
Citation: *New Brunswick (Financial and Consumer Services Commission) v. Sebastian*, 2016 NBFCST 9

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: 2016-11-29
Docket: SE-004-2015

BETWEEN:

Financial and Consumer Services Commission,

Applicant,

-and-

Fred Louis Sebastian,

Respondent.

REASONS FOR DECISION AND ORDER

PANEL: Louise Caissie, Panel Chair
Jean LeBlanc, Panel Member
Gerry Legere, Panel Member

DATE OF HEARING: Hearing in writing

WRITTEN REASONS: November 29, 2016

I. OVERVIEW

- [1] On November 13, 2015, the Financial and Consumer Services Commission (“the Commission”) filed an Application with the Financial and Consumer Services Tribunal (“the Tribunal”) seeking an order reciprocating an August 27, 2015 Order of a panel of the Financial and Consumer Affairs Authority of Saskatchewan (“Saskatchewan Authority”) against Fred Louis Sebastian.
- [2] In its Application, the Commission requests the following relief against the Respondent pursuant to paragraphs 184(1.1)(b) and (c) of the *Securities Act*:
- (a) pursuant to clause 184(1)(c)(ii)(A), the Respondent cease trading in any securities or derivatives permanently, or for such period as is specified by the Tribunal;
 - (b) pursuant to paragraph 184(1)(d), any exemptions contained in New Brunswick securities law do not apply to the Respondent permanently, or for such period as is specified by the Tribunal;
 - (c) pursuant to paragraph 184(1)(h), the Respondent resign all positions that he may hold as a director or officer of any issuer, registrant or mutual fund manager; and
 - (d) pursuant to paragraph 184(1)(i), the Respondent is prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager permanently, or for such period as is specified by the Tribunal.
- [3] The Commission also filed an affidavit of Linda Rickard, Case Management Officer with the Commission, sworn on October 28, 2015.
- [4] The Registrar of the Tribunal issued a Notice of Application on November 25, 2015, providing notice to Mr. Sebastian of his right to be heard with respect to the reciprocal order requested by the Commission. The Notice of Application indicated that if Mr. Sebastian intended to exercise this right, he had to notify the Registrar of the Tribunal on or before December 16, 2015.
- [5] Mr. Sebastian did not contact the Registrar within the timeline set out in the Notice of Application.
- [6] For the reasons that follow, we find it is in the public interest to issue the requested reciprocal order.

II. PRELIMINARY ISSUE

- [7] On April 5, 2016, Mark McElman, the solicitor for the Commission, requested that the Tribunal proceed to issue the requested reciprocal order without a hearing given that Mr. Sebastian had not exercised his opportunity to be heard. The Commission relied upon paragraph 12(7) of Local Rule 15-501 *Proceedings before the Tribunal* (the “Tribunal’s procedural rules”).
- [8] Paragraph 12(7) of the Tribunal’s procedural rules states:

12(7) No request to be heard – If no affected Party, after having been duly served, provides notice to the Registrar that they wish to be heard, a decision will

be issued without further notice.

- [9] In our view, we could not issue the reciprocal order without a review of the evidence as subsection 184(1.1) of the *Securities Act* requires that the Tribunal be satisfied that it is in the public interest to grant the order.
- [10] On April 18, 2016, we informed the parties that this matter would proceed under paragraph 12(7) and there would be no oral hearing given that Mr. Sebastian had not exercised his opportunity to be heard. We directed that:
- a) The parties should provide Pre-hearing submissions setting out the applicable law by May 2, 2016; and
 - b) We would render our decision on the basis of the Affidavit evidence and the Pre-hearing submissions. In other words, we would conduct a hearing in writing.

III. FACTS

- [11] The Affidavit of Linda Rickard outlines the Commission's investigation into the activities of Mr. Sebastian and details the Saskatchewan Authority's enforcement proceedings against Mr. Sebastian.
- [12] On November 4, 2013, the Saskatchewan Authority made a formal request of assistance to the Commission with respect to a matter involving Fred Louis Sebastian.
- [13] In response to this request of assistance, an Investigation Order was issued by the Commission, dated December 5, 2013, appointing Gordon Fortner as an investigator pursuant to paragraph 171(1)(b) of the *Securities Act*. Mr. Fortner served Mr. Sebastian with documents relating to a proceeding in Saskatchewan.
- [14] In a July 23, 2015 decision, the panel of the Saskatchewan Authority found that:
- Mr. Sebastian befriended an elderly resident of a retirement residence in Saskatchewan and regularly visited her to play cards.
 - He presented himself as an experienced businessman and told the elderly resident that he would make very profitable investments on her behalf.
 - Mr. Sebastian was not registered as a financial dealer or adviser.
 - The resident gave Mr. Sebastian five cheques totalling \$47,000, which represented a significant portion of her assets.
 - Mr. Sebastian advised the resident not to share what they were doing with her family, as it would be a nice surprise for them when he doubled or tripled her money.

