IN THE MATTER OF

THE SECURITIES ACT
S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

WILLIAM WATSON PRIEST
(a.k.a. WILLIAM WATSON PRIEST-PHILLIPS)

(THE RESPONDENT)

REASONS FOR DECISION AND ORDER

Date of Hearing: 16 May 2013
Date of Reasons: 5 July 2013

Panel:
Guy G. Couturier, Q.C., Panel Chair
Céline Robichaud-Trifts, Panel Member
Sheldon Lee, Panel Member

Appearances:

Ella-Jane Loomis	For Staff of the New Brunswick Securities Commission
William Watson Priest, *per se*	(via telephone)

IN THE MATTER OF

WILLIAM WATSON PRIEST
(a.k.a. WILLIAM WATSON PRIEST-PHILLIPS)

(RESPONDENT)

REASONS FOR DECISION AND ORDER

1. Background

[1] On 12 February 2013 Staff of the New Brunswick Securities Commission ("Staff") filed a Statement of Allegations with the Securities Commission[1] ("Commission") against the Respondent William Watson Priest ("Respondent"). Staff sought various Orders, pursuant to subsection 184(1), as well an Order for costs under subsection 185(2), of the *Securities Act*, SNB 2004, c. S-5.5, ("*Act*").

[2] Specifically, Staff aims to obtain the following relief against the Respondent, which is:

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

(b) pursuant to paragraph 184(1)(d) of the *Act, that any e*xemptions under New Brunswick securities law will not apply to the Respondent permanently;

(c) pursuant to paragraph 184(1)(i) of the *Act*, the Respondent will be prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager permanently;

(d) pursuant to paragraph 184(1)(p) of the *Act*, that the Respondent disgorge to the Commission the amount of $594,997.82, obtained as a result of noncompliance with New Brunswick securities law; and

[1] As of 1 July 2013 the New Brunswick Securities Commission is continued as the Financial and Consumer Services Commission, and the adjudicative functions of the Securities Commission are to be performed by the Financial and Consumer Services Tribunal. In accordance with section 75 of the *Financial and Consumer Services Commission Act*, 2013, c.30, this decision of the Commission is deemed to be a decision of the Financial and Consumer Services Tribunal.

it further claims, pursuant to section 185(2) of the *Act*, that the Respondent should pay the investigation and hearing costs, in the amount of $3,610.00.

[3] The relevant sections of the Act are:

> ***184****(1) The Commission may, if in its opinion it is in the public interest to do so, make one or more of the following orders:*
>
> *...*
>
> *(c) an order that*
>
> *...*
>
> *(ii) a person specified in the order cease trading in or purchasing securities or exchange contracts, specified securities or exchange contracts or a class of securities or class of exchange contracts;*
>
> *...*
>
> *(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;*
>
> *...*
>
> *(i) an order that a person is prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager;*
>
> *...*
>
> *(p) if a person has not complied with New Brunswick securities law, an order requiring the person to disgorge to the Commission any amounts obtained as a result of the non-compliance.*
>
> *...*
>
> ***185****(2) In respect of a person whose affairs were the subject of a hearing, the Commission, after conducting the hearing, may order the person to pay the fees and expenses prescribed by regulation for the costs of or related to the hearing that are incurred by or on behalf of the Commission if the Commission*

(a) is satisfied that the person has not complied with, or is not complying with, New Brunswick securities law, or

(b) is of the opinion that the person has not acted in the public interest.

[4] The Commission had previously banned the Respondent temporarily from participating in New Brunswick's capital markets, by order dated 14 November 2011. The Commission had, on consent of the Respondent, issued a temporary cease trading order, and had also denied him applicable statutory exemptions and had also prohibited the Respondent from becoming, or acting, as a director or officer of any issuer, registrant or mutual fund manager, until further order of the Commission.

[5] A Notice of Hearing setting a hearing date on the merits was originally issued for 15 April 2013. The hearing was however adjourned to 16 May 2013, to allow time for the preparation and service of materials. The Respondent was properly served with the Statement of Allegations, supporting affidavits, as well as the Notice of Hearing for the 16 May, 2013 proceeding. The Panel is satisfied that the Respondent received sufficient notice of the latter hearing.

[6] The Respondent did not file a response to the Statement of Allegations, as permitted under subsection 13(5) of Local Rule 15-501 *Proceedings Before a Panel of the Commission* ("LR 15-501"). As no response was filed, Staff requested that it be allowed to proceed by way of written submission, in accordance with subsection 13(5.1) of LR 15-501. The Panel granted the request but nevertheless retained the 16 May 2013 date for oral submissions.

