

ALBERTA SECURITIES COMMISSION
SETTLEMENT AGREEMENT AND UNDERTAKING

Citation: Kirkham, Re, 2013 ABASC 429

Date: 20130918
Docket: ENF-007976

Securities Act, R.S.A. 2000, c. S-4, as amended (Act)

Brian R. Kirkham

Admitted Facts

Introduction

1. The staff of the Alberta Securities Commission (respectively, **Staff** and **Commission**) conducted an investigation into the distributions of securities of Rogers Oil & Gas Inc. and of Rogers Gold Corp., to determine if Alberta securities laws had been breached.
2. The investigation confirmed and Kirkham admits that he breached the sections of the *Act* referred to in this Settlement Agreement and Undertaking (**Agreement**), and that he acted contrary to the public interest.
3. Solely for the purpose and use in relation to securities regulation in Alberta, and elsewhere, and as the basis for the settlement and undertaking referred to in paragraph 30, but not in respect of any other proceedings or claims that may now or at any time in the future exist, Kirkham makes the admissions and gives the undertakings set out in this Agreement.
4. Terms used in this Agreement have the same meaning as provided for in Alberta securities laws, a defined term in the *Act*.

Parties

5. Kirkham was, at the material time, a director and the President of Rogers Gold Corp. (**Rogers Gold**), an Alberta company purported to be in the business of investing in gold exploration and development opportunities in British Columbia's Cariboo District.

Circumstances

6. Between December 2010 and July 2011, Rogers Gold distributed securities in Alberta.
7. No prospectus was filed with the Commission's Executive Director in respect of securities of Rogers Gold.

8. The distributions of securities of Rogers Gold, which included both shares and debentures, were made pursuant to a number of Offering Memoranda (**Gold OMs**), in purported reliance on the “offering memorandum” exemption contained in NI 45-106.
9. The Gold OMs contained numerous material defects and omissions, including:
 - a. failure to disclose the key terms of agreements between Rogers Gold and Harbour Castle Capital Inc., Western Mountain Resources Inc., Rogers Associated Financial Partners Inc., and Rogers Oil & Gas Inc. Each of these entities were related parties to Rogers Gold;
 - b. inclusion of a technical report dated May 1, 2011 entitled “Rogers Gold Man Placer / Mineral Project, NI 43-101 Technical Report, Historical Review” by Terry Garrow (**Report**). The Report failed to comply with the requirements of NI 43-101, *Standard of Disclosure for Mineral Projects*. Deficiencies included:
 - i. The Report stated the property contained a current inferred resource of 382,500 cubic meters at a grade of 14.09 grams gold/cu. meter, which the Report described as a “secure average.” However, the Report did not include data suitable for the estimation of any quantity or grade of a resource, and there was no data verification as required by section 3.2 of NI 43-101. In addition, the Report did not provide the information required by section 3.4 of NI 43-101 to support a resource.
 - ii. The Report contained estimates of historical mineral resources and reserves on adjacent or nearby properties that did not comply with the requirements of items 17(b), (c), and (e) of form 43-101F1 (**Form**).
 - iii. The Report did not illustrate the geology and the areas of historical exploration in adequate detail, as required by item 26(a) of the Form.
 - iv. The certificate of qualified person did not indicate the date and title of the technical report to which the certificate applies, as required by section 8.1(b) of NI 43-101.
 - v. Rogers Gold did not include a consent of qualified person in the Form as required by section 8.3 of NI 43-101.;
 - c. certain of the Gold OMs failed to disclose Robert Harold Keenan (**Keenan**) as a director and the executive officer of Rogers Gold, despite the fact that Keenan actually acted in the capacity of director and the executive officer of Rogers Gold;
 - d. certain of the Gold OMs failed to disclose that Keenan had previously been sanctioned by the Pennsylvania Securities Commission in 2006 for breaches of securities regulations and that , in 2007, an issuer for which Keenan was the President and CEO was cease traded by the British Columbia Securities Commission.

10. Kirkham, together with John Rogers (**Rogers**), Charles Mitchell and/or Keenan, authorized the distribution of some of the Gold OMs referenced in the Notice of Hearing in this matter.
11. With hindsight, Kirkham admits that the above omissions in the Gold OMs, including the deficiencies in the Report, were omissions that, in a material respect and at the time and in light of the circumstances in which they were not made, failed to state facts required to be stated to make the Gold OMs not misleading, a reality that Kirkham ought reasonably to have known.
12. Kirkham understood investors would rely upon the Gold OMs, but signed OM certificates that, with hindsight, he acknowledges inaccurately declared that the Gold OMs did not contain any misrepresentations.
13. Kirkham admits that as a result of the misrepresentations and other deficiencies, the disclosure contained in the Gold OMs was insufficient to enable a prospective investor to make an informed investment decision.
14. All of the above constitutes the **Admitted Facts**.

Admitted Breaches of Alberta Securities Laws

15. Based on the Admitted Facts outlined above, Kirkham admits that he breached the *Act* as follows:
 - a. Section 110, by distributing securities without having filed a prospectus with the Executive Director, or having received a receipt for a prospectus, and without an applicable prospectus exemption; and
 - b. Section 92(4.1), by making statements that he reasonably ought to have known were materially misleading and would reasonably be expected to have a significant effect on the market price or value of a security.
16. Kirkham also admits that his omissions were contrary to the public interest.
17. All of the above constitute the **Admitted Breaches**.

