

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

- and -

IN THE MATTER OF
**MI CAPITAL CORPORATION, ONE CAPITAL CORP. LIMITED,
SEAN AYEARS and SCOTT PARKER**
(RESPONDENTS)

REASONS FOR DECISION

Date of Hearing: 11 June 2012
Date of Orders: 11 June 2012
Date of Reasons for Decision: 8 August 2012

Panel:

Denise A. LeBlanc, Q.C., Panel Chair
Guy G. Couturier, Q.C., Panel Member
Sheldon Lee, Panel Member

Counsel:

Marc Wagg

For Staff of the New Brunswick
Securities Commission

IN THE MATTER OF

**MI CAPITAL CORPORATION, ONE CAPITAL CORP. LIMITED,
SEAN AYEARS and SCOTT PARKER**

(RESPONDENTS)

REASONS FOR DECISION

1. BACKGROUND

[1] On 29 May 2012, Staff of the New Brunswick Securities Commission (“Staff” and the “Commission”) filed a Statement of Allegations seeking an Order pursuant to subsection 184(1) of the *Securities Act (Act)* against the Respondents MI Capital Corporation (“MI Capital”), One Capital Corp. Limited (“One Capital”), Sean Ayears and Scott Parker. Staff alleged that the Respondents, without being registered with the Commission, solicited several New Brunswick residents to invest in gold options and gold commodities. Staff were requesting that a permanent cease trade order be issued against the Respondents. A Notice of Hearing was issued on 29 May 2012 scheduling this matter for a hearing on 11 June 2012.

[2] On 6 June 2012 Staff filed an Affidavit of Service dated 5 June 2012 and sworn by Staff counsel Marc Wagg. The Affidavit of Service detailed service on the Respondents of the Notice of Hearing, Statement of Allegations and affidavits of two New Brunswick investors. The Panel is satisfied that the Respondents were properly served via email transmission on 29 May 2012, and that the Respondents therefore received sufficient notice of the 11 June 2012 hearing.

[3] The hearing into Staff’s allegations was held on 11 June 2012. Despite being properly served, no one appeared on behalf of any of the Respondents, and none of the Respondents filed a response to Staff’s allegations.

[4] At the 11 June 2012 hearing, Staff's evidence consisted of the testimony of two witnesses: Commission Case Management Officer Linda Rickard ("Mrs. Rickard") and Commission Senior Investigator Gordon Fortner ("Mr. Fortner"); and affidavits sworn by two New Brunswick residents who had been solicited by the Respondents,. Staff also entered into evidence a supplementary affidavit of Linda Rickard, sworn 6 June 2012.

2. FACTS

[5] The evidence is that the respondent MI Capital is a corporation with a head office in Hong Kong, and the respondent One Capital is a corporation with its head office in Singapore. Neither MI Capital nor One Capital is registered to trade in securities in New Brunswick.

[6] The respondents Sean Ayears ("Ayears") and Scott Parker ("Parker") are names used by individuals claiming to be trading advisors with One Capital and MI Capital, respectively. Neither of Ayears nor Parker is registered to trade securities in New Brunswick.

[7] Mrs. Rickard testified before the Panel during the 11 June 2012 hearing. She explained that in her role as Commission Case Management Officer, she is the party responsible for conducting background and general research for the Commission investigators on all matters which come through the enforcement division. Mrs. Rickard testified that it is in this capacity that she had spoken with certain individuals who had reported receiving telephone calls from individuals purportedly calling on behalf of MI Capital.

[8] Mrs. Rickard referenced a New Brunswick resident, referred to herein as NBR1, who reported receiving telephone calls at his place of work regarding investing in gold options and being promised very high returns on any investments he would make. NBR1 reported that in early May, he received a call from a male individual who identified himself as being from MI Capital and asking if NBR1 followed the markets,

more specifically gold options. NBR1 advised the caller that he was not interested and ended the call. NBR1 received a second call five (5) days later, from an individual again identifying himself as calling on behalf of MI Capital. At this time, NBR1 was told that he would be required to invest a minimum of Six Thousand Dollars (\$6,000.00) and that he could obtain returns of thirty (30) to seventy (70) per cent in as little as ninety (90) days. NBR1 was also advised that he would need to open a bank account to be used for making deposits and withdrawals. NBR1 advised the caller, once again, that he had no interest in making such investments and ended the call.

