FINANCIAL AND CONSUMER SERVICES TRIBUNAL | TRIBUNAL DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: New Brunswick (Financial and Consumer Services Commission) v. Sachs International S.A., 2015 NBFCST 1

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *SECURITIES ACT*, S.N.B. 2004, c s-5.5

Date: 2015-01-30
Docket: SE-005-2014

BETWEEN:

**Financial and Consumer Services Commission,**

Applicant,

**-and-**

**Sachs International S.A. and Charles King,**

Respondents.

## REASONS FOR DECISION AND ORDER

Restriction on publication: This decision has been anonymized to comply with the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c R-10.6.

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| PANEL: | Monica L. Barley, Panel Chair<br>John M. Hanson, Q.C., Panel Member<br>Donald C. Moors, Panel Member |
| DATE OF HEARING: | October 21, 2014 |
| WRITTEN REASONS: | January 30, 2015 |
| APPEARANCES: | Brian Maude for the Applicant<br>The Respondents did not appear |

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**REASONS FOR DECISION AND ORDER**

## I. OVERVIEW

[1] On October 21, 2014, the Financial and Consumer Services Tribunal ("Tribunal") held a hearing pursuant to section 184 of the *Securities Act*, S.N.B. 2004, c S-5.5 ("*Securities Act"*) to consider whether Sachs International S.A. ("Sachs") and Charles King had breached the *Securities Act* and whether it was in the public interest to order sanctions against the Respondents.

[2] On September 4, 2014, a Statement of Allegations was filed by Staff of the Financial and Consumer Services Commission ("Commission"). The Tribunal issued a Notice of Hearing on October 6, 2014. Staff alleges that in July 2014, the Respondents were involved in trading in derivatives for which registration requirements or exemptions under the *Securities Act* were not met. Staff further alleges that the Respondents made representations contrary to the *Securities Act* that the investor's money would be refunded if the price of the derivative decreased. Finally, Staff alleges that the Respondents made misrepresentations regarding (1) the regulatory requirements on derivatives; (2) that their products did not constitute derivatives; (3) the potential profitability of an investment; and (4) refunding the investor's money if the price of the derivative decreased.

[3] For the reasons set out below, the Tribunal finds the Respondents breached paragraph 45(a), paragraph 58(1)(c) and subsection 58(4) of the *Securities Act* and that sanctions under subsection 184(1) of the *Securities Act* are appropriate.

## II. FACTS

[4] The evidence in this matter consisted of the Affidavit of a New Brunswick resident, Resident 1, and the Certificate of Kevin Hoyt, the Executive Director of Securities for New Brunswick, under subsection 196(1) of the *Securities Act*.

[5] Sachs International S.A. purported to be a company based in London, England with corporate offices at Vicarage House, 58-60 Kensington Church Street, London, England.

[6] Charles King represented himself to be a Senior Advisor with Sachs.

[7] On or about July 15, 2014, the Respondent Charles King, claiming to be a Senior Advisor of the Respondent Sachs, contacted Resident 1 by telephone at Resident 1's office. During that telephone conversation, the Respondent Charles King informed Resident 1 that it was an opportune time to invest in gasoline/fuel futures as the price was about to go up. Resident 1 disagreed with the Respondent Charles King that the price of gasoline/fuel futures was about to go up and indicated that it was his understanding that gasoline prices went down in the fall months.

[8] The Respondent Charles King told Resident 1 that if the futures price increased, he would get profits and if the futures price decreased, he would be refunded his investment.

[9] Following this telephone discussion, the Respondent Charles King sent an e-mail to Resident 1 on July 15, 2014 attaching two documents: (1) a Sachs International Client Account Agreement and, (2) a diagram entitled "RBU14- Gasoline RBOB0 Daily OHLC Chart".

[10] The Sachs International Client Account Agreement indicates at page 4, Clause "G. Lack of Regulation", that Sachs and its employees are not registered as a broker-dealer with any government agency nor have its options been registered with its local authorities. Clause G further states that no banking or international authority regulates derivative options.

[11] Resident 1 investigated the Sachs website of www.sachsint.com by conducting a search of that website on the Whois website, which search revealed that the Registrant of the website was Ulises Azofeifa Robles.

