IN THE MATTER OF

The *Securities Act*

S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

KERRY JOHN O'NEILL and
RENEE MARIE HELMIG AKA NISHA HELMIG
(RESPONDENTS)

REASONS FOR THE DECISION

Date of Hearing:	14 January 2010
Date of Order:	19 February 2010
Date of Reasons for Decision:	14 May 2010

Panel:

David G. Barry, Q.C., Panel Chair

Anne W. La Forest, Panel Member

Counsel:

Marc Wagg	For staff of the New Brunswick Securities Commission

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(RESPONDENTS)

REASONS FOR THE DECISION

1. BACKGROUND

[1] This matter involves an application by staff (staff) of the New Brunswick Securities Commission (Commission) for an order under paragraph 184(1.1)(c) of the *Securities Act* (*Act)* against the respondents, Kerry John O'Neill (O'Neill) and Renee Marie Helmig aka Nisha Helmig (Helmig). Paragraph 184 (1.1)(c) of the *Act* states as follows:

> **184**(1.1)In addition to the power to make orders under subsection (1), the Commission may, after providing an opportunity to be heard, make one or more of the orders referred to in paragraphs (1)(*a*) to (*d*) and (1)(*g*) to (*i*) against a person if the person
>
> …
>
> (*c*)is subject to an order made by a securities regulatory authority or self-regulatory organization in Canada or elsewhere imposing sanctions, conditions, restrictions or requirements on the person,
>
> …

[2] On 23 November 2009, staff filed an application (application) and the supporting affidavit of Commission Investigator Gordon Fortner (supporting affidavit) seeking relief against the respondents. Pursuant to

subparagraphs 184(1)(c)(i) and (ii) and paragraph 184(1)(d) of the *Act*, staff sought that:

> (a) all trading in securities of PAY IT FORWARD shall cease (including without limitation, the solicitation of trades in securities or any acts constituting attempts or acts in furtherance of trading, in such securities);
>
> (b) the respondents shall cease trading in all securities (including, without limitation, the solicitation of trades in securities or any acts constituting attempts or acts in furtherance of trading in securities); and
>
> (c) any exemptions in New Brunswick securities law do not apply to the respondents

for as long as the orders issued by the British Columbia Securities Commission (as from time to time extended) remain in force.

[3] Staff based their application on the grounds that the respondents are subject to orders made by the British Columbia Securities Commission (BCSC) imposing sanctions, conditions, restrictions or requirements and that it is in the public interest for an order to be issued in New Brunswick.

[4] A notice of application was issued by the Commission on 26 November 2009. It provided notice to the respondents of the application and the relief sought. The notice of application advised the respondents of their right to be heard which could be exercised by notifying the Commission by 11 December 2009. The notice of application also advised the respondents that failure to notify the Commission might result in an order contrary to their interest being issued without further notice to them.

[5] Staff filed an affidavit on 22 December 2009 (affidavit of service), outlining their service on the respondents of the notice of application, the application and the supporting affidavit. As provided by subsection 5(1) of Local Rule 15-501

Procedures for Hearings Before a Panel of the Commission, the respondents were served by email. We were advised by the Office of the Secretary of the Commission that the respondents did not request an opportunity to be heard.

2. THE FACTS

[6] The facts as outlined are derived from the orders of the BCSC that were submitted by staff in the supporting affidavit.

[7] O'Neill was the principal of an unincorporated investment scheme called the Pay It Forward Program (the PIF Program), which ran from approximately November 2005 to April 2007.

[8] Between November 2005 and December 2006, O'Neill solicited investors to join the PIF Program and enter into investment contracts (the PIF Securities) with him.

[9] In the PIF Program, O'Neill was to use investors' money to buy and sell distressed merchandise. Investors were to receive back their principal plus a portion of the profits that O'Neill would earn buying and selling distressed merchandise.

[10] No prospectus was ever filed for the PIF Securities and none of the exemptions under the *Securities Act*, RSBC 1996, c.418 (the BC Act) applied to their distribution. O'Neill was not registered under the BC Act when he distributed the PIF Securities.

[11] Between November 2005 and December 2006, Helmig solicited investors to enter into investment contracts with O'Neill. Helmig has never been registered under the BC Act.

[12] O'Neill and Helmig made the following representations to investors and potential investors to convince them to invest with O'Neill:

(a) O'Neill would use the principal amount of each investment for the sole purpose of buying and selling new and used merchandise;

(b) investors would earn returns of 100% to 300% on their investments every 90 days; and

(c) payments to investors would be comprised of their original investment capital plus a portion of the profits that O'Neill earned from buying and selling distressed merchandise.

[13] The above representations were false or misleading because:

(a) O'Neill used only about $1.08 million of investors' money to purchase merchandise. O'Neill used the rest of the funds to pay amounts due to other investors, for his personal expenses, and for other investment opportunities;

(b) most investors did not earn any return on their investments, but rather lost some or all of the investment capital; and

(c) the payments O'Neill made to investors did not come from profits he made buying and selling distressed merchandise. Instead, O'Neill paid investors with other investors' funds.

[14] Helmig relied on false information from O'Neill and did not conduct any due diligence inquiries into O'Neill or his business endeavours.

[15] As a result of O'Neill and Helmig's conduct, 943 investors invested approximately $9,630,000 with O'Neill. Of these investors, 590 are British Columbia residents who gave O'Neill a total of approximately $4,317,752.

[16] The BCSC provided staff the names of three New Brunswick residents who had also invested in the PIF Program. One investor, C.G. lost between $115,000 and $125,000. She also invested on behalf of another New Brunswick resident, her employee M.S., in the amount of $10,000. C.G. also invested on behalf of the

third New Brunswick resident affected, M.P. The amount invested on his behalf is unknown. C.G. invested through Helmig.