[9] Mrs. Rickard also spoke with another New Brunswick resident, referred to herein as "NBR2", who reported to the Commission being contacted at his place of work on several occasions by an individual from MI Capital. On each occasion, NBR2 ended the telephone call by saying he was not interested in the investment opportunities being offered.

[10] Finally, Mrs. Rickard spoke with a third New Brunswick resident, referred to herein as "NBR3". NBR3 reported to the Commission that in April 2012, he had been contacted by someone who identified himself as Sean Ayears of One Capital. The telephone call was followed up by an email from Sean Ayears to NBR3, explaining the minimum amount required to be invested and setting out a high rate of return within ninety (90) days. NBR3 reported that as of the date of the email, he was contacted at least six (6) times via emails from Sean Ayears. NBR3 then received a second telephone call from someone identifying himself as Scott Parker, from MI Capital. The person who identified himself as Scott Parker, during the conversation, showed NBR3 application forms online and NBR3 asked that the forms be sent to him. The forms were sent to NBR3 via an email from Scott Parker. It was at this point that NBR3 contacted the Commission.

[11] Mrs. Rickard first conducted a research to ascertain whether any one of MI Capital, One Capital, Sean Ayears or Scott Parker was registered under the Act. Staff presented evidence indicating that none of them are or ever were registered with the Commission, nor had they filed any documentation with the Commission.

[12] Mrs. Rickard testified that she had conducted an online research and had found a website for One Capital and MI Capital. She testified that the only difference between the two (2) websites was the address used for the head office and the names of the corporations. In all other respects such as graphics, links, text and layout of the two (2) websites were identical. Mrs. Rickard also stated that during the conduct of her research she discovered an investor alert from the Australian securities regulator advising Australian investors to beware of One Capital and another corporation named Asean Commodities. She explained that when she went to the Asean Commodities website, it was identical to that of MI Capital and One Capital, save and except the head office address and the name of the corporation.

[13] On May 14, 2012, Mrs. Rickard sent a letter to each of Scott Parker and Sean Ayears, at the address indicated on the MI Capital and One Capital websites, asking them to confirm the nature and extent of their trading and/or advising related activities in New Brunswick and/or dealings with New Brunswick residents and setting out specific questions requiring a response. Mrs. Rickard testified that she never received a response to such letters.

[14] The Panel also received the evidence of Mr. Fortner during the 11 June hearing. Mr. Fortner testified that in his capacity of senior investigator with the Commission he had spoken with a New Brunswick resident, referred to herein as "NBR4", on 8 June 2012 and that NBR4 had relayed the following information. NBR4 explained that he had received a number of unsolicited calls from an individual who identified himself as **A.A.**, calling for or on behalf of MI Capital. NBR4 described the individual as speaking with an Australian or English accent. When NBR4 showed some interest in the investments proposed to him, he began receiving four (4) to six (6) calls per day. The minimum investment which was required and the promise of high returns were the same as that made to the other New Brunswick residents discussed above. NBR4 was told that he could double his money within a year and **A.A.** was very persistent in his attempts to have NBR4 open an account.

[15] NBR4 went so far as to initiate the opening of an account but it is at this point that he contacted the Commission. After having spoken with Commission representatives, NBR4 received a further call from an individual identifying himself as **B.B.** for the purpose of finalizing the investment transaction. At this time, NBR4 advised **B.B.** that he was having financial difficulties and was no longer interested. The following day, NBR4 received a call from **A.A.** during which **A.A.** attempted to change NBR4's mind and offered him the ability to invest a lesser amount than the minimum amount which had originally been presented to NBR4. NBR4 confirmed that he was no longer interested and did not receive any further calls.

[16] Overall, the evidence presented to this Panel is that several investors were solicited by individuals purporting to be "Sean Ayears" and/or "Scott Parker", along with other names, acting on behalf of MI Capital Corporation and/or One Capital Corp. Limited, to invest in gold options. There were discussions about the option prices, how the options work (leverage, strike price and profits) and documentation enabling the investors to purchase such options was put forth.

