

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

- and -

IN THE MATTER OF  
**LANDBANKERS INTERNATIONAL MX, S.A. DE C.V.,  
SIERRA MADRE HOLDINGS MX, S.A. DE C.V.,  
L & B LANDBANKING TRUST S.A. DE C.V.,  
BRIAN J. WOLF ZACARIAS, ROGER FERNANDO AYUSO LOYO,  
ALAN HEMINGWAY, KELLY FRIESEN, SONJA A. MCADAM,  
ED MOORE, KIM MOORE, JASON ROGERS and  
DAVE URRUTIA**

(RESPONDENTS)

#### **REASONS FOR THE DECISION**

Dates of Hearing: 7 October 2009 and 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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## 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, Landbankers International MX, S.A. de C.V. (Landbankers), Sierra Madre Holdings MX, S.A. de C.V. (Sierra Madre), L & B Landbanking Trust S.A. de C.V. (Landbanking Trust), Brian J. Wolf Zacarias (Zacarias), Roger Fernando Ayuso Loyo (Ayuso Loyo), Alan Hemingway (Hemingway), Kelly Friesen (Friesen), Sonja A. McAdam (McAdam), Ed Moore (Ed Moore), Kim Moore (Kim Moore), Jason Rogers (Rogers), and Dave Urrutia (Urrutia). 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, or

...

[2] On 30 July 2009 staff filed an application (application) and the supporting affidavit of Commission Legal Counsel Mark McElman (supporting affidavit) seeking the following relief against the respondents, pursuant to subparagraphs 184(1)(c)(i) and (ii) and paragraph 184(1)(d) of the *Act*, for as long as either of the orders issued by the Ontario Securities Commission or the Saskatchewan Financial Services Commission (as from time to time extended,) remain in force:

- (a) all trading in securities of LANDBANKERS INTERNATIONAL MX, S.A. DE C.V. and SIERRA MADRE HOLDINGS MX, S.A. DE C.V. 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.

[3] Staff based their application on the grounds that the respondents are subject to an order made by the Ontario Securities Commission (OSC) and to an order made by the Saskatchewan Financial Services Commission (SFSC) 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 30 July 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 and of the requirement to notify the Commission of their intent in this regard by 14 August 2009. The notice of application also advised them that failure to notify the Commission might result in an order contrary to their interest being issued without further notice.

[5] Staff filed an affidavit on 27 August 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*, some respondents were served by fax and courier and some were served by courier alone. Mr. Friesen was served at a later date by mail. We were advised by the Office of the Secretary of the Commission that no respondent requested an opportunity to be heard.

[6] As requested by the Panel during the hearing on 7 October 2009, staff filed an affidavit on 19 November 2009 giving further evidence as to why the SFSC recommended that other jurisdictions should seek orders against the respondents.

[7] As requested by the Panel during the hearing on 7 October 2009, staff filed a submission on 24 November 2009 outlining the policies of other Canadian securities regulators in regard to making orders pursuant to provisions similar to paragraph 184(1.1)(c) of the *Act*.

## **2. THE FACTS**

[8] With the exception of those matters outlined in paragraphs [37] and [38], the facts outlined below are derived from the orders of the OSC or the SFSC that were submitted by staff in the supporting affidavit.

[9] Landbankers is a company based in Puerto Vallarta, Mexico.

[10] Landbankers holds itself out on its website as being a highly profitable, fast growing land banking company.

[11] According to its website, Landbankers is the parent company of four subsidiary companies including Sierra Madre.

[12] Sierra Madre has been described in promotional material as being a Mexican corporation but also a limited partnership. Sierra Madre is related to Landbankers and is based in Puerto Vallarta, Mexico. Sierra Madre is also known as SMHMX.

[13] Landbanking Trust acts as the General Partner of Sierra Madre, with offices in Puerto Vallarta, Mexico,

[14] Zacarias, a resident of Puerto Vallarta, Mexico, is the senior officer and major owner of Landbankers. He is also known as Brian Wolf, Brian Zacharias, Brian Zacirias, Brian Zacharias Wolf, and Brian Zacharias Wolfe.

[15] Ayuso Loyo, a resident of Puerto Vallarta, Mexico, is the President of Landbankers. He is also known as Roger Ayuso.

[16] Hemingway, a resident of Puerto Vallarta, Mexico, formerly of British Columbia, Canada, is the Chief Executive Officer of Sierra Madre. Hemingway is also known as Alan Hemmingway.

[17] Ed Moore, a resident of Puerto Vallarta, Mexico, is in charge of the team of individuals that sells Landbankers securities.

[18] Kim Moore, a resident of Puerto Vallarta, Mexico, assists Ed Moore.

[19] According to the Landbankers website, there are 21 individuals on the team of individuals that sells Landbankers securities, including:

- (a) Rogers, a resident of Puerto Vallarta, Mexico, and
- (b) Urrutia, a resident of Puerto Vallarta, Mexico.

[20] Kelly Friesen, a resident of Warman, Saskatchewan, and Sonja A. McAdam of Christopher Lake, Saskatchewan, are involved in the promotion of Landbankers securities.

### ***Saskatchewan Order***

[21] In October 2007, the SFSC became aware that Landbankers, and Friesen, acting on behalf of Landbankers, had been trading securities issued by Landbankers to Saskatchewan residents without complying with the registration and prospectus requirements of the Saskatchewan *Securities Act, 1988*, S.S. 1988, c.S-42.2 (the Saskatchewan Act).

[22] The SFSC issued a temporary cease order on 26 November 2007 against Landbankers and Friesen. The temporary cease trade order was extended on 11 December 2007.