- No investments were made by Mr. Sebastian on behalf of the resident.
- Mr. Sebastian deposited the resident's cheques into his personal bank account and used the money to repay debt and for various personal purchases.

[15] The panel of the Saskatchewan Authority concluded that Mr. Sebastian had contravened Saskatchewan securities law in three ways:

- (1) He acted as a securities dealer and advisor without being registered to do so, contrary paragraphs 27(2)(a) and 27(2)(b) of the Saskatchewan *Securities Act*, 1988 (S.S. 1988-89, c. S-42.2);
- (2) He gave an oral undertaking relating to the future value of a security with the intention of effecting a trade in that security contrary to subsection 44(2) of the *Securities Act*; and
- (3) He perpetrated a fraud on a person contrary to subsection 55.1(b) of the Saskatchewan *Securities Act*.

[16] The panel of the Saskatchewan Authority described the fraud as follows at paragraph 26 of its Decision:

[26] Sebastian's actions were not a minor technical violation of a complex act nor were they an innocent oversight. Rather they were a deliberate attempt to gain the confidence of a trusting, elderly individual with limited investment experience for the purpose of personal enrichment. He defrauded the Investor and in so doing contravened other provisions of *The Act*. He acted without conscience, not appearing to care that his actions would cause significant economic loss and emotional distress. He did not appear at the hearing to defend himself against the allegations. FCAA staff were not aware of any mitigating factors and none were presented on his behalf.

[17] In an August 27, 2015 Order, the panel of the Saskatchewan Authority ordered the following sanctions against Mr. Sebastian:

1. Pursuant to clause 134(1)(a) of the Act, all of the exemptions in Saskatchewan securities laws do not apply to the Respondent, permanently;
2. Pursuant to clause 134(1)(d) of the Act, the Respondent shall cease trading in any securities or exchange contracts in Saskatchewan, permanently;
3. Pursuant to clause 134(1)(d.1) of the Act, the Respondent shall cease acquiring securities for and on behalf of residents of Saskatchewan, permanently;
4. Pursuant to clause 134(1)(e) of the Act, the Respondent shall cease giving advice respecting securities, trades or exchange contracts in Saskatchewan;

5. Pursuant to clause 134(1)(h)(i) of the Act, the Respondent shall resign any position that he holds as a director or officer of any issuer, registrant or investment fund manager;

6. Pursuant to clause 134(1)(h)(ii) of the Act, the Respondent is prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager, permanently;

7. Pursuant to clause 134(1)(h)(iii) of the Act, the Respondent shall not be employed by any issuer, registrant or investment manager in any capacity that would entitle him to trade or advise in securities;

8. Pursuant to clause 134(1)(h.1) of the Act, the Respondent is prohibited from becoming or acting as a registrant, an investment fund manager or a promoter, permanently;

9. Pursuant to section 135.1 of the Act, the Respondent shall pay an administrative penalty to [the] Financial and Consumer Affairs Authority of Saskatchewan, in the amount of \$75,000; and

10. Pursuant to section 161 of the Act, the Respondent shall pay costs of and related to the hearing in this matter in the amount of \$4,513.48.

[18] The Decision of the panel of the Saskatchewan Authority was subject to a 30 day appeal period. Legal counsel for the Saskatchewan Authority advised that Mr. Sebastian did not appeal the decision within the appeal period.

[19] Mr. Sebastian is believed to have been living in Ludlow, New Brunswick since 2013.

IV. ISSUE

[20] Should a reciprocal order be issued against Mr. Sebastian pursuant to paragraphs 184(1.1)(b) and (c) of the *Securities Act*?

V. ANALYSIS

[21] We find the test for issuing a reciprocal order is met.

(1) Principles for Issuing a Reciprocal Order

[22] At the time the Application was filed, the relevant provisions of the *Securities Act* were as follows:

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

[...]