2. Summary of Facts

[7] The relevant facts are straight forward and agreed to, in all substantive aspects, by the Respondent. Commencing in 2008, the Respondent solicited and obtained a total of $858,782.82 from 11 investors ("Investors"). The Investors are all residents of New Brunswick. The money was obtained from the Investors with the promise to each that the Respondent would be investing these funds on their behalf. He promised them all

high rates of return on their investments. The Respondent never in fact invested any of the funds, rather he deposited the monies into his personal account and used the money to either pay other investors or for his personal use.

[8] The Investors suffered greatly, with an aggregate financial loss of $594,997.82. The Respondent was eventually charged, and plead guilty to nine counts of securities fraud, contrary to paragraphs 69(b) and 179(2)(c) of the *Act*.[2] He was sentenced by the Court to three years of incarceration, on each count, to run concurrently.

[9] The relevant sections of the Act read:

> ***69*** *No person shall, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, exchange contracts or derivatives of securities that the person knows or reasonably ought to know*
>
> > *(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, an exchange contract or a derivative of a security, or*
> >
> > *(b) perpetrates a fraud on any person.*
>
> *...*
>
> ***179****(2) A person who does any of the following commits an offence and is liable on conviction to a fine of not more than $1,000,000 or to imprisonment for a term of not more than 5 years less a day, or to both:*
>
> *...*
>
> > *(c) contravenes or fails to comply with a provision of this Act that is listed in Schedule A;*
>
> *SCHEDULE A*
>
> *Number of provision*
>
> *...*
>
> *69(b)*

[2] Exhibits #1 - #9, Investigator's affidavit

…

[10] Staff's evidence consists of several affidavits:

(a) Affidavit of Commission Investigator J.R. Normand Lewicki, sworn 29 April 2013, and filed on 3 May 2013 ("Investigator's Affidavit");

(b) Affidavit of Brian Maude, sworn 2 May 2013, and filed on 3 May 2013; and

(c) Affidavits of Ella-Jane Loomis, sworn 3 May 2013, and filed on 3 May 2013 and sworn 14 May 2013 and filed on 14 May 2013

[11] This evidence is uncontested and in fact, as stated, is agreed to by the Respondent. During the oral hearing of 16 May 2013, the Respondent verbally confirmed that he had received and reviewed Staff's affidavit evidence in its entirety and stated that he agreed with all of Staff's submissions and evidence.

[12] The Investigator's Affidavit, and exhibits thereto, is comprehensive and contains almost 400 pages of detailed information setting out the results of Staff's investigation into the Respondent's conduct and activities. The Investigator's Affidavit provides a clear insight into the Respondent's activities as well as details of the financial loss suffered by each Investor, which extended over several years. The Investigator provides a succinct and adequate summary of his conclusions at paragraph 16 of his affidavit:

> "16. *My investigation of Priest's activities revealed that:*
>
> *a. Priest obtained funds from investors with the promise of investing these funds and giving them a high return on their investment.*
>
> *b. Priest never invested any of the funds obtained from investors.*
>
> *c. Priest represented he would provide them with collateral security purported to be from Manulife Securities ("Manulife") or Berkshire Investment Group ("Berkshire").*
>
> *d. Certain investors received documentation of collateral security with either Manulife or Berkshire from Priest, however certain of those documents had been forged.*

e. *Priest used the funds from the investors to pay personal expenses as well as make payments to other investors who were looking for interest payments on their investments.*

[13] In its oral submission, Staff provided a general overview of the scheme by which the Respondent defrauded each Investor. Specifically, each Investor provided the Respondent, or a corporation controlled by the Respondent, various sums of money to invest. The Respondent in turn provided each Investor, with a promissory note in respect to the investment. Several of these promissory notes are annexed as exhibits to the Investigator's affidavit.[3]

[14] Banking records annexed to Investigator's affidavit indicate that much of the Investor's monies went into the Respondent's personal accounts. These funds were, over time, used for his personal use or otherwise used to pay other investors. There were a number of cash withdrawals and further amounts of the funds that went to pay the Respondent's credit card obligations. [4]

[15] The Respondent purported to provide some of the Investors with collateral security from either Manulife or Berkshire. Indeed these documents were provided to eight of the Investors; but unfortunately all of these documents were forged.