Additional Facts

18. Kirkham became associated with Rogers Gold at the request of his brother in law, Keenan. Kirkham had some experience in mining and construction and, in particular with some of the property that Rogers Gold would be involved with.
19. Prior to his involvement in Rogers Gold, at the request of Keenan, Kirkham had never been involved in being a director or officer of a public company or in raising funds in any capital markets. He had no expertise, knowledge or experience in the requirements or obligations imposed upon him or Rogers Gold.
20. As such, in carrying out his role with Rogers Gold, Kirkham relied extensively upon the expertise, experience and advice of the other officers and directing minds of Rogers together with the advice and representations of the professionals retained by Rogers Gold to assist it in preparing and reviewing the Gold OMs. Without limitation, Kirkham was largely uninvolved in the drafting of the OMs but received finalized copies for signature, generally from Keenan, prior to their distribution. Kirkham was told and understood that the OMs complied with the necessary rules and regulations. To the extent Kirkham had questions, he generally directed them to Keenan.
21. At the time the Gold OMs were distributed, Kirkham was not aware that the omissions set out in paragraph 9 above were, in fact, inaccurate. Without limitation:
 - a. At the time of the Gold OMs, while Mr. Kirkham was familiar in a general sense with Western Mountain Resources Inc., Harbour Castle Capital and Rogers Oil & Gas Inc., other than with respect to any details in the Gold OMs, Kirkham was not aware of any of the agreements between any of those companies or Rogers Associated Financial Partners Inc., on the one hand, and Rogers Gold on the other;
 - b. Kirkham relied upon representations from Terry Garrow that the Report was complete and accurate and that it complied with the standards of NI 43-101; and
 - c. Kirkham was unaware that Keenan had been previously sanctioned by the Pennsylvania Securities Commission or that an issuer of which he was President and CEO had been cease traded by the British Columbia Securities Commission.
22. At all times, Kirkham believed that the Gold OMs were proper and compliant with the relevant securities regulations and legislation. Kirkham was not aware that more information was required in the Gold OMs than in fact was included.
23. During the time Rogers Gold was operating, Kirkham generally worked in the field to get the mineral claims into production. At all times, he believed and understood that Rogers Gold was a legitimate operation and that his job was to work on the operations side to make Rogers Gold into a small gold exploration and development company. He worked at all times, in good faith, to accomplish that task.
24. To the extent that he directed or was involved in directing any of the funds for Rogers Gold, Kirkham directed and used those funds for the ordinary business operations of

Rogers Gold and, in particular, for the purpose of securing and developing its gold mineral claims. At times, Kirkham was told that the directors, officers or controlling minds of Rogers Oil and Gas Inc., namely Rogers and Keenan, directed some funds from Rogers Gold to Rogers Oil and Gas Inc. to address "cash flow" problems with Rogers Oil and Gas Inc. In all cases, this was done without Kirkham's approval, through the direction of other officers in Calgary or Phoenix.

25. Other than being paid a salary during 2010 of approximately \$52,000, Kirkham has not received any financial benefit from his association with Rogers Gold.
26. To the contrary, as a result of his role with Rogers Gold, Kirkham made personal loans and payments to and on behalf of Rogers Gold for which he has not been reimbursed. In respect of these loans and payments, Kirkham or companies controlled by him are currently owed approximately \$92,000 by Rogers Gold. Given the financial condition of Rogers Gold, Kirkham has no expectation of being repaid these funds.

Circumstances of the Admissions

27. Kirkham has not been previously sanctioned by the Commission.
28. Kirkham cooperated with Staff during the investigation.
29. This Agreement has saved the Commission the time and expense associated with a contested hearing as between Staff and Kirkham.

Settlement and Undertakings

30. Based on the Admitted Facts and Admitted Breaches, Kirkham agrees and undertakes to the Executive Director of the Commission:
 - a. to pay to the Commission \$20,000;
 - b. for a period of 7 years from the date of this Agreement:
 - i. to refrain from trading in or purchasing securities or exchange contracts, except for trades made through a Registrant, who has been given a copy of this Agreement, in a personal brokerage account, a registered retirement savings plan, a tax-free savings account, or a registered education savings plan, for the benefit of one or more of himself, his spouse, and his children;
 - ii. to refrain from becoming or acting as either a director or an officer of any issuer, registrant, or investment fund manager, and to immediately resign any such positions he currently holds, except that Kirkham may act as a director or officer of Geniers T.V. Colour Sales Ltd. and Kirkham Holdings Ltd., provided those two companies continue to be owned and operated solely by Kirkham and his immediate family;

- iii. to refrain from acting in a management or consultative capacity in connection with activities in the securities market;
 - iv. to refrain from using any of the prospectus and registration exemptions contained in Alberta securities laws; and
- c. to pay costs of \$5,000 to the Commission towards the costs of the investigation of this matter.

Administration

- 31. Kirkham acknowledges that he has received independent legal advice, that he has voluntarily made the admissions and undertakings in this Agreement.
- 32. Kirkham acknowledges that this Agreement may be referred to in this or any other proceedings under the *Act*, and in securities regulatory proceedings in other jurisdictions.
- 33. Kirkham agrees to make himself available to testify, if required by Staff, at any hearing in relation this matter, and in preparation for such testimony, to meet with Staff counsel in advance of the hearing.
- 34. Kirkham acknowledges and agrees that the Commission may enforce this Agreement in the Court of Queen’s Bench, or in any other court having competent jurisdiction.
- 35. The Agreement may be executed in counterpart and by facsimile.

Signed by Brian R. Kirkham at)
 Vernon, B.C. this 18 September)
 2013 in the presence of:)
)
 _____)
 WITNESS NAME)
 _____)
 WITNESS NAME)
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 “Original Signed By”)
 SIGNATURE)

) _____
) “Original Signed By”
) BRIAN R. KIRKHAM

) ALBERTA SECURITIES COMMISSION
)

Agreed and accepted at Calgary, Alberta,)
 this 18th September 2013)
)
) “Original Signed By”
) _____
) W.E. Brett Code, Q.C.
) Director, Enforcement