[12] Resident 1 continued his research and discovered that Ulises Azofeifa Robles was the Registrant of two other domain names: mylloydstrader.com and forexoptionstraderplatform.com.

[13] Again, upon further investigation, Resident 1 discovered that both myllodstrader.com and forexoptionstraderplatform.com were listed on an Ontario Securities Commission Investor Warning List as being not registered to engage in the business of trading in securities or advising anyone with respect to investing in, buying or selling securities.

[14] Resident 1 did not invest with the Respondents. Rather, on August 7, 2014, Resident 1 contacted Jake van der Laan, the Director of Enforcement with the Commission, and informed him of his contacts with Charles King and Sachs.

## III. ISSUES

[15] Staff's allegations raise the following issues in this matter:

(a) Did the Respondents trade in derivatives while not registered and not exempted from registration under New Brunswick securities law contrary to paragraph 45(a) of the *Securities Act*?

(b) Did the Respondent Charles King make a representation that the premium paid with respect to the purchase of the futures would be refunded if the price of the futures decreased, contrary to paragraph 58(1)(c) of the *Securities Act*?

(c) Did the Respondents make misrepresentations contrary to subsection 58(4) of the *Securities Act*?

(d) Is the relief sought by Staff in the public interest as required under subsection 184(1) of the *Securities Act?*

## IV. ANALYSIS

### A. PRELIMINARY ISSUES

#### 1. Failure of the Respondents to Appear

[16] The Respondents did not file a Response to the Statement of Allegations, as permitted under subsection 13(5) of the Commission's Local Rule 15-501 *Proceedings Before the Tribunal* (Local Rule 15-501), which governs procedure in proceedings before the Tribunal. The Respondents did not appear at the October 21, 2014 hearing, either personally or through a representative, nor present evidence or make submissions.

[17] The Affidavit of Service of Brian Maude, legal counsel for the Commission, filed on October 17, 2014 indicates that the Respondents were served on October 8, 2014 with the Notice of Hearing, Statement of Allegations and Affidavit of Resident 1 by e-mail and fax to the e-mail address and fax number on the website of Sachs. The Respondents were further served on October 13, 2014 at their London, England offices, at the office location posted on Sachs' website.

[18] Subsection 5(1) of Local Rule 15-501 stipulates the manner in which a Statement of Allegations may be served on the Respondents. Paragraph 5(1)(e) specifies that documents may be served by prepaid courier to the last known address for the party, while paragraph 5(1)(f) permits service of documents by electronic transmission. Electronic transmission is defined in subsection 1(1) of Local Rule 15-501 and means transmission by facsimile or e-mail.

[19] The Tribunal is satisfied that the Respondents were properly served with the Notice of Hearing, Statement of Allegations and Affidavit of Resident 1.

[20] Subsection 14(4) of Local Rule 15-501 deals with non-appearance of a party at a hearing and stipulates:

> 14(4) Non-appearance of Party – If a Notice of Hearing has been duly served on a Respondent or any other person required to be served and the Respondent or other person does not attend a hearing, the hearing may proceed in his or her absence and the Respondent is not entitled to any further notice of any step in the Proceeding.

[21] Pursuant to subsection 14(4), the Tribunal was authorized to proceed with the hearing in this matter despite the Respondents' non-appearance.

**2. Evidence by Written Submissions**

[22] As no Response was filed in this matter, Staff requested on October 17, 2014, that it be allowed to proceed by way of written submission, in accordance with subsection 13(5.1) of Local Rule 15-501. On that same date, the Tribunal instructed Staff that the matter would proceed to an oral hearing and to have their witnesses available for the oral hearing.

[23] Part 15 of Local Rule 15-501 deals with proceedings in writing. Subsection 15(1) states that a proceeding may be dealt on the basis of written submissions made by the parties if all parties agree in writing. Subsection 15(4) stipulates that the evidence in a written hearing shall be in affidavit form or other form as the Panel may direct.

[24] As previously indicated, the Respondents did not file a Response nor appear at the hearing of this matter.

[25] At the commencement of the hearing, the Tribunal allowed Staff to present its evidence by way of Affidavit evidence, namely the Affidavit of Resident 1, sworn September 3, 2014.

