

NEW BRUNSWICK
SECURITIES COMMISSION

COMMISSION DES
VALEURS MOBILIÈRES
DU NOUVEAU-BRUNSWICK



IN THE MATTER OF
THE *SECURITIES ACT*, S.N.B. 2004, c.S-5.5

AND

IN THE MATTER OF
JAMES K. HANLEY

REASONS FOR DECISION

HEARING DATE: 26 February 2007
DECISION DATE: 26 February 2007

PANEL:

David T. Hashey, Q.C.
Hugh J. Flemming, Q.C.
William D. Aust

Panel Chair
Panel Member
Panel Member

COUNSELS:

Jacob van der Laan
Kelly T. VanBuskirk

for Staff of the New Brunswick Securities Commission
for James K. Hanley

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

- and -

IN THE MATTER OF
JAMES K. HANLEY

REASONS FOR DECISION

I. INTRODUCTION

The matter before the panel relates to an individual, Mr. James K. Hanley, (hereinafter Mr. Hanley or the respondent), who has violated New Brunswick Securities law, specifically section 54 of the *Securities Act*, S.N.B. 2004, c. S-5.5 (the Act) and acted contrary to the public interest by:

- (a) failing to apprise two investors as to the whereabouts of monies provided by these investors;
- (b) providing these investors with misleading account statements and information in April 2005 and January 2006; and
- (c) making misleading statements to staff of the Commission on 28 June 2006.

On 3 October 2006, the New Brunswick Securities Commission (the Commission) issued a Notice of Hearing in this matter with a view to holding a hearing on 15 January 2007. The hearing was to be held to consider whether, in the opinion of the Commission, it was in the public interest to make certain orders against Mr. Hanley pursuant to sections 184, 185 and 186 of the Act.

On 15 January 2007, the Panel heard a request from counsel for Mr. Hanley for an adjournment to retain an expert witness and to obtain additional time to review the documents disclosed by staff's counsel. The Panel adjourned the hearing to 26 February 2007.

On 15 February 2007, counsel for staff of the Commission filed with the Commission a Settlement Agreement dated the same day. On 20 February 2007, counsel for staff filed written submissions with respect to the Settlement Agreement.

This Panel held a hearing on 26 February 2007 to consider whether it would be in the public interest to approve the Settlement Agreement reached by the parties. At the hearing, counsels for staff and the respondent both made arguments with regard to facts and law as they felt relevant to the matter before the Panel.

The Panel considered and accepted the Settlement Agreement and rendered an order as of 26 February 2007. The following pages contain the Panel's reasons for the Order made on 26 February 2007 (the Order).

II. FACTS

The Panel, in reaching its decision, accepted the joint Statement of Facts contained in Part II of the Settlement Agreement. We do not intend to replicate in this document the joint Statement of Facts which is attached to these reasons as Appendix "A". We are however summarizing material facts relied upon in making the Order.

James K. Hanley is a financial advisor who was registered with the Administrator of the New Brunswick Securities Branch from 1982 until July 2004 and then with the Commission from July 2004 until January 2006. During that time, he was a salesperson with a number of registered broker firms. For the relevant period, Mr. Hanley was a salesperson with the following firms:

- (a) Merrill Lynch Canada Inc. from August 1998 to September 1999;
- (b) DPM Securities Inc. from September 1999 to November 2000; and
- (c) Assante Capital Management Ltd. from November 2000 until January 2006.

From the mid 1980's to 2005, Mr. Hanley acted as sole financial advisor for the two investors who are the subject of this matter, DG and GP.

On a number of occasions for a period starting in June 1999 and ending in September 2002, Mr. Hanley redeemed investments for DG and GP and asked these investors to subsequently write cheques to him for reinvestment. Mr. Hanley then deposited the redeemed funds or parts thereof to his personal account or the account established for a numbered company that he had incorporated. Details as to the redeemed amounts which were deposited in Mr. Hanley's personal account or the account established for a numbered company he had incorporated are contained in Appendix "A".

These transactions were subsequently presented to his clients, DG and GP, when asked, as off-book investments or personal loans.

In April 2005, the daughter of DG and niece of GP reviewed the financial affairs of DG and GP and asked Mr. Hanley to provide details of their current investments. On 25 April 2005, Mr. Hanley provided a statement presented as DG's investments being managed by Mr. Hanley which contained a section called "Off-Book" funds. Mr. Hanley advised DG's daughter that these funds had been segregated to avoid detection by the government should DG have to go to a nursing home. As contained in the joint Statement of Facts, DG stated she had not provided Mr. Hanley these instructions.

In June 2006, as part of the investigation, Mr. Hanley made misleading statements to staff of the Commission as it relates to certain of the monies provided by GP and DG.

In both his written and verbal submissions, counsel for staff indicated that Mr. Hanley has repaid the majority of the monies to his two clients, DG and GP. Other monies have been paid by Mr. Hanley's former employer and a release from the complainants was obtained.