3. ANALYSIS AND DECISION

a. Jurisdiction and mandate of the Commission

[17] It is the Commission's mandate to protect New Brunswick investors, to foster fair and efficient capital markets and to foster confidence in New Brunswick's capital markets (See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SC 37; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.))

[18] The powers available to the Commission to protect the public interest are set out in the provisions of section 184 of the Act. Staff have requested orders under paragraphs 184(1)(c) and (d) of the Act, which read as follows:

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:

(i) trading in or purchasing cease in respect of any securities or exchange contracts specified in the order, or

(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

[19] It warrants noting that the purpose of the provisions of section 184 are neither remedial nor punitive but rather protective and preventive, and intended to be exercised to prevent likely future harm to capital markets (see *Re Mithras Management Ltd* (1990), 13 O.S.C.B. 1600 (Ont. Securities Comm.), cited with approval in *Asbestos*, supra.).

[20] The powers set out in section 184 may be exercised even absent a breach of the Act (see *Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd.*, affirmed (1987), 59 O.R. (2d) 79 (Ont. Div. Ct.), leave to appeal to C.A. denied (1987), 35 B.L.R. xx (Ont. C.A.), cited with approval in *Asbestos*, supra.).

b. The Respondents' Activities

[21] Section 1 of the *Act* defines "security" as follows:

"security" includes

...
(q) *any item or thing not referred to in paragraphs (a) to (p) that is a futures contract or an option but is not an exchange contract.*

[22] The Commission has, as well, issued Local Rule 91-501, where derivatives are defined as follows:

“derivative” means

- (a) an exchange contract,*
- (b) an option, swap, futures contract or any other contract or instrument, that is not an exchange contract, whose market price, value or delivery or payment obligations are derived from, referenced to or based on an underlying interest, or*
- (c) any other contract or instrument determined to be a derivative on the basis of criteria determined by the Commission.*

[23] It appears abundantly clear to this Panel that the gold options touted by “Sean Ayears” and “Scott Parker” on behalf of MI Capital and One Capital fall within the definition of “security” under the *Act* and are regulated by the Commission.

[24] That the registration requirement constitutes one of the cornerstones of the regulatory framework of the *Act* has been iterated many times by this Commission. The registration requirement is the process through which the Commission can best ensure that the individuals who engage in trading activities meet the necessary proficiency requirements, are of good character and satisfy the appropriate ethical standards.

[25] Section 45 of the *Act* provides as follows:

Except where exempted under the regulations, a person shall not

- (a) trade in a security or an exchange contract,*
- (b) act as an advisor,*
- (c) act as an investment fund manager, or*
- (d) act as an underwriter,*

unless the person is registered, in accordance with the regulations, in the category that the regulations prescribe for the activity.

[26] Pursuant to paragraph 45(a), the registration requirement is imposed upon a person trading in a security or an exchange contract if two (2) conditions are satisfied: 1) there is a trade in a security; and 2) there is no exemption to registration which is available.

[27] The Act defines "trade" as follows:

"trade" includes:

- (a) a sale or disposition of a security for valuable consideration or an attempt to sell or dispose of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in paragraph (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,*
- (a.1) entering into a futures contract or an option that is an exchange contract,*
- (b) participation as a trader in any transaction in a security on or through the facilities of an exchange or quotation and trade reporting system,*
- (c) the receipt by a registrant of an order to buy or sell a security or an exchange contract,*
- (d) a transfer, pledge or encumbering of securities of an issuer from the holdings of a control person for the purpose of giving collateral for a debt made in good faith, and*
- (e) an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (d). [emphasis added]*

[28] In order to trade in derivatives, one must be registered as an investment dealer or a portfolio manager (or as its representative) unless one falls under an enumerated exception.

[29] The actions of the Respondents in this matter clearly fall within the definition of "trading".

[30] With regard to any exemption from registration from which the Respondents could benefit, the onus of proof to establish the existence of a valid exemption falls upon the Respondents. The Respondents did not appear at the hearing and have submitted no evidence to this Panel.