(ii) a person specified in the order

(A) cease trading in or purchasing securities or derivatives, specified securities or derivatives or a class of securities or class of derivatives, or

(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;

[...]

(h) an order that a person resign one or more positions that the person holds as a director or officer of an issuer, registrant or mutual fund manager;

(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;

[...]

184(1.1) In addition to the power to make orders under subsection (1), the Tribunal, on the application of the Commission and after providing an opportunity to be heard, may 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

[...]

(b) has been found by a court or tribunal of competent jurisdiction in Canada or elsewhere to have contravened or to have failed to comply with the laws of the jurisdiction respecting the purchase or sale of securities or derivatives;

(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, or

[23] The principles for issuing a reciprocal order in this case are set out in *Shire International Real Estate Investment Ltd., Re*, 2010 NBSECE 1 [*Shire*]. The general principles gleaned from that decision are:

- There are two pre-conditions to issuing a reciprocal order under subsection 184(1.1) of the *Securities Act*: (1) the Respondents were provided with an opportunity to be heard;

and (2) each Respondent is subject to an order made by a securities regulatory authority in Canada or elsewhere imposing sanctions, restrictions, or requirements on the Respondents. [*Shire*, par. 20]

- The power to grant a reciprocal order under subsection 184(1.1) of the *Securities Act* is discretionary and not mandatory. [*Shire*, par. 34]
- The test to be applied is the following: It is in the public interest for the Tribunal to exercise its discretion under subsection 184(1.1) to recognize the order of another securities regulatory authority when the Tribunal is satisfied that there is a real and substantial connection between that securities regulator and the subject matter of the order. [*Shire*, par. 21-34]
- The Tribunal should not enquire into the evidence behind the original proceeding or order as this could lead to a re-hearing of the same evidence. [*Shire*, par. 29]
- Evidence of actual conduct by the Respondents in New Brunswick or actual harm to New Brunswick residents is not a prerequisite to granting a reciprocal order pursuant to subsection 184(1.1). [*Shire*, par. 22]

(2) Pre-Conditions to Issuing a Reciprocal Order

[24] Turning now to the application of these principles, we are satisfied that the two pre-conditions to issuing a reciprocal order under subsection 184(1.1) of the *Securities Act* are met.

[25] With respect to the pre-condition that Mr. Sebastian must have been provided an opportunity to be heard, the evidence reveals that he was provided this opportunity, but chose not to exercise his right to be heard. This finding is based on the evidence detailed below:

- The Registrar of the Tribunal issued a Notice of Application on November 25, 2015. The Notice of Application advised Mr. Sebastian that he had the right to be heard with respect to the application and that if he wished to exercise this right, he had to contact the Registrar of the Tribunal on or before December 16, 2015.
- The Affidavit of Service of Gordon Fortner, a Senior Investigator in the Enforcement Division of the Commission, filed on April 5, 2016 details the Commission's attempts to hand-deliver the Application, the Notice of Application and the Affidavit of Linda Rickard to Mr. Sebastian.
- In his Affidavit of Service, Mr. Fortner indicates that he attended at Mr. Sebastian's residence in Ludlow, New Brunswick on November 27, 2015, but that no one answered the door. As Mr. Fortner returned to his car, he noticed an individual in the door window of the residence. Mr. Fortner states that this individual's appearance was consistent with Mr. Sebastian's appearance, whom he had met previously when he served him with documents in the context of the Saskatchewan Authority's proceedings. Mr. Fortner returned to the door and knocked again, but the individual did not answer.

- Mr. Fortner indicates that after this attempted service, he called Mr. Sebastian's telephone number and left a voicemail message asking him to return his call. Mr. Fortner received an e-mail from Mr. Sebastian on November 30, 2015 indicating that if "this is regarding serving me with an inter-jurisdictional enforcement order could you please do it via email and registered mail. A number of the provinces have used this method and it appears to work o.k. If it is not please send me a reply email and I will phone you as per your request."
- On November 30, 2015, Mark McElman sent an e-mail to Mr. Sebastian attaching a letter dated November 25, 2015, the Notice of Application (with Application attached) and the Affidavit of Linda Rickard.
- Mr. Sebastian acknowledged receipt of Mr. McElman's e-mail on December 1, 2015.
- Mr. McElman also sent Mr. Sebastian a letter dated December 7, 2015 by Canada Post Expresspost to which was attached the Notice of Application, the Application and the Affidavit of Linda Rickard. According to the Canada Post tracking summary, the package was delivered at Mr. Sebastian's residence on December 8, 2015.
- Mr. Sebastian did not contact the Registrar of the Tribunal within the timeline set out in the Notice of Application.