**B. PARAGRAPH 45(a) OF THE *SECURITIES ACT***

[26] Staff submits that the Respondents traded in derivatives without being registered or exempted from registration under New Brunswick securities law, contrary to paragraph 45(a) of the *Securities Act*.

**1. The Law**

[27] Paragraph 45(a) of the *Securities Act* prohibits trading in securities or derivatives without being registered unless the person is exempted under the regulations. That paragraph reads:

> **45** Unless the person is exempted under the regulations, if a person is not registered in accordance with the regulations in the category that the regulations prescribe for the activity, the person shall not
>
> *(a)* trade in a security or derivative [….]

[28] The term "derivative" employed in paragraph 45(a) is defined in section 1 of the *Securities Act*:

> "derivative" means
>
> (*a*) an option, swap, futures contract, forward contract or other financial or commodity contract or instrument whose market price, value, or delivery, payment or settlement obligations are derived from, referenced to or based on an underlying interest, including a value, price, index, event, probability or thing[…]

[29] The term "trade" found in paragraph 45(a) is also defined in subsection 1(1) and includes:

> (*b*) entering into a derivative or making a material amendment to, terminating, assigning, buying, selling or otherwise acquiring or disposing of a derivative,
>
> […]
>
> (*f*) the receipt by a registrant of an order to buy or sell a security or an order to buy, sell, enter into, amend, terminate, assign or novate a derivative,
>
> […]
>
> (*h*) an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (*a*) to (*g*).

**2. Findings**

[30] In order to prove a breach of paragraph 45(a) of the *Securities Act*, Staff must prove: (1) that the Respondents were required to be registered with the Securities Division of the Commission; (2) that the gasoline/fuel futures for which the Respondents solicited Resident 1 constitute a derivative; and (3) that the actions of the Respondent Charles King constitute a trade in a derivative.

[31] First, with respect to registration, the Tribunal reiterates that the registration requirement constitutes one of the cornerstones of the regulatory framework established by the *Securities Act* [*Re MI Capital*, NBSC 8 August 2012, paragraph 24].

[32] The Tribunal finds that the Respondents were not registered to trade in securities or derivatives. The Certificate of Kevin Hoyt, Executive Director of Securities for New Brunswick, under subsection 196(1) of the *Securities Act* states that Sachs International S.A. and Charles King had never been registered with the Financial and Consumer Services Commission. Paragraph 196(1)(a) of the *Securities Act* states regarding the admissibility of the Certificate of the Executive Director:

> **196**(1) A certificate containing any of the following statements and purporting to be signed by the Chair of the Commission, another member of the Commission or by the Executive Director is, without proof of the appointment, authority or signature of the person who has signed the certificate, admissible in evidence and is, in the absence of evidence to the contrary, proof of the facts stated in the certificate:
>
> (*a*) a statement about the registration or non-registration of any person under this Act or the regulations […]

[33] In addition, Clause G. "Lack of Regulation" at page 4 of the Sachs Client Account Agreement is conclusive evidence that the Respondents are not registered as a broker-dealer with the Securities Division of the Commission. Clause G reads in part:

> **G. Lack of Regulation**
>
> […] Both SACHS INTERNTATIONAL and its' employees are not registered as a broker-dealer with any government agency nor have the options been registered with its' local authorities. […]

[34] The onus of proof to establish the existence of a valid exemption falls upon the Respondents. The Respondents did not file a Response, did not appear at the hearing and have submitted no evidence to this Panel. [*Re MI Capital*, NBSC 8 August 2012, paragraph 30].

[35] The Panel finds the Respondents have not discharged their onus of establishing the existence of a valid exemption to the registration requirement found at paragraph 45(a) of the *Securities Act*.

[36] Second, the Panel finds the gasoline/fuel futures for which the Respondents solicited Resident 1 constitute a derivative under subsection 1(1) of the *Securities Act* as the market price of the futures contract is based on an underlying interest, namely the price of gasoline/fuel.

