

New
Nouveau  Brunswick

PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF The *Securities Act*,
R.S.N.B. 1973, c.S-6, as amended,

- and -

IN THE MATTER OF the Registration of
Emile Arsenault

DECISION AND ORDER

Hearing: Wednesday, January 30, 2002 9:00am

Tribunal: Donne W. Smith, Administrator

Appearances: Suzanne Ball, Deputy Administrator, Policy and Hearings
– Counsel for the Securities Administration Branch

Emile Arsenault, Registrant – on his own behalf

A. INTRODUCTION:

This Decision follows a Hearing held on January 30, 2002 pursuant to a Notice of Hearing ("Notice") dated December 21, 2002 and issued to Emile Arsenault ("Arsenault" or the "Respondent"), a registered salesperson under the *Securities Act*, also called the *Security Frauds Prevention Act* ("Act"). The Administrator gave notice that at the hearing he would consider:

- (a) pursuant to subsection 12(1)(c)(v) of the Act, whether it is in the public interest to suspend or cancel the registration of Arsenault; and/or
- (b) pursuant to section 12(1)(f) of the Act whether the registration of Arsenault should be subject to such conditions as the Administrator deems necessary.

A Statement of Allegations was attached to the Notice. Prepared by staff of the Securities Administration Branch ("Branch") it alleges that the Respondent participated in the sale of securities that were neither approved for distribution in New Brunswick nor of a class that the Respondent's registration permitted him to sell. Consequently, he violated not only his conditions of registration but also provisions of the Act, and in doing so acted against the public interest, bringing his fitness for registration into question.

The Hearing was originally scheduled for January 16, 2002 but with consent of the parties was postponed to January 22 and then to January 30.

At the commencement of the Hearing on January 30, the Respondent acknowledged his right to counsel but indicated his desire to remain unrepresented. Because the facts were

generally not in dispute, Arsenault used the Hearing as an opportunity to explain his actions and argue about the nature of sanctions, if any, which might be imposed.

B. FINDINGS OF FACT:

The facts are not in dispute. My findings result from a consideration of the testimony of the Deputy Administrator, Enforcement and Compliance, Ed LeBlanc ("LeBlanc"); from the Statement of Allegations; and documentary evidence filed during the course of the Hearing. Particularly relevant is the written statement of the Respondent given to staff and submitted in evidence at the Hearing at which time the Respondent reconfirmed the truth of its contents. The Respondent was at all material times and remains a registered salesperson sponsored by Education Fund Services Inc., a broker restricted to the sale of scholarship plans. The indices in the Branch indicate that Arsenault has been registered continuously since 1987 to sell only scholarship plans.

In the course of an investigation commenced in August, 2001 staff of the Branch discovered that the Respondent was distributing equity securities of an issuer that had not received a security issuer certificate to distribute its securities nor was it otherwise exempt from the requirements of the *Securities Act*. It was determined that the issuer, Four Seasons and Fun Land Inc. ("Four Seasons"), had commenced a public solicitation of common shares for \$75.00 each promising through a convoluted method of calculation a potential return of \$28,000.00. Arsenault was listed as a salesperson for that company.

Staff subsequently took action against Four Seasons which resulted in the freezing of bank accounts and the issuance by the Court of Queen's Bench of a Cease Trade Order pursuant to provisions of the Act. It is the involvement of the Respondent, however, that is in issue.

On November 27, 2001, following a request by the Deputy Administrator, Compliance and Enforcement, Arsenault attended the Branch office to be examined under provisions of the Act. On that date he admitted under oath that he himself had bought a share of the company and that between August 26, 2001 and September 27, 2001 he sold a total of 121 shares to other New Brunswick investors for which he received \$676.00 in sales commissions. Additionally, he received dividends amounting to \$50.00 on the first shares he had bought. He also acknowledged he knew that monies paid by Four Seasons as dividends came from the sale of additional shares and that later investors might have little or no chance of receiving dividends.