On 15 February 2007, staff of the Commission and the respondent reached a Settlement Agreement in which Mr. Hanley agrees to the making of an order whereby:

- (a) pursuant to section 184(1)(a) of the *Act*, he would be barred from being granted registration under New Brunswick securities law for a period of twenty years;
- (b) pursuant to section 184(1)(d) of the *Act*, he would not be entitled to any exemptions contained in New Brunswick securities law for a period of twenty years;
- (c) pursuant to section 186(1) of the *Act*, he would pay an administrative penalty in the amount of \$45,000 by 1 July 2007 for failing to comply with New Brunswick securities law,
- (d) pursuant to section 185(1) of the *Act*, he would pay the fees and expenses for the costs of investigation, in the amount of \$5,000, by 1 July 2007; and
- (e) he would not make any statement which is inconsistent with the joint Statement of Facts that forms part of the Settlement Agreement.

At the hearing on 26 February 2007, the Panel was asked to accept the Settlement Agreement. The Panel did accept the Settlement Agreement and executed an Order of the same date.

III. VIOLATION OF NEW BRUNSWICK SECURITIES LAW - RELEVANT SECTIONS OF LEGISLATION

As set out in the joint Statement of Facts, Mr. Hanley agrees that he violated section 54 of the *Act*, which sets out:

Standards of business conduct

A registrant shall

- (a) act fairly, honestly, in good faith and in the best interest of a client of the registrant,
- (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances,
- (c) not engage in conduct that would bring the reputation of the capital market into disrepute,

- (d) take all reasonable steps to learn the essential facts about the identity, reputation and financial circumstances of each of the clients of the registrant and to keep current the registrant's knowledge of those essential facts, and
- (e) ensure that the recommendations made to a client of the registrant are appropriate to the general investment needs and objectives of the client and the client's risk tolerance level.

More specifically, Mr. Hanley agrees that he acted contrary to the public interest by:

- (a) failing to apprise DG and GP as to the whereabouts of monies provided to him by DG and GP;
- (b) providing DG and GP with misleading account statements and information in April 2005 and January 2006; and
- (c) making misleading statements to Staff of the Commission on 28 June 2006, including:
 - I. representations that certain of the monies provided by DG and GP were business loans to 510003 NB Ltd. when that was not the case;
 - II. denying that funds other than those characterized as loans had been received from DG and GP, when that was not the case; and
 - III. characterizing funds received from DG and GP as "Off Book" investments.

IV. REASONS FOR DECISION

On 26 February 2007, the Panel considered whether the sanctions agreed to by the parties in the Settlement Agreement were appropriate.

The Settlement Agreement proposed that the respondent pay to the Commission by 1 July 2007 a penalty of \$45,000 and \$5,000 for the costs of the investigation. In addition, the Settlement Agreement proposed that Mr. Hanley be barred from being granted registration under New Brunswick securities law and from using any exemptions contained in New Brunswick securities law for a period of 20 years from the date of any order by the Commission.

The purpose of securities regulation is clearly set out in section 2 of the *Act*. It is to protect investors from unfair, improper and fraudulent securities activities and to foster fair and efficient capital markets and confidence in those markets.

As to the role of the Commission in the exercise of the public interest jurisdiction, counsel for staff directed this Panel to the decision of the Ontario Securities Commission in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at pages 1610—1611:

[...] the role of the Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently or temporarily, as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity to those capital markets. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonable be expected to be [...].

As set out in *Re Sohan Singh Koonar*, (2002), 25 O.S.C.B. 2691 (Ontario Securities Commission) and cited in *Re Pollitt*, (2004), 27 O.S.C.B. 9643 (Ontario Securities Commission),

The role of the Commission in reviewing a settlement agreement is not to substitute the sanctions it would impose in a contested hearing for what is proposed in the settlement agreement, but rather to make sure the agreed sanctions are within acceptable parameters.

At the hearing, counsel for staff of the Commission outlined that the facts forming the basis for imposing an administrative penalty are limited to facts which occurred after 1 July 2004. This position was advanced by virtue of the fact that it is the *Act*, which came into force in 2004, which grants the power to impose administrative penalties.

Our consideration of the proposed administrative penalty in this matter has therefore been in fact based on the breaches of the Act which occurred after 1 July 2004.

As it relates to the relief sought by staff under section 184 of the Act, more precisely the request to ban Mr. Hanley from becoming a registrant for a period of 20 years and the removal of the right to request exemptions under New Brunswick Securities law for a period of 20 years, counsel for staff indicated that all of Mr. Hanley's conduct should be considered. Counsel for staff noted that Mr. Hanley is 54 years of age and that the registration ban would remove him from the market place for the rest of his productive life. He also noted that this provides a serious specific deterrent to Mr. Hanley and a general deterrent to current and prospective participants in the capital markets of New Brunswick that making misrepresentations to investors and staff of the Commission is not acceptable.