[37] The Respondents admit that the gasoline/fuel futures constitute a derivative in Clause 1 and 2 of page 1 of the Sachs Client Account Agreement:

> **1. APPOINTMENT OF DERIVATIVES BROKER AND PARTIES**
>
> […] CLIENT hereby appoints Agent as CLIENT'S broker for CLIENT'S purchases and sales of options and futures contracts on the derivative markets by and through an International Brokerage Firm (hereinafter "ICF"), […]

**2. DESCRIPTION OF PRODUCTS**

> The CLIENT purchases the derivative options or futures contracts for a specified sum of money or margin deposit, which SACHS INTERNATIONAL determines based upon prevailing rates with ICF or in the international derivatives market. […]

[38] Third, the Panel finds that the actions of the Respondent Charles King on behalf of the Respondent Sachs constitute a trade in a derivative as defined under paragraph 1(1)(h) of the *Securities Act*. The following facts establish that the Respondents were trading in derivatives:

- The Respondent Charles King contacted Resident 1 by telephone on July 15, 2014, and advised the latter that it was an opportune time to invest in gasoline/fuel futures as the price was about to go up;
- After the July 15, 2014 telephone call, the Respondent Charles King sent an e-mail to Resident 1 enclosing the Sachs Client Account Agreement and a diagram entitled "RBU14-Gasoline RB0B0 Daily OHLC Chart"; and
- In Clause 1 at page 1 of the Sachs Client Account Agreement, Sachs offers to act as a derivatives broker for the client.

[39] The Panel concludes that the Respondents breached paragraph 45(a) of the *Securities Act* by trading in derivatives on July 15, 2014 while not registered and not exempted from registration.

## C. PARAGRAPH 58(1)(c) OF THE *SECURITIES ACT*

[40] Staff submits that the Respondent Charles King made representations contrary to paragraph 58(1)(c) of the *Securities Act* when he represented to Resident 1 during the July 15, 2014 telephone conversation that he could make a profit if the price of the gasoline/fuel futures increased and his money would be refunded if the price of the futures decreased.

### 1. The Law

[41] Paragraph 58(1)(c) of the *Securities Act* states that no person shall make any representation, orally or in writing, that the person or another person will refund all or any margin or premium paid with respect to a derivative. That subsection reads as follows:

> **58**(1) No person shall make any representation, orally or in writing, that the person or another person
>
> (*c*) will refund all or any margin or premium paid with respect to a derivative […].

[42] Subsection 58(1.2) creates an exception to paragraph 58(1)(c) for certain derivatives as follows:

> **58**(1.2) Subsection (1) does not apply to a derivative if its terms

> (*a*) provide a refund or provide to a counterparty the right to require a refund, or
>
> (*b*) provide to a counterparty a right to assume all or part of an obligation set out in the derivative.

**2. Findings**

[43] In order to prove a breach of paragraph 58(1)(c) of the *Securities Act*, Staff must prove that: (1) a person made a representation orally or in writing; (2) the representation was that the person or another person would refund all or any margin or premium paid with respect to a derivative; and (3) the exceptions in subsection 58(1.2) are not applicable.

[44] The Tribunal accepts the uncontested evidence of Resident 1 that the Respondent Charles King told him during the July 15, 2014 telephone call that if the price of the gasoline/fuel futures increased, he would make a profit and if the futures price decreased, he would be refunded his money.

[45] The Tribunal finds the elements of paragraph 58(1)(c) of the *Securities Act* are proven.

[46] Turning now to the exceptions in paragraphs 58(1.2)(a) and (b) of the *Securities Act*, the Tribunal finds paragraph 58(1.2)(a) is of no application to this matter. The Sachs Client Account Agreement provides at Clause 2 "Description of Products" that the premium is non-refundable. Clause 2 states:

> **2. DESCRIPTION OF PRODUCTS**
>
> The CLIENT purchases the derivative options or futures contracts for a specified sum of money or margin deposit […]. In purchasing options, which is known as the premium in addition to fees, commissions and other charges to be described hereinafter in the ("OPTIONS FEE DISCLOSURE"). **The premium is considered fully earned by the Agent at the time of payment and is therefore non-refundable.** CLIENT may thereafter sell the options back to the Agent at any time prior to the expiration date for the price the ICF or Agent is then quoting, based upon the prevailing rates. **If on the date of expiration, the prevailing market price of the particular option does not exceed the strike price of the call option (or in the case of a put option, be less than the strike price), CLIENT will lose the entire premium, in addition to all fees and commissions**.[Our emphasis]

[47] The Respondent Charles King's representations to Resident 1 are in direct contradiction to Clause 2.