Branch Staff concluded that the distribution was a pyramid scheme, by its nature contrary to the public interest, and an offence under the Criminal Code. By selling Four Seasons common shares, Arsenault not only engaged in the sale of securities for an entity that was not registered to sell securities but also acted outside the conditions of his registration.

Evidence of Arsenault's involvement was submitted at the Hearing. This included a "subcontractor agreement", between Four Seasons and Arsenault which outlined Arsenault's obligation while selling shares for Four Seasons; copies of receipts for every sale made by Arsenault; copies of commission cheques from Four Seasons to Arsenault; and a copy of Arsenault's most current Certificate of Registration under the Act including Schedule A, the standard conditions of registration for salespersons.

The Deputy Administrator testified that during the course of the investigation of Four Seasons, at a public presentation held on September 19 in Moncton, he observed the Respondent actively participating in distributing share certificates and dividend cheques to

the investors present. He also indicated that throughout the investigation of the Respondent's involvement, that Arsenault was forthright and cooperative.

C. ANALYSIS AND ARGUMENT:

For his part the Respondent readily admits that he "broke the law" but argues extenuating circumstances. Both in his written statement given to Staff and in his own testimony at the Hearing Arsenault acknowledges his involvement with Four Seasons. He claims that when he made inquiries on several occasions to the principals of Four Seasons, he was told that that company required no registration under the *Securities Act*. He states that he "never gave it a second thought that (he) couldn't sell something that didn't need an approval by the Securities Commission". He indicated that he "made the inquiries that I feel a reasonable person would do".

The Respondent also made several legal references, ostensibly to demonstrate his cooperation with the Branch. Firstly, he suggested that he had the right to remain silent when examined pursuant to section 7 of the Charter of Rights, but he chose not to. He also claims that consideration should be given to the fact he had no *mens rea*, that is, he had no intention to violate of the Act. Finally, he argues that any sanction which the Administrator might impose would be "cruel and unusual punishment" given the nature of his transgression and the absence of harm to investors. The Respondent spoke of the concept of bias and his right to an impartial tribunal hearing, but did not specifically object to the proceedings.

Counsel for Staff in turn argues that section 5 of the Charter applies to criminal proceedings not administrative ones. Additionally, the *Securities Act* permits an institutional bias on the part of the Administrator, that it, an institution such as this tribunal is allowed by law to act

and render decisions so long as the Respondent is accorded procedural fairness, including the right to know the facts against him, to be heard and to be represented by counsel.

Branch Staff point out that Arsenault admits he should have given more thought to where cash dividends were coming from, that is, from new investors, and despite Arsenault's nagging doubts about the scheme, that the "math didn't add up", he still sold 121 shares and received commission as a consequence. Indeed, Arsenault only stopped selling one day before Four Seasons' bank accounts were frozen by the Branch. Counsel further argues that despite his own doubts Arsenault described the program to investors in such a positive way as to make the investment more credible in order to make more commissions. Finally, Counsel argues that Arsenault operates as a registrant in a sophisticated and highly regulated industry and he should not be allowed to plead ignorance of the limitations of his license.

D. CONCLUSIONS:

It is clear that the Respondent violated the registration provisions, section 5 of the *Securities Act*, by selling equity securities when he was neither registered to do so nor permitted by the conditions of his registration. It is also clear that the Respondent was actively involved in the distribution of the unregistered Four Seasons securities. Indeed, he freely admits doing so. In his defense he claims that clients who bought from him did not lose any money. Furthermore, he argues that he did everything that a "reasonable person" would do to determine the appropriateness of the investment. In my view, however, this is not the appropriate standard to which the Respondent should be held.

The privilege of registration under the *Securities Act* imposes upon individuals important standards in order to protect the investing public and ensure that overall public interest is

maintained. There is a fundamental obligation on registrants to act in an ethical manner at all times and with the greatest integrity. Unfortunately, the Respondent failed in this duty.