[17] Helmig entered into a Settlement Agreement with the BCSC and a BCSC Order imposing restrictions was issued on 18 August 2009. Part 3 of the Settlement Agreement contains a "Consent to Reciprocal Orders" whereby "any securities regulator in Canada may rely on the facts admitted in this Settlement Agreement solely for the purpose of making an order similar to the one contemplated above".

[18] O'Neill entered into a Settlement Agreement with the BCSC and a BCSC Order imposing restrictions was issued on 9 September 2009. Part 3 of the Settlement Agreement contains a "Consent to Reciprocal Orders" whereby "any securities regulator in Canada may rely on the facts admitted in this Settlement Agreement solely for the purpose of making an order similar to the one contemplated above".

3. ANALYSIS AND DECISION

Pre-conditions of 184(1.1)(c) of the Act

[19] Prior to issuing an order under paragraph 184(1.1)(c) of the *Act*, the Panel must be satisfied that the respondents were provided with an opportunity to be heard, and that each respondent is a person who is subject to an order made by a securities regulatory authority in Canada or elsewhere imposing sanctions, restrictions or requirements on the respondents. The Panel is satisfied in this case that these conditions have been met. As outlined in the A*dcapital Industries Inc. et al.* (*Adcapital*) decision issued on 19 August 2008, at paragraph 26:

> ...once these two pre-conditions have been met, a Panel must then determine if it is in the public interest to make the order.

Public Interest

[20] The panel must consider whether it is in the public interest to grant the order requested by staff in accordance with subsection 184(1.1) of the *Act*. As recognized by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, dispositions referring to the public interest should be assessed by considering the objects of the *Act* described in section 2; namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in the capital markets." As stated, in part, at paragraph 45 of that decision:

> ... the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. [1]

[21] In the decision *Shire International Real Estate Investment Ltd. et al.* (*Shire*), issued on 14 May 2010, followed in *Landbankers International MX, S.A. de C.V. et al. (Landbankers)*, issued on 14 May 2010 and *Oil International, LLC. et al.* (*Oil International*), issued on 14 May 2010, the Commission Panel assessed whether mutual support and cooperation between provinces is sufficient to satisfy the public interest provisions of subsection 184(1.1) of the *Act*. Prior decisions of the Commission such as *Al-tar Energy Corp. et al. (Altar)*, issued on 17 December 2007; *Adcapital (supra)*; and *Global Petroleum Strategies, LLC et al. (Global Petroleum)*, issued 8 September 2008, held that it was appropriate to grant an order under subsection 184(1.1) where it would serve a protective purpose for New Brunswick investors and the capital markets. In *Shire,* however, there was no evidence of any connection between the respondents and New Brunswick. In spite of this, the Panel stated at paragraph 33 of *Shire*:

[1] *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 45.

> In our view, the plain language of subsection 184(1.1) of the *Act* does not limit the provision to the protective purpose that was directly at issue in *Altar, Adcapital, and Global Petroleum*. Rather, it reasonably extends to recognizing the orders of a securities regulatory authority in another jurisdiction. Subsection 184(1.1) was implemented as part of the Canadian Securities Administrators efforts to ensure the protection of the capital markets across the country and reinforces our view that the public interest test to be applied should be broad in scope. Stated in other words, a narrow approach to subsection 184(1.1) of the *Act* does not, in our view, fully comply with the legislative intent of the 2007 legislative amendments.

[22] While the Commission clearly has the power to recognize the orders of a sister securities regulator, the authority to do so under s. 184 (1.1) is nevertheless discretionary. In *Shire*, the Panel took the position that it is in the public interest for the Commission to exercise this discretion when it is satisfied that the regulator making the order has properly or appropriately exercised its jurisdiction. A regulator has so exercised its jurisdiction when there is a real and substantial connection between the regulator and the subject matter of the order. This approach protects the respondents from having an order issued in New Brunswick based upon an unwarranted exercise of jurisdiction by another regulatory authority.

[23] In *Shire,* the Panel then turned its mind to the question of what evidence would be necessary to establish that jurisdiction had been properly or appropriately exercised. As stated by the Panel at paragraph 40 of *Shire*:

> While.... we should not look behind the evidence led in the original proceeding, the mere existence of an order of another securities regulator should not be accepted as *prima facie* evidence that the order itself was properly or appropriately issued. Evidence that there was a real and substantial connection between the jurisdiction issuing the order and the subject matter of the order must be submitted in support of an application.

[24] In the present matter, the Panel accepts the evidence included in the supporting affidavit. The evidence demonstrates that both of the respondents are residents of British Columbia and that 590 British Columbia residents invested funds in the respondents' Pay It Forward scheme. We conclude that there existed a real and substantial connection between British Columbia and the respondents and that the BCSC has thus appropriately exercised its jurisdiction.

[25] Although the evidence demonstrates that several New Brunswick residents were also contacted and solicited by the respondents, staff did not explain why the scope of the order requested was different from that issued by the BCSC. Accordingly, the Panel is of the view that an order consistent with that of the BCSC should be issued in accordance with paragraph 184(1.1)(c) of the *Act*.

[26] The above constitutes the Panel's reasons for decision for its order issued on 19 February 2010 pursuant to paragraph 184(1.1)(c) of the *Act.*

Dated this 14th day of May, 2010.

"original signed by"
David G. Barry, Q.C., Panel Chair

"original signed by"
Anne W. La Forest, Panel Member

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