

IN THE MATTER OF
The *Securities Act*
S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF
BARRY ADAMS
(Respondent)

REASONS FOR THE DECISION

Date of Hearing: 20 April 2009

Date of decision: 27 July 2009

Panel:

Harry Williamson, Panel Chair

Kenneth Savage, Panel Member

Sheldon Lee, Panel Member

Representatives:

Mark McElman

For Staff of the New Brunswick
Securities Commission

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(Respondent)

REASONS FOR THE DECISION

1. INTRODUCTION

[1] On 26 February 2009, Staff (Staff) of the New Brunswick Securities Commission (Commission) filed a Statement of Allegations against the Respondent, Mr. Barry Adams. The Respondent and Staff entered into a Settlement Agreement dated 10 March 2009, which was later amended on 20 April 2009 (Agreement), in which the Respondent agreed to a settlement of the violations of New Brunswick securities law as alleged in the Statement of Allegations.

[2] A Settlement Hearing was held on 20 April 2009, at which time a Panel of the Commission was asked to approve the Agreement pursuant to section 191 of the *Securities Act (Act)*, and issue an order containing sanctions agreed upon by the parties. The Panel reviewed the Agreement and heard submissions from both parties.

2. PARTIES

[3] The Respondent appeared at the hearing on his own behalf, without counsel. The Agreement, in its original form, contained a paragraph indicating that the Respondent had received independent legal advice. However, at the Settlement Hearing, the Respondent advised the Panel that he had not sought independent legal advice. As such, the Agreement was amended by the parties to strike that paragraph.

[4] Prior to the Agreement being amended, the Panel reviewed with the Respondent the terms of the Agreement – specifically the proposed sanctions – and requested confirmation from the Respondent that he understood the Agreement, was in agreement with it, and understood the proposed sanctions. As the Respondent had not received independent legal advice, the Panel advised the Respondent on numerous occasions during the Settlement Hearing that if the Respondent was uncomfortable with the Agreement or the proposed sanctions, he had the option to either:

- (a) adjourn the Settlement Hearing to allow the Respondent to obtain legal advice; or
- (b) request a full hearing on the merits, with a new Panel.

[5] The Respondent advised the Panel that he waived his right to legal counsel, and that he wished to proceed with the Settlement Hearing. He indicated that he acknowledged that he had been provided with ample opportunity to adjourn the Settlement Hearing and obtain legal advice or request a new hearing, but that he instead wished to proceed with the amended Agreement.

[6] Counsel for Staff indicated that they would agree to an adjournment request if the Respondent so desired the opportunity to obtain independent legal advice or to further review the Agreement. The Respondent declined and again indicated that he wished to proceed.

[7] After the lengthy discussion with the parties about the Respondent's comprehension and acceptance of the Agreement, the Panel is satisfied that the Respondent understood the Agreement and the proposed sanctions. The Panel is satisfied that the Respondent was fully aware of all of his options, and is satisfied that the Respondent – with full knowledge of his rights – waived his right to legal counsel. As such, the Panel proceeded with the Settlement Hearing and considered the amended Agreement.

3. FACTS

[8] The Agreement contains a detailed Agreed Statement of Facts which sets out the facts upon which the parties rely in this matter. The Agreed Statement of Facts also contains a section in which the Respondent admits to various violations of New Brunswick securities law, and contains a draft order with sanctions proposed by the parties. The Panel accepts the facts as set out in the Agreed Statement of Facts as the evidence upon which to base its decision in this matter.

[9] Below is a summary of some of the key facts from the Agreed Statement of Facts:

- (a) The Respondent, a New Brunswick resident, was a registered mutual fund salesperson from February 2006 to May of 2007. Beginning in January 2007, the Respondent was engaged by Estate Financial Inc. (Estate), a New Brunswick insurance broker, to participate in the distribution of securities of Walton International Group (Walton), under the exemption provisions set out in National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106).
- (b) NI 45-106 includes exemption provisions which permit the receipt of commissions for the referral, solicitation and/or sale of securities where the purchaser is an "accredited investor", as defined in NI 45-106.
- (c) The Respondent participated in the distribution of Walton securities by promoting these securities to a number of his New Brunswick clients and referring them to promotional seminars held by Walton.
- (d) The Respondent earned a commission of between 7% and 10% on all sales Walton made to the clients he referred.
- (e) Eight out of the 11 investors who purchased Walton securities after being referred by the Respondent were not, in fact, eligible for the "accredited investor" exemption, as defined in NI 45-106. This is a fact that the Respondent knew or should have known at the time of the referral.
- (f) The Respondent earned commissions of approximately \$19,000 as a result of the referrals of persons who were not accredited investors.

(g) In May 2007, the Respondent was interviewed by Commission staff about his involvement with Walton. During this interview, the Respondent made numerous misleading statements to Staff about his participation in the distributions, his referrals and his commissions.

[10] In the Agreement, the Respondent admits to the following contraventions of New Brunswick securities law:

(a) The Respondent admits that he has violated section 45 of the *Act* as a result of failing to comply with NI 45-106 by referring non-accredited investors to Walton and receiving a commission for these referrals.

(b) The Respondent admits that he violated subsection 179(2) of the *Act* by making misleading statements to Staff of the Commission.

[11] The Respondent also agrees that his violations of the *Act* constitute acts contrary to the public interest.

4. FINDINGS AND SANCTIONS

[12] The Respondent admits and the Panel finds that the Respondent failed to comply with New Brunswick securities law in regards to his participation in the Walton distribution and his dealings with Staff. The Panel also agrees that the Respondent's actions were contrary to the public interest.