[26] Subsection 5(1) of the Tribunal's procedural rules stipulates the manner in which a notice or document may be served on another party. 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, which term is defined in subsection 1(1) and means transmission by fax or e-mail.

[27] We are satisfied that Mr. Sebastian was properly served with the Notice of Application, Application and Affidavit of Linda Rickard.

[28] As previously discussed, we are authorized by subsection 12(7) of the Tribunal's procedural rules to proceed with the application for a reciprocal order as Mr. Sebastian was duly served with the application documents and did not exercise his opportunity to be heard.

[29] As for the second pre-condition to issuing a reciprocal order under subsection 184(1.1) of the *Securities Act*, it is also met as Mr. Sebastian is the subject of an order of the Saskatchewan Authority imposing sanctions upon him for breaching Saskatchewan securities law.

(3) Public Interest and Real and Substantial Connection

[30] Having concluded that the pre-conditions are met, we must now decide whether it is in the public interest to exercise our discretion to recognize the order of the Saskatchewan Authority. To do so, we must be satisfied there is a real and substantial connection between the Saskatchewan Authority and the subject matter of their order. After reviewing the Affidavit of Linda Rickard and the Decision of the panel of the Saskatchewan Authority, we are satisfied that it is in the public interest that we exercise our discretion to recognize the order of the Saskatchewan Authority.

[31] There is a real and substantial connection between Mr. Sebastian and the originating jurisdiction, Saskatchewan. The decision of the panel of the Saskatchewan Authority makes several findings that Mr. Sebastian breached Saskatchewan securities law; namely

- At the time of his breaches of Saskatchewan securities law, Mr. Sebastian was a resident of Saskatchewan; and
- Mr. Sebastian breached Saskatchewan securities law by soliciting investments from and defrauding an elderly Saskatchewan resident.

[32] We are also mindful in considering our public interest mandate of the panel's comments in *Shire* regarding the reality of our capital markets:

[38] [...] The reality of the modern world of commerce is such that it is in the broader public interest for jurisdictions to cooperate with each other to ensure the protection of investors and confidence in Canada's capital markets.

[33] According to the Decision of the panel of the Saskatchewan Authority, Mr. Sebastian moved to Ludlow, New Brunswick sometime after the commencement of the Saskatchewan Authority's enforcement proceedings. At the time he was served with the Notice of Application, Application and Affidavit of Linda Rickard, Mr. Sebastian still resided in New Brunswick. This is but another piece of evidence which weighs in favour of the exercise of our public interest jurisdiction.

[34] Mr. Sebastian's actions towards a vulnerable person in Saskatchewan were recent and so egregious that it is necessary to protect the public of New Brunswick by reciprocating the order of the panel of the Saskatchewan Authority.

VI. DECISION AND ORDER

[35] We find it in the public interest to grant the order requested by the Commission under subsection 184(1.1) of the *Securities Act* with the suggested carve out to permit Mr. Sebastian to trade in securities or derivatives in and for his own account through a registered securities dealer.

[36] We make an Order against Mr. Sebastian under subsection 184(1.1) of the *Securities Act* as follows:

- (a) pursuant to clause 184(1)(c)(ii)(A), Fred Louis Sebastian cease trading in or purchasing securities or derivatives permanently, except that he may trade in and for his own account through a registered securities dealer;
- (b) pursuant to paragraph 184(1)(d), any exemptions contained in New Brunswick securities law do not apply to Fred Louis Sebastian permanently;
- (c) pursuant to paragraph 184(1)(h), Fred Louis Sebastian resign all positions that he may hold as a director or officer of any issuer, registrant or mutual fund manager; and
- (d) pursuant to paragraph 184(1)(i), the Fred Louis Sebastian is prohibited from becoming or

acting as a director or officer of any issuer, registrant or mutual fund manager permanently.

DATED this 29th day of November, 2016.

“original signed by”

Christine M. Bernard

Registrar

Signed for panel members Louise Caissie, Jean LeBlanc and Gerry Legere

pursuant to subsection 40(3) of the *Financial and Consumer Services Commission Act*