[16] The Investors suffered terrible financial losses. The 3 May 2013 affidavit of Ella-Jane Loomis and the affidavit of Brian Maude, noted above, contain victim impact statements provided by 9 of the 11 Investors who suffered financial loss as a result of the actions of the Respondent. They are persuasive. The Respondent effectively extracted in excess of $850,000 from Investors 1 through 11; resulting in a net financial loss of $594,997.82, which is attributable as follows:

- Investor 1: Financial loss of $90,000.00
- Investors 2 & 3: Financial loss of $130,115.95
- Investors 4 & 5: Financial loss of $155,081.87

[3] Ibid, Exhibits #14,16,19,23,24,25,26,28,35,37,40,45,47,53,62,65,67,70,71,72, & 73
[4] Ibid, Exhibits # 17,22,30,46,56 & 74

- Investor 6: Financial loss of $50,000.00
- Investor 7: Financial loss of $3,500.00
- Investor 8: Financial loss of $50,000.00
- Investor 9: Financial loss of $10,000.00
- Investor 10: Financial loss of $21,200.00
- Investor 11: Financial loss of $85,100.00

3. Issues

[17] In this matter, this Panel of the Commission ("Panel") is called upon to address certain issues. It must determine that:

(a) it is in the " public interest " to make the orders sought by Staff;

(b) the evidence establishes that the Respondent has not complied with New Brunswick securities laws, specifically in terms of the subsection 184(p) remedy sought by Staff;

(c) the May 16th proceeding was indeed a "hearing" within the meaning of the Local Rule 15-501;

(d) the amounts claimed by Staff as costs are consistent and aligned with the sums prescribed by Local Rule 11-501 Fees ("LR11-501"), following the determination of (a) , (b) and (c).

4. Analysis

[18] The Panel is obligated to determine if the relief generally 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 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 markets and confidence in capital markets.*

[19] The overarching purpose ,or goal, of the Act is therefore two-fold .The Supreme Court of Canada succinctly describes this binary nature of a Securities Commission's role in its decision *Equal Treatment of Asbestos Minority Shareholder v. Ontario (Securities Commission)*[5]:

> 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.*

[20] The Commission has consistently followed this interpretation of the phrase *"in the public interest"*[6]. The purpose, in our view, is thus one that is protective and preventative, rather than remedial or punitive.

[21] Turning now to the issue of a disgorgement order under section 184(p) of the Act.; in *Re Limelight Entertainment Inc.*[7] , the Ontario Securities Commission considered the interpretation of section 127(1) of its legislation, which is the equivalent of the New Brunswick section 184(p) provision. It addressed the true meaning of the "disgorgement order" provision in the following fashion:

---

[5] [2001] SCC 37

[6] *Locate Technologies Inc., Tubtron Controls Corp., 706166 Alberta Ltd. and Lorne Drever*, October 29, 2008 at para 17
Legacy Associates Inc. March 23, 2009 at para 11
Michael Cody and Donald Nason, July 3, 2009 at para 22
Intercontinental Trading Group S.A., Ron Wallace and Gary McCory, December 23, 2009 at para 11
MI Capital Corporation,One Capital Corp.Limited,Sean Ayers and Scott Parker,August 8,2012 at para 17

[7] (2008),31 O.S.C.B. 12030 at par 49

> "*the legal question is not whether a respondent " profited " from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money obtained from investors can be ordered to be disgorged, not just the "profit' made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test."*

[22] This principle was adopted by the Alberta Securities Commission, and refined, in *Re Planned Legacies Inc.*[8] where the Commission states at paragraph 71:

> "*The rationale for ordering disgorgement in a securities commission proceeding reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act. It is not a compensation mechanism for victims of the wrongdoing. A disgorgement order thus provides a further element of specific and general deterrence."*

[23] Deterrence is a feature that is key to the sanction. It is intended to specifically prevent, and effectively deter, the Respondent, as well as anyone else having similar ambitions, from pursuing these types of activities henceforth. In *Re Cartaway Resources Corp.*[9] the Supreme Court of Canada speaks to a Securities Commission's role in the imposition of deterrence sanctions. At paragraph 52 it is stated:

> *"Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrong doing. The first is general deterrence; the second is specific or individual deterrence [...]. In both cases deterrence is prospective in orientation and aims at preventing future conduct."*

[24] Although a disgorgement of unlawfully obtained funds is not intended to automatically flow through to the victims of the wrongdoing, the Commission has adopted a distribution method for such funds. Local Rule 15-502 *Procedure for Distribution of Disgorged Funds* sets out a detailed process whereby victims, such

[8] 2011 ABASC 278
[9] *Re Cartaway Resources Corp.*, [2004] S.C.J. No. 22

as the Investors, can make claim for their proportionate share of any disgorged money recovered by the Commission.