[48] Regarding the exception at paragraph 58(1.2)(b) of the *Securities Act*, the Sachs International Client Account Agreement does not deal with assumption of rights set out in the derivative. To the contrary, Clause 5 of the Agreement contains a prohibition against the transfer of futures contracts :

> **5. CONTRACT TRANSFERS**
>
> At this time, all open futures or option contracts with SACHS INTERNATIONAL will not be transferred to third party brokerage firms. SACHS INTERNATIONAL

> or ICF will remain the broker in closing/offsetting any option or futures contract.

[49] The Tribunal finds the exception in paragraph 58(1.2)(b) of the *Securities* Act does not apply in this matter. As no exceptions are applicable in this matter, the Tribunal concludes the Respondent Charles King made representations contrary to paragraph 58(1)(c) of the *Securities Act*.

## D. SUBSECTION 58(4) OF THE *SECURITIES ACT*

[50] Staff submits that the Respondents made misrepresentations contrary to subsection 58(4) of the *Securities Act* as follows: (a) there is no regulatory requirement on derivatives; (b) their products were removed from the definition of securities as a result of client ownership; (c) the potential profitability from the purported investment; and (d) the refunding of the investor's money.

### 1. The Law

[51] Subsection 58(4) of the *Securities Act* stipulates:

> **58**(4) No person shall, orally or in writing, make a statement about a security, derivative or trade that the person knows or ought reasonably to know is a misrepresentation.

### 2. Findings

[52] In order to prove a breach of subsection 58(4) of the *Securities Act*, Staff must prove: (1) that a person made a statement orally or in writing; (2) that the statement was about a security or derivative; (3) that the person knew or ought to have known the statement was a misrepresentation.

[53] The Tribunal has already found, in the context of its analysis under paragraph 58(1)(c) of the *Securities Act,* that the Respondent Charles King made representations regarding the potential profitability from the purported investment; and the refunding of the investor's money.

[54] The Respondent Charles King's statements of July 15, 2014 were oral statements about a derivative. As previously discussed in these reasons, the Respondent Charles King's statements are in direct contradiction to Clause 2 "Description of Products" of the Sachs International Client Account Agreement which stipulates that the premium is non-refundable.

[55] Given the content of Clause 2, the Tribunal finds that the Respondent Charles King knew or ought to have known that his statements regarding the potential profitability from the purported investment and the refunding of the investor's money were untrue. The Tribunal concludes that these statements constitute misrepresentations contrary to subsection 58(4) of the *Securities Act*.

[56] Turning now to the Respondents representations regarding regulatory requirements, the Respondent Sachs represents in Clause G at page 4 of the Client Account Agreement that no banking or international authority regulates derivatives options. The relevant portion of Clause G reads:

> **G. Lack of Regulation**
>
> At the current time, no banking or international authority regulates derivative options or the international market. […]

[57] This statement is in direct contradiction to the requirement under paragraph 45(a) of the *Securities Act* that "unless the person is exempted under the regulations, if a person is not registered in accordance with the regulations in the category that the regulations prescribe for the activity, the person shall not trade in a security or derivative".

[58] As for the Respondent Sachs' knowledge that this statement was untrue, one has simply to look at the remainder of Clause G to determine that Sachs knew the statement was untrue:

> **G. Lack of Regulation**
>
> At the current time, no banking or international authority regulates derivative options or the international market. […] Moreover, SACHS INTERNATIONAL could become the subject of adverse regulatory actions or determinations by one or more governmental agencies or courts. **At any given time, officers, managers or agents of the company may have had previous regulatory sanctions by governmental agencies.** [Our emphasis]

[59] The Tribunal concludes that the Respondent Sachs' statement in Clause G of page 4 of the Client Account Agreement is a misrepresentation contrary to subsection 58(4) of the *Securities Act.*

[60] Finally, Staff alleges that the Respondent Sachs made misrepresentations to the effect that their products were removed from the definition of securities as a result of client ownership.

[61] At Clause G of page 4 of the Sachs International Client Agreement, Sachs states regarding the nature of their products:

> **G. Lack of Regulation**
>
> […] each CLIENT individually owns the options contract (s) thereby removing these vehicles from the definition of securities.