[23] After the 26 November 2007 order and the extension on 11 December 2007, information became available to the SFSC that McAdam also contacted Saskatchewan residents and offered to sell Landbankers securities.

[24] The SFSC issued a temporary cease trade order on 22 January 2008 against Landbankers and McAdam. The temporary cease trade order was extended on 6 February 2008.

[25] After the 26 November 2007 and 22 January 2008 orders were issued, Ed Moore, Kim Moore, Rogers and Urrutia, all acting on behalf of Landbankers, contacted residents of Saskatchewan and offered to sell them Landbankers securities.

[26] After the 26 November 2007 and 22 January 2008 orders were issued, Zacarias, Ayuso Loyo and Hemingway presented investors who had purchased Landbankers securities with the following information:

- (a) Landbankers had been restructured into Sierra Madre, a limited liability partnership, with Landbanking Trust acting as general partner;
- (b) investors could request a refund of the money that they had paid for Landbankers securities;
- (c) alternatively, investors could convert their investment in Landbankers securities into limited partnership units of Sierra Madre at \$11,000 USD per unit;
- (d) investors could also purchase additional limited partnership units at \$11,000 USD per unit.

[27] Ed Moore, Kim Moore, Rogers and Urrutia also contacted Saskatchewan residents who had previously purchased Landbankers securities and offered them the proposal set out in paragraph 28 above.

[28] Ed Moore, Kim Moore, Rogers and Urrutia contacted Saskatchewan residents, offered to sell and may have sold limited partnership units of Sierra Madre.

[29] None of the respondents were registered to trade in securities in Saskatchewan.

[30] In carrying out the above activities, the respondents traded in securities in Saskatchewan in contravention of the registration requirements in section 27 of the Saskatchewan *Act*.

[31] No receipt for prospectus had been issued in Saskatchewan for a prospectus for the securities of either Landbankers or Sierra Madre. The

respondents have therefore contravened the prospectus requirement in section 58 of the Saskatchewan *Act*.

[32] The respondents appear to be continuing to trade in securities in Saskatchewan in contravention of the registration and prospectus requirements of the Saskatchewan *Act*, and in contravention of the 26 November 2007 and 22 January 2009 SFSC orders.

### ***Ontario Order***

[33] Neither Landbankers nor Sierra Madre is a reporting issuer in Ontario.

[34] None of the respondents are registered with the OSC to trade in securities.

[35] The respondents have solicited or have sold to Ontario residents the securities of Landbankers and Sierra Madre in breach of sections 25 and 53 of the Ontario *Securities Act*, R.S.O. 1990, c.S.5, as amended (the Ontario *Act*).

[36] The OSC issued a temporary order on 27 March 2008. The temporary order was extended on 14 April 2008, on 8 May 2008 and again on 11 November 2008. On 17 June 2009, the hearing in the matter was adjourned sine die and the temporary order was extended until further order of the OSC.

[37] Mark McElman, Enforcement Legal Counsel, is a member of the Reciprocal Enforcement Sub-Committee of the Canadian Securities Administrators (CSA) Enforcement Standing Committee. This committee reviews cases with multi-jurisdictional aspects on a monthly basis. On a conference call in June 2009, Mr. McElman was informed of the order against the respondents by Ed Rodonets, Deputy Director of Enforcement of the SFSC, and that the SFSC had concerns that the respondents had known connections to other Canadian jurisdictions and may pose a risk to capital markets in all Canadian jurisdictions.

[38] As requested by the Panel during the hearing on 7 October 2009, and as evidenced in staff's affidavit of 19 November 2009, NBSC Enforcement staff contacted Mr. Rodonets, Deputy Director of Enforcement of the SFSC, by email and he responded by email that the SFSC had identified investors in nearly every province in Canada, numerous U.S. states and in foreign countries.

### **3. ANALYSIS AND DECISION**

#### ***Pre-conditions of 184(1.1)(c)***

[39] 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 *Adcapital 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***

[40] What remains is for the panel to consider if it is in the public interest to issue the order requested by staff. In the Commission decision *Shire International Real Estate Investment Ltd. et al. (Shire)*, issued on 14 May 2010, the Panel assessed whether mutual support and cooperation between provinces is sufficient reason to issue an order in the public interest in accordance with subsection 184(1.1) of the *Act*.

[41] In earlier 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, it was held that it is appropriate to grant an order under subsection 184(1.1) when there was

evidence that such an order would serve a protective purpose for New Brunswick investors and capital markets. In *Shire*, however, there was no evidence of any connection between the respondents in that case and New Brunswick. Nonetheless, the Panel held that the public interest was engaged. At paragraph 33 of *Shire*, the Panel stated as follows:

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.

[42] 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.

[43] In *Shire*, the Panel also turned its mind to the question of what evidence would be necessary to establish that jurisdiction had been exercised properly. At paragraph 40, the Panel states as follows:

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.

[44] In the present matter, the Panel accepts the evidence included in the supporting affidavits. That evidence demonstrates that two of the respondents are residents of Saskatchewan and that residents of both Saskatchewan and Ontario were contacted and solicited by the respondents. Based on these facts, both Saskatchewan and Ontario can be said to have a real and substantial connection to the matter giving their security regulators jurisdiction in the matter.

[45] Accordingly, the Panel is of the view that an order similar to that sought by Enforcement staff should be issued in accordance with but limited to orders authorized by paragraph 184(1.1)(c) of the *Act*.

[46] 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 14<sup>th</sup> day of May, 2010.

\_\_\_\_\_  
"original signed by"

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

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"original signed by"

Anne W. La Forest, Panel Member

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