Counsel for staff presented for the Panel's guidance on the matter of sanctions the following cases:

- *Re Johnson* (2007), A.B.A.S.C. 28 (Alberta Securities Commission)
- *Re Kader* (2006), CarswellOnt 3254 (Alberta Securities Commission)
- *Re Brien*, (2006), 25 April (New Brunswick Securities Commission)
- *Re Karl* (2006), ABASC 1755 (Alberta Securities Commission)
- *Re Wallace* (2004), ABSECCOM 1518353 (Alberta Securities Commission)
- *Re Valentine* (2004) CarwellOnt 5819 (Ontario Securities Commission)
- *Re Harris* (2003) ABSECCOM 1385856 (Alberta Securities Commission)

Counsel for staff submitted that the case of *Re Johnson* was of particular interest. In this recent decision of the Alberta Securities Commission, the Commission approved a \$100,000 administrative penalty. Counsel for staff submitted that the conduct in the *Re Johnson* case was significantly more severe than the matter at hand and noted that Mr. Johnson had been the subject of administrative penalties twice previously.

Counsel for staff indicated that the most relevant case as it relates to misrepresentations to staff was the Commission's *Re Brien* matter. He noted that in the

Re Brien matter, the contravention of the *Act*, although significantly less severe, provides an indication of the acknowledgement of the severity of misrepresentations.

Counsel for Mr. Hanley provided us with the names of two decisions of the Mutual Fund Dealers Association of Canada which we have looked at:

1. Donald Kent Coleman, file number 200511, dated 10 April 2006; and
2. Shawn Sandink, file number 200602, dated 19 July 2006.

Although counsel for Mr. Hanley noted that in his client's view, the circumstances of these two matters were more severe than the case at hand, he later noted on a number of occasions that the Settlement Agreement was within the parameters of what the law has imposed in other similar circumstances.

We want to restate the words of the Panel in *Re Brien* as it relates to sanctions imposed in previous decisions:

Although the information on the penalties imposed in previous decision may be useful and may help us in our deliberations, the circumstances of each case should dictate the order that is required and that is in the public interest.

Panels of this Commission reaffirmed that a public interest test must be applied in determining whether to accept a settlement agreement in *optionsXpress Inc. (Re)* [2005] 28 O.S.C.B. 7957 (Ontario Securities Commission) and *Re Brien*, 25 April 2006 (New Brunswick Securities Commission). In these matters, the Panels reiterated their primary responsibility to determine appropriate sanctions given facts pertinent only to the specific matter before it.

Staff cited the Ontario Securities Commission's cases of *Belteco Holdings* (1998), 21 O.S.C.B. 7743 (Ontario Securities Commission) and *M.C.J.C. Holdings and Micheal Cowpland* (2002) O.S.C.B. 1133 (Ontario Securities Commission), which enumerate a number of factors to consider when imposing sanctions:

- (a) the seriousness of the allegations proved,
- (b) the respondent's experience in the marketplace,
- (c) the level of a respondent's activities in the marketplace,
- (d) whether or not there has been a recognition of the seriousness of the improprieties,
- (e) the restraint of future conduct that is likely to be prejudicial to the public interest with reference to past conduct,
- (f) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered but any like-minded people from engaging in similar abuses of the capital markets,
- (g) any mitigating factors,
- (h) the size of any profit or loss avoided from the illegal conduct,
- (i) the reputation and prestige of the respondent, and
- (j) the remorse of the respondent.

The Panel found Mr. Hanley's actions to be serious breaches of the *Act* and that he engaged in conduct contrary to the public interest. In considering the Settlement Agreement, we considered whether these sanctions would ensure that the capital markets are protected from further harm by Mr. Hanley or by others who may consider similar actions.

At the hearing, we asked counsel for the respondent as to the reasons his client wished to delay the payment of the agreed upon administrative penalty and costs until July 2007. Counsel for Mr. Hanley indicated that an employment opportunity had recently been presented to Mr. Hanley who was attempting to finalize arrangements in this regard.

We found that the sanctions contained in the Settlement Agreement are within an acceptable range and meet the appropriate public interest test. More specifically, the Panel found that the payment of the administrative penalty along with the other sanctions send the proper message to Mr. Hanley and market participants that providing false information to clients and to staff are serious offences which are not tolerated.

The Panel considered that Mr. Hanley accepts responsibility for his misconduct, has repaid the majority of monies to the affected investors and has not been the subject of other proceedings under the *Act*. We also note that the parties, in reaching the Settlement Agreement, avoided the requirement for the Commission to hold a full hearing as it relates to this matter and also avoided the calling of fragile complainants.

Under subsection 191(1) (a) of the *Act*, the Panel approved the Settlement Agreement on 26 February 2007 and executed an Order of the same date consistent with the conclusions presented in this document.



David T. Hashey (Panel Chair)

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