[62] Staff has not elaborated on this argument in either its Statement of Allegations, the Affidavit of Resident 1, the Pre-Hearing Submission or its oral arguments at the hearing.

[63] The Tribunal concludes Staff has not shown how Sachs' statement regarding client ownership of the derivatives constitutes a misrepresentation contrary to subsection 58(4) of the *Securities Act.*

## E. SHOULD AN ORDER BE ISSUED?

[64] In its Statement of Allegations filed September 4, 2014, Staff seeks Orders from the Tribunal under sub-paragraphs 184(1)(c)(i) and 184(1)(c)(ii), clause 184(1)(c)(ii)(B), paragraph 184(1)(d), sub-paragraph 184(1)(f)(ii) and subsection 186(1) of the *Securities Act* as well as an Order for costs under paragraph 44(1)(a) of the *Financial and Consumer Services Commission Act*.

[65] At the October 21, 2014 hearing of this matter, Staff abandoned the claim for an administrative penalty under subsection 186(1) of the *Securities Act* and also indicated that an award of costs under paragraph 44(1)(a) of the *Financial and Consumer Services Commission Act* may not be appropriate given the likelihood that collection of any monetary penalty in any form would be highly unlikely in this matter. Staff based this new position on a line of case law that has come out of the Ontario Securities Commission and been adopted in other jurisdictions. This case law was not provided to the Tribunal.

[66] The Tribunal agrees that an administrative penalty and an award of costs are not appropriate in this matter given that it is highly unlikely that any monetary amount could be recovered from the Respondents. The Respondents appear to be a boiler room and have in no way participated in this matter.

[67] Turning now to section 184 of the *Securities Act*, subsection 184(1) grants the Tribunal the authority to make orders in the public interest. The relevant portions of that section to this matter are:

> **Orders in the public interest**
>
> **184**(1) On the application of the Commission, the Tribunal, if in its opinion it is in the public interest to do so, may make one or more of the following orders:
>
> […]
>
> (*c*) an order that
>
> (i) trading in or purchasing cease in respect of any securities, derivatives, class of securities or class of derivatives, or
>
> (ii) a person specified in the order
>
> […]
>
> (B) is prohibited from acting in a management or consultative capacity in connection with activities in the securities or derivatives market;
>
> (*d*) an order that any exemptions contained in New Brunswick securities law do not apply to a person permanently or for such period as is specified in the order;
>
> […]
>
> (*f*) if the Tribunal is satisfied that New Brunswick securities law has not been complied with, an order that a release, a report, a preliminary prospectus, a prospectus, a return, a financial statement, an information circular, a take-over bid circular, an issuer bid circular, a notice of change or variation in respect of a take-over bid circular or an issuer bid circular, an offering memorandum, a proxy solicitation or any other document described in the order
>
> […]
>
> (ii) not be provided by a market participant to a person […].

[68] The Tribunal must determine if the relief sought by Staff is in the public interest. The expression "in the public interest", within the framework of securities law in New Brunswick, can be traced to the legislative purposes found at section 2 of the *Securities Act*:

> **2** The purposes of this Act are
>
> (*a*) to provide protection to investors from unfair, improper or fraudulent practices, and
>
> (*b*) to foster fair and efficient capital and derivatives markets and confidence in capital and derivative markets.

[69] The Supreme Court of Canada succinctly describes the binary nature of securities legislation in its decision *Equal Treatment of Asbestos Minority Shareholder v. Ontario (Securities Commission)*, 2001 SCC 37:

> 41. Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.
>
> 42. Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as Canadian Tire, supra, aff'd (1987), 59 O.R. (2d) 79 (Div. Ct.); leave to appeal to C.A. denied (1987), 35 B.L.R. xx, in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, at p. 219.

[70] The former New Brunswick Securities Commission and the Financial and Consumer Services Tribunal have consistently followed this interpretation of the phrase "in the public interest".

[71] The purpose of section 184, in the Tribunal's view, is thus one that is protective and preventative, rather than remedial or punitive, and intended to be exercised to prevent likely future harm to capital markets [*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 (Ont. Securities Commission), cited with approval in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37].

[72] In addition, the powers set out in section 184 may be exercised even absent a breach of the *Securities Act* [*Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd.,* affirmed (1987), 59 O.R. (2d) (Ont.