[13] The Agreement contains sanctions which Staff and the Respondents jointly propose be issued against the Respondent to address his violations. The sanctions involve a long-term market ban and an administrative penalty. The specific proposed sanctions are as follows:

(a) Pursuant to paragraph 184(1)(c) of the *Act*, the Respondent shall be barred from trading in any securities, other than those beneficially owned directly by him, for a period of 10 (ten) years;

(b) Pursuant to paragraph 184(1)(d) of the *Act*, any exemptions contained in New Brunswick securities law shall not apply to the Respondent for a period of 10 (ten) years; and

(c) Pursuant to subsection 186(1) of the *Act*, the Respondent shall pay an administrative penalty in the amount of twenty thousand dollars (\$20,000.00).

a. Law

[14] The Panel was asked to approve the Agreement and order the proposed sanctions pursuant to paragraph 191(a) of the *Act*.

[15] As set out in numerous decisions of this Commission, including *Re Legacy Associates Inc.* released on 23 March 2009 and *Re Sang H. Park* released 20 January 2009, the Panel's role in considering the approval of a settlement agreement is to ensure that the sanctions proposed by the parties are appropriate and within acceptable parameters, given the particular circumstances facing the Respondent. As well, these same decisions of this Commission have confirmed that the Panel is to give significant weight to the Agreement negotiated between the parties.

[16] The Panel, in considering the reasonableness and appropriateness of the Agreement in this matter, must also be cognizant of the dual purposes of the *Act*: to protect investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets. The *Act*, in subparagraph 5(b)(iii), also confirms that in pursuing these purposes, the Commission's mandate includes the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[17] This Commission has outlined, in several recent decisions including *Re Sang H. Park* and *Re Legacy Associates Inc.*, numerous factors to consider when deciding on the appropriateness of proposed sanctions in a settlement agreement. The *Re Park* decision, in particular, was factually similar to this particular matter. The factors considered by the Panel in this matter include the following, as set out in *Re Park*:

(a) the seriousness of the allegations proved,

- (b) the respondent's past conduct,
- (c) mitigating factors,
- (d) the respondent's experience in the capital markets and the respondent's level of activity in the capital markets,
- (e) whether the respondent recognizes the seriousness of the improper activity,
- (f) the harm suffered by investors as a result of the respondent's activities,
- (g) the benefits received by the respondent as a result of the improper activity,
- (h) the risk to investors and the capital markets in the jurisdiction,
- (i) the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities,
- (j) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity,
- (k) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets, and
- (l) previous decisions made in similar circumstances.

[18] The Panel, in deciding whether to approve the Agreement, must consider what is in the public interest. In making this determination, the Panel considered – along with the above factors – the specific circumstances surrounding the Respondent and his admitted activities.

b. Analysis of factors and decision on proposed sanctions

[19] This Respondent has admitted to serious violations of the *Act*. He participated in the sale of exempt securities in the province without complying with the provisions of NI 45-106, and when interviewed by Staff he denied his participation in these sales.

[20] The Commission's mandate, and the purpose of the *Act*, is to protect investors and to foster fair and efficient capital markets. The Respondent's

violations undermine both purposes. As noted by the Commission at paragraph 19 of the *Re Park* decision:

The exemptions contained in NI 45-106 are an effective means to balance investor protection with efficient capital markets. Non-compliance with these requirements is a serious matter; it increases the potential for investor harm and has a significant impact on the efficiency and integrity of capital markets.

[21] The Respondent had experience in the marketplace. He was a registered mutual fund salesperson at the time of his violations of New Brunswick securities law. As a market participant, he had an obligation to conduct himself in an honest and responsible way. He has admitted that he failed to do so, both through his non-compliance with NI 45-106 and his misrepresentations to Staff.

[22] As mitigating factors, the Respondent did acknowledge the seriousness of his conduct and accepted responsibility for his failure to comply with New Brunswick securities law.

[23] Though the Respondent's actions caused harm to the integrity of the capital markets, and though the Respondent's conduct had the potential to expose investors to harm by circumventing the protections that are built into the *Act*, there is no evidence in this case of any actual loss suffered by investors. The Panel stresses that this does not lessen the seriousness of the Respondent's actions; however, it is a factor to be taken into account when considering the appropriateness and reasonableness of the sanctions proposed in this matter.

[24] The proposed sanctions contemplate the Respondent being removed from New Brunswick's capital markets for a period of 10 years. This is a significant prohibition, and is an appropriate specific and general deterrent. This penalty reflects the seriousness of the Respondent's conduct and sends a message to other market participants that such conduct will not be tolerated in New Brunswick.

[25] The administrative penalty proposed by the parties in this matter directly relates to the profit received by the Respondent as a result of his violations of New Brunswick securities law. Staff have advised in their written submissions on sanctions that the proposed penalty seeks to remove the benefit obtained by the Respondent. The Panel agrees that this is appropriate in the circumstances.

[26] Having regard to the factors set out in paragraph [17] and the specific circumstances facing the Respondent, the Panel finds that the 10 year market ban, together with the administrative penalty, are appropriate and reasonable sanctions in this matter.

5. CONCLUSION

[27] It is for the reasons set out above that the Panel finds it in the public interest to approve the Agreement and issue the 20 April 2009 Order in this matter.

Dated this 27 day of July, 2009

“original signed by”
Harry Williamson, Panel Chair

“original signed by”
Kenneth Savage, Panel Member

“original signed by”
Sheldon Lee, Panel Member

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