[31] We note that National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) imposes a registration requirement, as an Exempt Market Dealer ("EMD"), for anyone trading in exempt securities who has met the "business trigger". The "business trigger" threshold is set out in NI 31-103 as follows:

8.4 *Person or Company not in the business of trading in British Columbia, Manitoba and New Brunswick*

(1) in British Columbia and New Brunswick, a person or company is exempt from the dealer registration requirement if the person or company

(a) is not engaged in the business of trading in securities or exchange contracts as a principal or agent, and

(b) does not hold himself, herself or itself out as engaging in the business of trading in securities or exchange contracts as a principal or agent.

[32] Thus, an individual or company will be exempted from registration in New Brunswick only if they neither "*engage in the business of trading securities*" nor "*hold themselves out*" as such. Anyone engaging in either of these activities must seek registration in the appropriate category.

[33] The Companion Policy to NI 31-103 provides guidance as to whether certain conduct falls within the meaning of "*engaged in the business*". It will suffice to say that the Respondents' promotional activities, including the dissemination of materials, and their pursuit of a cold calls campaign clearly place them over the threshold set out in NI 31-103.

[34] There are no exemptions available to the Respondents which would allow them to trade without the benefit of being registered and none of the Respondents are registered to trade.

[35] Staff have also alleged that the Respondent Ayears breached the provisions of subsection 58(2) of the *Act* in that he made representations as to the future value of the securities which he was touting to New Brunswick investors. Exercise of this Commission's public interest jurisdiction does not require a breach of the *Act* however we will add that were a breach of the *Act* required, the evidence presented to this Panel would support a finding of a breach of the provisions of subsection 58(2) by the Respondent Ayears.

c. Public Interest Orders under section 184

[36] Staff are seeking an order pursuant to section 184 of the *Act* that the Respondents cease trading in all securities, and that any exemptions in New Brunswick securities law do not apply to the Respondents. The Commission may make an order under section 184 if the Commission finds that it is in the public interest to do so.

[37] The evidence shows that the Respondents are not registered to trade in securities in New Brunswick and have not shown that they are afforded the benefit of any of the exemptions from registration. Despite this lack of registration, a campaign was mounted to call potential New Brunswick investors for the purpose of soliciting gold options. There is evidence of high pressure tactics, a requirement for a large minimum investment and representations of time being of the essence in order to secure a favourable strike price. In addition, the evidence presented to this Panel shows that

the Respondents' efforts in recruiting New Brunswick investors were pursued even after receipt of Mrs. Rickard's letter of 14 May, to which no response has been provided, and after receiving the Statement of Allegations filed by Staff, thereby exhibiting a complete disregard for New Brunswick securities laws and this Commission.

[38] We reiterate that the purpose of the provisions of section 184 are neither remedial nor punitive but rather protective and preventive, and intended to be exercised to prevent likely future harm to capital markets. Based on the whole of the evidence presented to this Panel, New Brunswick residents do require protection from the actions of the Respondents and it is appropriate, in these circumstances, for the Commission to exercise its public interest jurisdiction pursuant to section 184 in order to fulfill its mandate and to achieve the purposes set out in section 2 of the *Act*.

[39] The Order was issued as against the Respondents MI Capital and One Capital only as it was apparent to the Panel, based on the evidence presented at the hearing, that the individuals purporting to act on behalf of the Respondents MI Capital and One Capital were doing so under assumed names. An Order extending to the Respondents Ayears and Parker would, in the Panel's view, have little, if any, effect on those individuals who engaged in the campaign and the potential to cause prejudice to any individuals whose names are those used by the Respondents would outweigh any possible benefit derived from extending the Order to the Respondents Ayears and Parker.

d. Decision

[40] Based on the evidence presented by Staff regarding violations of the *Act* by the respondents MI Capital and One Capital, and various individuals purporting to represent and transact on behalf of the respondents MI Capital and One Capital, the Commission held that it was in the public interest to issue their 11 June 2012 order.

[41] The above constitute the Commission's Reasons for their Decision and resulting Order in this matter.

Dated this 8th day of August, 2012.

"original signed by"
Denise A. LeBlanc, Q.C., Panel Chair

"original signed by"
Guy G. Couturier, Q.C., Panel Member

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