We must consider Arsenault's responsibility not as a "reasonable person", not even as a "reasonable investor", but as a "reasonable registrant". Every registrant has a duty to take all necessary steps to inform themselves before advising others. In the circumstances before me I would have expected Arsenault to more fully inquire about Four Seasons, its management and the nature of the proposed investment. The Respondent obviously had significant doubts not only about the economic viability of the issuer and the suitability of the investments, but also its potential lack of compliance with securities legislation. I would have expected a "reasonable registrant" with such severe doubts to have resolved them to his complete satisfaction before enticing others to invest.

The Respondent spoke sincerely about the importance of integrity, noting his involvement as a registrant for over fifteen years in a segment of the securities industries that is not always known for its ethical conduct. He acknowledged that he had "seen it all". It is, therefore, somewhat surprising that he failed to recognize his own unethical activity. He recognizes that investors turn to him, as a registrant, in order to safeguard the educational futures of their children. This is even more reason to be careful before involving himself in improper securities activities.

E. ORDER:

At the Hearing both the Respondent and Counsel for Branch staff spoke of appropriate sanctions in the circumstances. Cases suggested by Counsel, however, were not particularly helpful as they related to much more serious transgressions. The issue before

me is how to protect the public with regard to the Respondent's registration, recognizing that he admitted the allegations.

The Respondent seeks compassion and understanding given his age, his fifteen year registration history without complaint or disciplinary action, and his lack of intention to offend the securities regulation.

Counsel suggests a two year suspension for the Respondent with an Order for disgorgement of the commissions earned by Arsenault. Counsel also requests that before the Respondent is permitted to again sell securities he be required to file proof of successful completion of a course on ethical conduct and behaviour.

In considering an appropriate sanction I have reviewed my earlier decisions involving registrants in similar circumstances. I note that penalties have become progressively more severe over the decade. This is because the ethical standards required of registrants have been rising as a consequence of the increasing number of investors and the importance the investing process has become for most citizens.

After full consideration of the evidence and arguments before me I order that:

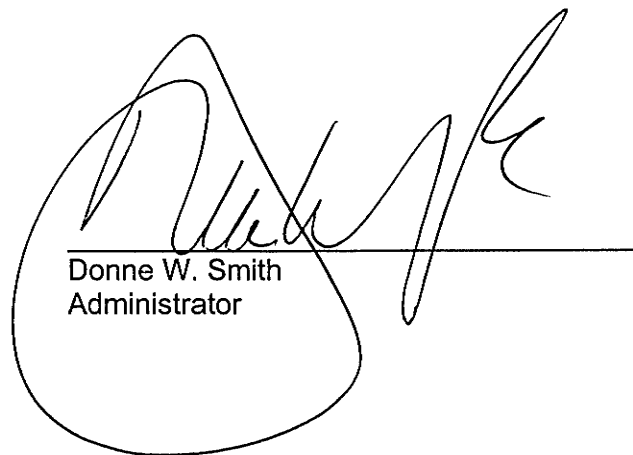
- 1) the salesperson's registration of Emile Arsenault be suspended immediately;
- 2) the Registrar not consider any application for registration or reinstatement of registration for a period of six months from the date of this Decision and Order; and
- 3) should the Respondent seek reinstatement, he submit proof that he has successfully completed prior to the date of the application for reinstatement the

Ethical Conduct and Behaviour Course sponsored by the Investment Funds Institute of Canada.

The Respondent argued at the Hearing that an extended suspension would be financially devastating and that an order to take a course demeaning. However, the harm to the general public by the Respondent's actions must be acknowledged and a message sent to others that such action will not be tolerated by this Office. It is clear to me that had the Respondent a better understanding of securities, capital markets and the securities industry beyond the scholarship plan industry, in which he is registered to trade, and a better appreciation for his ethical obligations to the investing public as a whole, he could have avoided the actions which I am taking today.

The Respondent is reminded that the *Securities Act* offers avenues of appeal from this Decision. However, he should be aware that time limitations may apply.

DATED at Saint John, New Brunswick this 26th day of April, 2002.



Donne W. Smith
Administrator