and the rendering of a decision by the panel.

Triclean is a corporation incorporated under the laws of the Province of Ontario according to the records of the Ontario Business Information System as of May 19, 2009 (Exhibit 6). The registered office of Triclean is located in Thornhill, Ontario.

Allegations of Staff of the Manitoba Securities Commission (MSC)

1. Triclean traded in securities without having been registered and without prospectus in contravention of sections 6 and 37 of The Securities Act of Manitoba (“Act”);
2. Triclean acted improperly and contrary to the public interest in its use of the Accredited Investor Exemption.

Registration of Triclean

With respect to the registration of Triclean, MSC staff alleges, in particular, that:

- At all material times, Triclean was not registered to trade in securities under The Securities Act of Manitoba (“Act”).
- At all material times, Triclean had not filed a preliminary prospectus or a prospectus with The Manitoba Securities Commission (“Commission”), nor had it applied for or been granted an exemption order under section 20 of the Act.
- At all material times, Triclean had not filed any reports under section 7 of the Regulation to the Act or any notice under section 91 of the Regulation to the Act with respect to any trades under section 19 of the Act or sections 90 or 91 of the Regulation.
- At all material times, Triclean had not made any filings with the Commission under the accredited investor exemption pursuant to either Multilateral Instrument 45-103 (“MI 45-103”) or National Instrument 45-106 (“NI 45-106”).

MSC counsel submitted a Certified Statement of Director (Exhibit 7) prepared by the Director – Registrations of the MSC. This statement confirmed that:

- Triclean is not now and has never been registered in any capacity under the Act;
- Triclean has not at any time filed a preliminary prospectus or prospectus with the MSC;
- Triclean has not applied for or been granted an exemption order from the Commission under section 20 of the Act from any requirement of the Act;
- Triclean has not filed any reports under clause 7 of the Regulation to the Act (Regulation) or any notice under clause 91 of the Regulation with respect to any trades under section 19 of the Act or clauses 90 or 91 of the Regulation; and
- that Triclean has not made filings with the MSC under the Accredited Investor exemption pursuant to either MI 45-103 or NI 45-106.

Use of Accredited Investor Exemption

The panel heard evidence from eleven Manitoba investors who purchased shares in Triclean. In all but one case, these investors had been contacted by telephone and solicited to purchase shares in Triclean. They did not know how they had come to the attention of Triclean as potential investors.

One of the investors learned about Triclean from a colleague and, after some research, contacted Triclean by telephone.

Following the initial contact, the process was generally the same. Usually several calls were made to each prospective investor by various representatives of Triclean. Triclean was promoted as a company that disposed of hazardous waste, with the specifics sometimes tailored to the business of the prospective investor. Evidence indicated that the callers were persuasive in promoting the company as a start up with potential for the share price to go up significantly in a short period of time.

The amount invested by the witnesses varied although the price per share was \$3.00 for all purchases except for one transaction where a lower price per share was offered for a large investment.

Once the investor had committed to purchase shares the following would occur for each purchase:

- The investor received by fax two copies of a confirmation on Triclean letterhead. One copy was to be signed and returned with a cheque for the full amount the purchase.
- Triclean arranged for a courier to pick up the documents the next day.
- After Triclean received the investor's payment, a package of documents was sent. In some cases this package was sent almost immediately after payment was received, in other cases some weeks or months later. The documents included a welcome letter, a share certificate, a subscription agreement and a return envelope for a signed copy of the subscription agreement to be returned to Triclean.

The Subscription Agreement

At the top of the Subscription Agreement for purchasers of common shares was the following notice:

"THE SECURITIES HEREBY OFFERED ARE BEING PRIVATELY OFFERED TO ACCREDITED INVESTORS AS DEFINED IN PARAGRAPH 1(f) IN ATTACHED SCHEDULE "B", PURSUANT TO EXEMPTIONS FROM THE PROSPECTUS AND REGISTRATION REQUIREMENTS UNDER RULE 45-501 (REVISED) IMPLEMENTED BY THE ONTARIO SECURITIES COMMISSION AND UNDER REVISED MULTILATERAL INSTRUMENT 45-103, IMPLEMENTED BY THE SECURITIES REGULATORY AUTHORITIES IN ALBERTA, BRITISH COLUMBIA, MANITOBA, NEWFOUNDLAND & LABRADOR, NORTHWEST TERRITORIES, NOVA SCOTIA, NUNAVUT, PRINCE EDWARD ISLAND AND SASKATCHEWAN."

The Subscription Agreement contained one paragraph that stated:

"The undersigned (the Purchaser) hereby irrevocably purchases, subject to the terms and conditions set forth in this Agreement, Common Shares of the Company in the principal amount (the "Purchase Price") and with the specific purchase instructions as set forth below. The particulars of the Common Shares and certain terms of the sale of the Common Shares are set out in Schedule "A" to this Agreement. Attached as Schedule "B" to this Agreement are certain of the representations, warranties and covenants to be made by the Purchaser (on his/her own behalf and, if applicable, on behalf of others for whom he/she is contracting hereunder) so that the Company can ensure compliance with applicable securities laws. Each such schedule forms a part of and is incorporated into this Agreement and the Purchaser should review each carefully."

