



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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Citation: Katanga Mining Limited (Re), 2021 ONSEC 11

Date: 2021-04-13

File No.: 2020-37

**IN THE MATTER OF
KATANGA MINING LIMITED, ARISTOTELIS MISTAKIDIS,
TIM HENDERSON, LIAM GALLAGHER, JEFFREY BEST,
JOHNNY BLIZZARD, JACQUES LUBBE and MATTHEW COLWILL**

**REASONS FOR DECISIONS
(Section 144 of the *Securities Act*, RSO 1990, c S.5, and
Rule 21(4) of the *Ontario Securities Commission Rules
of Procedure and Forms*, (2019) 42 OSCB 9714)**

Hearing: In Writing

Reasons issued: April 13, 2021
(orders issued January 6, 2021)

Panel: Timothy Moseley Vice-Chair and Chair of the Panel
M. Cecilia Williams Commissioner
Lawrence P. Haber Commissioner

Submissions: Alan P. Gardner For Katanga Mining Limited
Amanda McLachlan

Carlo Rossi For Staff of the Commission
Alvin Qian

Andrew Morganti For proposed intervenor Terence
Moyana

REASONS FOR DECISIONS

I. OVERVIEW

- [1] In December 2018, the Commission approved a settlement between Katanga Mining Limited (**Katanga**) and Staff of the Commission. Katanga now applies to vary the terms of the Commission's order¹ approving the settlement.
- [2] One term of the settlement called for a review of Katanga's accounting practices and procedures by an external consultant. The consultant's work is substantially complete but was interrupted by the pandemic.
- [3] Katanga asks that the consultant's review be concluded on terms acceptable to Katanga and the consultant, and that once the review is concluded, Katanga and the consultant be released from any further obligations under the settlement.
- [4] On January 6, 2021, we issued two orders. In the first, we dismissed the request by a former Katanga investor for intervenor status in this application.² In the second, we granted Katanga's requested variation.³ These are our reasons for the two orders. We begin with Katanga's application and then address two procedural issues – the request for intervenor status, and service of the application.

II. KATANGA'S APPLICATION

- [5] Section 144 of the *Securities Act*⁴ (the **Act**) authorizes the Commission to revoke or vary an earlier decision on the application of a company affected by the earlier decision. The Commission may do so if, in its opinion, the requested order would not be prejudicial to the public interest.
- [6] Katanga submits that its requested variation would not be prejudicial to the public interest. Katanga notes that:
 - a. it has relinquished its status as a reporting issuer;
 - b. the consultant's work is substantially complete;
 - c. the only remaining step in the consultant's planned work is the testing of certain metals accounting procedures;
 - d. the pandemic has caused an indefinite postponement of that remaining work; and
 - e. Katanga has otherwise complied with all its obligations under the settlement.
- [7] Staff supports Katanga's application and consents to the requested relief.
- [8] We see no reason to disagree, and we place significant weight on Staff's consent. The Commission accorded significant deference to Staff on the original settlement, as it does on all settlements. That deference should be no less regarding a variation of the original settlement.

¹ (2018) 41 OSCB 9981

² (2021) 44 OSCB 219

³ (2021) 44 OSCB 219

⁴ RSO 1990, c S.5

[9] Under the circumstances, varying the original order as requested would not be prejudicial to the public interest.

III. PROCEDURAL ISSUES

[10] Two procedural issues arose in connection with Katanga's application. We begin by addressing service of the application. We then explain our reasons for dismissing a former Katanga investor's request for intervenor status.

1. Service on other parties to the settlement

[11] Rule 15(2) of the *Ontario Securities Commission Rules of Procedure and Forms*⁵ (the **Rules**) states that when an application is brought under s. 144 of the Act, the applicant must serve the Application and Notice of Hearing on every other party to the original proceeding.

[12] In this case, the original proceeding named eight respondents – Katanga, and seven individuals who were officers and/or directors of Katanga. If Katanga were to comply with the prescribed service requirement on this application, it would have had to serve all those individuals.

[13] Katanga asked that we waive the requirement to serve the individuals, as we are authorized to do by Rule 6(4) of the Rules. The individuals are no longer officers or directors of Katanga. The proposed variation would not affect them. Katanga submits that it would be unduly burdensome to serve them because the individuals reside in a number of foreign jurisdictions and they can no longer be served through the counsel that represented them in the original proceeding.

[14] Staff supports Katanga's request that we waive service.

[15] We agree with Katanga and Staff that in the exceptional circumstances of this case, it is appropriate for us to waive service on the individual respondents as requested.

2. Request for intervenor status

[16] Terence Moyana, a former investor in Katanga, requested intervenor status in this application, pursuant to Rule 21(4) of the Rules. He submitted that if we were to grant Katanga's request to vary the original order, he might be prejudiced in his ability to obtain information that would be relevant to determining whether Katanga's conduct contributed to his financial losses.

[17] Katanga opposed Moyana's request. Staff took no position.

[18] We dismissed Moyana's request to participate in this application for two reasons.

[19] First, Moyana's stated objective of obtaining information to assist him in asserting a claim against Katanga bears no relation to Katanga's requested variation. Moyana is interested in events that preceded the settlement. Katanga's requested variation relates exclusively to events that came long after the settlement.

[20] Second, Moyana and other Katanga investors have other avenues available to them if they believe they have a legitimate claim against Katanga or other parties. A Commission proceeding is not an appropriate vehicle for aggrieved investors to get discovery of third parties.

⁵ (2019) 42 OSCB 9714

IV. CONCLUSION

[21] For the reasons set out above, we:

- a. waived service of the Application and Notice of Hearing on the seven individual respondents;
- b. dismissed Moyana’s request for intervenor status; and
- c. ordered that Katanga may conclude the review of its practices and procedures by the consultant on terms acceptable to Katanga and the consultant, and that thereafter, Katanga and the consultant are released from any further obligations imposed by the Commission’s original order.

Dated at Toronto this 13th day of April, 2021.

“Timothy Moseley”

Timothy Moseley

“M. Cecilia Williams”

M. Cecilia Williams

“Lawrence P. Haber”

Lawrence P. Haber