Div. Ct.)]. However, in the within matter, specific breaches of the *Securities Act* have been established by Staff.

[73] In the within matter, the evidence shows that the Respondents are not registered to trade in securities or derivatives in New Brunswick and have not shown that they are afforded the benefit of any of the exemptions from registration. Despite this, the Respondent Charles King contacted at least one New Brunswick resident by telephone and e-mail for the purpose of soliciting gasoline/fuel futures. In addition, the Respondents made several misrepresentations to Resident 1 regarding the profitability of the derivative and the registration requirement.

[74] Staff has proven specific breaches of paragraph 45(a), paragraph 58(1)(c) and subsection 58(4) of the *Securities Act* by the Respondents. As previously noted, registration is one of the cornerstones of the regulatory framework established by the *Securities Act* and the Respondents' failure to register with the Securities Division of the Commission and its misrepresentations regarding the lack of regulation are particularly troublesome.

[75] At the hearing, the Tribunal questioned whether the wording of paragraph 184(1)(c) of the *Securities Act* granted the Tribunal the authority to grant permanent as opposed to temporary market bans. It should be noted that the wording of paragraph 184(1)(c) of the *Securities Act* does not place time limits on the market bans – and as such the Tribunal must have discretion in determining the appropriate length of the market ban.

[76] The Tribunal requested during the hearing that Staff provide case law regarding the Tribunal's authority to order permanent market bans under paragraph 184(1)(c) of the *Securities Act*. Staff has provided the Tribunal with seven decisions, which satisfy the Tribunal that it has the authority to order permanent market bans [*Re Colby Cooper Inc. et al*, FCST Decision dated May 27, 2014; *Re Goldpoint Resources Corporation, et al*, FCST Decision dated August 2, 2013; *Re William Watson Priest*, FCSC Decision dated July 5, 2013; *Re Samuel Richard Allaby et al*, 2012 BCSECCOM 399, Decision dated October 15, 2012; *Re MI Capital Corporation et al*, NBCS, Reasons for Decision dated August 8, 2012; *Locate Technologies Inc. et al,* NBSC, Reasons for Decision dated March 10, 2009; *Locate Technologies Inc. et al*, NBSC Reasons for Decision dated October 29, 2008].

[77] Based on the whole of the evidence, the Tribunal is satisfied that New Brunswick residents require protection from the actions of the Respondents and it is appropriate for the Tribunal to exercise its public interest jurisdiction pursuant to subsection 184(1) of the *Securities Act* in order to fulfill its mandate and to achieve the purposes set out in section 2 of the *Securities Act.*

## V. DECISION AND ORDER

[78] For the reasons set out above, the Tribunal concludes that the Respondents have breached New Brunswick securities law and engaged in conduct contrary to the public interest. It is in the public interest to make an Order against the Respondents under subsection 184(1) of the *Securities Act* as follows:

(a) pursuant to sub-paragraph 184(1)(c)(ii) of the *Securities Act*, that the Respondents cease trading in securities in New Brunswick permanently;

(b) pursuant to sub-paragraph 184(1)(c)(i) of the *Securities Act,* that all trading in securities or derivatives offered by the Respondents cease permanently;

(c) pursuant to clause 184(1)(c)(ii)(B) of the *Securities Act,* that the Respondent Charles King is prohibited from acting in a management or consultative capacity in connection with activities in the securities or derivatives market;

(d) pursuant to paragraph 184(1)(d) of the *Securities Act,* that any *e*xemptions under New Brunswick securities law do not apply to the Respondents permanently; and

(e) pursuant to sub-paragraph 184(1)(f)(ii) of the *Securities Act*, the Respondents are prohibited from disseminating to the public, or authorizing the dissemination to the public of any information or material of any kind that pertains to the trading of securities or derivatives.

[79] For the reasons set out above, the Tribunal concludes that the imposition of an administrative penalty under subsection 186(1) of the *Securities Act* or an order for costs under paragraph 44(1)(a) of the *Financial and Consumer Services Commission Act* are not appropriate.

Dated this 30th day of January, 2015.

"original signed by"
Monica L. Barley, Panel Chair

"original signed by"
John M. Hanson, Q.C., Panel Member

"original signed by"
Donald C. Moors, Panel Member