Schedule "A" to the Subscription Agreement was a two page document outlining the terms of the offering. Schedule "B" to the Subscription Agreement was another two page document containing the purchaser's representations, warranties and covenants. Section 1(f) of Schedule "B" was headed Prospectus Exemptions, and contained a definition of an accredited investor.

The definition of accredited investor in MI 45-103, and in its successor NI 45-106, includes income and asset tests which must be met before an individual qualifies as an accredited investor.

Some of the investors read the Subscription Agreement and schedules; others skimmed it or didn't read it at all. In no case did any of the witnesses really understand the document, or have it explained to them by a representative of Triclean. Some of the investors signed and returned the Subscription Agreement while others testified that they are not sure whether they did or not.

Accredited Investor Status

None of the eleven investors discussed the accredited investor exemption with a Triclean representative during any of their telephone conversations or received any information in the written material from Triclean to explain the representations in the Subscription Agreement. No one representing Triclean inquired about the financial situation of any of the investors to confirm that they met the criteria for an accredited investor.

During the testimony of each investor at the hearing, staff counsel asked whether or not they met the financial criteria required to qualify as an accredited investor at the time they invested in Triclean. Only three of the eleven investors would have qualified as accredited investors when they made the investment(s) in Triclean.

Although three of the investors would have qualified as accredited investors at the time they purchased Triclean shares, their status was not determined by Triclean before the sale of shares, and Triclean did not file any Form 45-103F4's with the MSC (Exhibit 7 – Certified Statement of Director) that are required if an issuer relies on the accredited exemption.

Trade in Securities

A trade in securities was completed when the confirmation was signed and returned to Triclean, along with a cheque for the purchase price. At the time of each of the trades, evidence given by the investors showed that there had been no investigation by Triclean into the financial circumstances of the investors to determine whether or not they met the criteria set out in the accredited investor definition. The evidence showed that most of the investors would not have qualified as accredited investors at the time of the trades.

Allegations Proven

Evidence submitted and testimony heard at the hearing show that the requirements of Multilateral Instrument 45-103 and National Instrument 45-106, which replaced MI 45-103 in September, 2005, were not met and that the exemption from prospectus and registration requirements for sale to an accredited investor was unavailable to Triclean for these transactions.

The panel finds that the allegations of MSC staff that Triclean traded in securities without having been registered and without prospectus in contravention of sections 6 and 37 of the Act, and that Triclean acted improperly and contrary to the public interest in its use of the accredited investor exemption have been proven.

Compensation for Financial Losses

The Act reads as follows:

148.2(3) When so requested by the director, the commission may order the person or company to pay the claimant compensation of not more than \$100,000 for the claimant's financial loss, if after the hearing the commission

(a) determines that the person or company has contravened or failed to comply with:

(i) a provision of the Act or the regulations, (ii) a direction, decision, order or ruling of the commission, or a rule made under ss. 149.1(1),

iii) a written undertaking made by the person or company to the commission or the director, or

(iv) a term or condition of the person or company's registration;

(b) is able to determine the amount of the financial loss on the evidence; and

(c) finds that the person or company's contravention or failure caused the financial loss in whole or in part.

Nine of the complainants have filed claims for financial compensation with the Director of the MSC. The Director has requested that the panel order Triclean to pay compensation for financial loss to those complainants.

The panel finds that all the requirements of this section have been met. Companion Policy 45-103CP states that "The issuer or selling security holder trading securities under an exemption is responsible for determining whether the exemption is available." Triclean contravened the legislation by not determining the status of the Manitoba investors prior to trading in its securities under the accredited investor exemption of MI 45-103 and NI 45-106, selling securities to eight investors who did not qualify as accredited investors, and failing to report the trades to three investors who would have qualified. All of the investors testified that they had not recovered any funds that were invested in Triclean securities. The panel agrees with staff counsel that the amount of the loss of each investor should be the amount each invested up to the maximum of \$100,000, and that in each case the financial loss resulted from Triclean's contravention of the legislation.

Penalties and Costs

Staff counsel provided the panel with an itemized determination of the costs incurred by the MSC for the investigation and hearing of the Triclean matter. The total cost was \$21,858.57. In addition, staff counsel requested that the panel impose an administrative penalty of \$25,000 against Triclean. Sections 154 and 148.1 of the Act give the panel authority to order costs and administrative penalties.

Finally, the panel was asked to permanently deny Triclean access to the exemptions under the Act as provided for in Section 19(5) in the public interest.

Decision

The panel's decision is as follows:

1. We order Triclean to pay compensation for financial loss as follows:

JM	\$ 15,000
RM	\$ 3,000
DB	\$ 3,000
SW	\$ 1,500
AZ	\$ 45,000
NP	\$ 15,000
DE	\$100,000
JP	\$ 12,000
CT	\$ 3,000

2. We order Triclean to pay an administrative penalty of \$25,000.

3. We order Triclean to pay the costs of the investigation and hearing in the amount of \$21,858.57.

4. We order that Triclean is permanently denied the exemptions in Sections 19(1) and 19(2) of the Act, pursuant to Section 19(5) of the Act.

"L.M. McCarthy"

L.M. McCarthy
Chair

"G.L. Lillies "

G.L. Lillies
Member

"G.S. Posner "

G.S. Posner
Member