[25] Concomitant with the determination of whether a disgorgement order is justified, is the issue of the sufficiency of the evidence. In *Re Arbour Energy Inc.*[10] the Alberta Securities Commission describes the duty and onus of proof involved:

> *''...the Staff bears the initial burden of proving the amount obtained by a respondent through non-compliance with the Act, with the burden then shifting to the respondent to disprove the reasonableness of that amount".*

[26] In *Stetler v. Ontario Flue –Cured Tobacco Growers' Marketing Board*[11], the Ontario Court of Appeal addresses the distinctive standards of proof in legal proceedings at paragraph 79:

> *"There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt."*

There is no express statutory provision in the *Act* dealing with the standard of proof.

[27] Here the evidence of non-compliance with New Brunswick securities law is compelling and uncontested. Exhibits 1 through 9 of the Investigator's Affidavit convincingly establish that the Respondent has *de facto* perpetrated a fraud on each of the Investors. The exhibited Certificates of conviction, all signed by a Judge of the Provincial Court, certify convictions for fraud, contrary to section 179 (2) (c) of the *Act*, meet the requirements of subsection 184 (p) of the legislation. The Respondent, by his oral submission, also admits to the fraud, the amount involved and to the reasonableness of the calculation. Therefore, in the matter before this Panel, Staff has, in our view, satisfied the burden of proof.

[28] Finally there is the question of whether the 16 May 2013 proceeding was indeed a hearing, within the intent of LR 15-501, given that "costs", according the section

[10] 2012 ABASC 416
[11] 2005 (CanLII) 24217 (ON C.A.)

185(2) of the Act, can only be awarded following a "hearing". Although Part 13(5.1) permits that a proceeding may occur on the "*basis of written submission*", it does not preclude the conduct of a hearing.

[29] The doctrine of procedural fairness espoused in the seminal case of *Mavis Baker v. Canada (Minister of Citizen and Immigration)*[12], dictates generally that an opportunity must be afforded to a party to present evidence, cross examine witnesses, and to make submissions. This duty can be reasonably be met by the Respondent being informed of the case against him or her and being provided an opportunity to respond.[13]

[30] Here the Respondent was provided the evidence and material, upon which the Panel has made its decision. He waived any right to submit evidence, or cross examine the deponents of the affidavits, and has effectively assented to the case made against him. He has chosen not to submit any contra evidence. He was further provided, and he exercised, the full right to make oral submissions to the Panel.

[31] Consequently, the Panel is of the view that the statutory requirement has been met and costs are permissible in this instance. The scale of which is prescribed at Part 4 of LR 11-501. A review of the Affidavit of Ella-Jane Loomis, sworn 14 May 2013[14] satisfies the Panel that the amount of $3,610.00 complies with the requirements of LR 11-501.

5. Decision and Order

[32] The Commission, based on the findings made herein, does determine that the Respondent has contravened the stipulated sections of the *Act* and that his conduct does justify sanctions in the public interest. The Commission does hereby **order:**

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

---

[12] [1999] 2 S.C.R.,174 D.L.R.(4th) 193
[13] Re Ont. (Securities Commission) and Electra (Canada) ltd. (18984), 45 O.R. (2d) 246 (H>C.)
[14] Exhibit # A

(b) pursuant to paragraph 184(1)(d) of the *Act, that any e*xemptions under New Brunswick securities law will not apply to the Respondent permanently;

(c) pursuant to paragraph 184(1)(i) of the *Act*, the Respondent will be prohibited from becoming or acting as an officer or director of any issuer, registrant or mutual fund manager permanently;

(e) pursuant to paragraph 184(1)(p) of the *Act*, that the Respondent disgorge to the Commission the amount of $594,997.82;

(f) pursuant to section 185(2) of the *Act*, that the Respondent pay the investigation and hearing costs, in the amount of $3,610.00.

[33] A final matter relates to the amount of confidential and private information about individuals, who are non-parties, that is found in the affidavits, and attached exhibits, considered by the Panel. In the spirit of Part 13(6) of LR 15-501, it is hereby ordered that all information identifying persons who are non-parties to the matter, be sealed and not disclosed to the public.

Dated this 5 day of July, 2013.

"original signed by"

Guy G. Couturier, Q.C., Panel Chair

"original signed by"

Céline Robichaud-Trifts, Panel Member

"original signed by"

Sheldon Lee, Panel Member

New Brunswick Financial and Consumer Services Tribunal
Suite 300, 85 Charlotte Street
Saint John, New Brunswick E2L 2J2
Tel: 506-658-3060
Fax: 506-658-3059