

Citation: *New Brunswick (Financial and Consumer Services Commission) v. Emond and Drapeau*, 2015 NBFCST 6

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: 2015-08-27
Docket: 2300-E1

BETWEEN:

Financial and Consumer Services Commission,

Applicant,

-and-

Pierre Emond and Armel Drapeau,

Respondents.

REASONS FOR DECISION

PANEL: Enrico A. Scichilone, Panel Chair
Jean LeBlanc, Panel Member
Gerry Legere, Panel Member

DATE OF HEARING: June 19, 2015

WRITTEN REASONS: August 27, 2015

APPEARANCES: Brian Maude for the Applicant
Armel Drapeau in his own capacity

REASONS FOR DECISION

I. OVERVIEW

- [1] On June 19, 2015, the Financial and Consumer Services Tribunal (“Tribunal”) held a status hearing to determine whether the August 27, 2013 Order issued in this matter adjourning this matter for a period of one year should be maintained or vacated.
- [2] Brian Maude appeared as counsel for the Financial and Consumer Services Commission and Armel Drapeau appeared in his own name at the status hearing. Pierre Emond did not appear at the status hearing, nor did he have counsel present at the hearing.
- [3] At the conclusion of the status hearing, the Tribunal issued an Order vacating the August 27, 2013 adjournment and indicated that reasons would follow. These are the reasons for the June 19, 2015 Order.

II. FACTS

- [4] This proceeding was commenced on August 19, 2009 by a preliminary motion filed with the New Brunswick Securities Commission seeking a temporary order that any exemptions under New Brunswick securities law do not apply to the Respondents.
- [5] It also bears mentioning that the Respondents had previously provided undertakings in 2008 not to trade in securities. These undertakings remain in effect.
- [6] A Statement of Allegations was subsequently filed by enforcement staff of the New Brunswick Securities Commission on June 24, 2010 alleging that the Respondents Armel Drapeau and Pierre Emond breached subsection 45(a) and section 54 of the *Securities Act*, S.N.B. 2004, c S-5.5. According to the Statement of Allegations, the Respondents’ conduct which is the subject matter of these proceedings occurred between 2006 and 2008.
- [7] On February 5, 2013, the Respondent Armel Drapeau filed a motion with the New Brunswick Securities Commission seeking to have this proceeding adjourned pending the outcome of civil proceedings in the Court of Queen’s Bench.
- [8] On March 1, 2013, the Respondent Armel Drapeau started a civil action in the Court of Queen’s Bench of New Brunswick against the New Brunswick Securities Commission, Ed LeBlanc (an employee of the Commission), and Investia Financial Services Inc. [the Drapeau action]. In that civil action, Mr. Drapeau alleges that the Commission and Ed LeBlanc breached their common law and statutory duties to act in good faith and interfered with contractual relations between him and Investia Financial Services Inc. As against Investia, Mr. Drapeau alleges it breached an October 17, 2005 contract whereby Mr. Drapeau was authorized to sell Investia’s approved products and services related to mutual funds, when it summarily dismissed Mr. Drapeau on or about March 20, 2009. In this civil action, Mr. Drapeau seeks general damages, punitive damages and special damages for loss of income, loss of business and loss of goodwill.
- [9] On May 9, 2013, the New Brunswick Securities Commission commenced a legal action against Armel Drapeau and Pierre Emond entitled *New Brunswick Securities Commission v. Drapeau and Emond*

[Commission action] seeking contribution and indemnity in relation to a third legal action entitled *Kavanaugh v. New Brunswick Securities Commission et al.* [Kavanaugh action].

- [10] The *Kavanaugh* action is a legal action by investors who purchased products from Investia. Neither Armel Drapeau nor Pierre Emond is a party to the *Kavanaugh* action.
- [11] On July 1, 2013, the New Brunswick Securities Commission was continued as the Financial and Consumer Services Commission by the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c 30. The adjudicative functions of the New Brunswick Securities Commission were transferred to the Financial and Consumer Services Tribunal, which was also established on July 1, 2013 by this same *Act*.
- [12] On August 27, 2013, the Tribunal issued an Order adjourning these proceedings for a period of one year, following which the parties would provide the Tribunal with a status report regarding the civil proceedings in which they are involved and could be called upon to appear before the Tribunal to make further submissions.
- [13] In accordance with section 75 of the *Financial and Consumer Services Commission Act*, previous decisions issued by the New Brunswick Securities Commission in this proceeding are deemed to be those of the Financial and Consumer Services Tribunal.
- [14] At the June 19, 2015 status hearing, the parties advised that the status of the three civil actions was as follows:
- a) *Kavanaugh* action: examinations for discovery are underway.
 - b) *Drapeau* action: this action has not progressed past the pleading stage. There has been no exchange of documents and dates are not set for the examination for discovery.
 - c) *Commission* action: this action also has not progressed past the pleading stage. The exchange of documents and examination for discovery has not commenced.
- [15] In essence, there has been no progress of the *Drapeau* action and *Commission* action since the August 27, 2013 Order was issued in this proceeding.

III. ISSUES

- [16] The issue is whether the adjournment of this proceeding granted by order of August 27, 2013 should be maintained or vacated.

IV. POSITION OF THE PARTIES

- [17] The Respondent Armel Drapeau seeks to have the adjournment of this proceeding maintained pending the outcome of the three civil actions in the Court of Queen's Bench. Prior to the status hearing, the Respondent Pierre Emond advised the Registrar of the Tribunal and all other parties that he supported the continued adjournment of these proceedings.

[18] As for the Financial and Consumer Services Commission, it also favours a continued adjournment of these proceedings.

V. ANALYSIS

[19] Both the Commission and Mr. Drapeau rely on *Curtis v. Manitoba Securities Commission*, 2006 MBCA 135 in support of a continued adjournment of these proceedings. In *Curtis*, the Manitoba Securities Commission had commenced proceedings against the directors of Crocus (of which Mr. Curtis was a member). Shortly thereafter, a legal action was filed against the directors of Crocus and the Manitoba Securities Commission. Thus, both Crocus and the Manitoba Securities Commission were defendants in the legal action. Mr. Curtis filed a motion seeking a stay of the Manitoba Securities Commission proceedings on the basis that there existed a reasonable apprehension of bias on behalf of the members of the Manitoba Securities Commission. The Commission rejected Mr. Curtis' motion and Mr. Curtis appealed this decision.

[20] The Manitoba Court of Appeal allowed the appeal and found there existed a real possibility of conflict between the interest of the Commission in the outcome of the hearing and their duty to give a fair hearing to the appellant. The Court of Appeal stated the following with respect to parallel procedures and the reasonable apprehension of bias:

It is critical that the public's confidence in the impartiality and integrity of governmental administrative agencies be maintained, especially those with significant public responsibilities such as the commission (see *Benedict*, at para. 15). If a reasonable member of the public would perceive that a person, whatever may be the circumstances, has become a judge in their own cause, this imperative is in jeopardy.

[21] In *Curtis*, the Court of Appeal took into account four factors in granting the stay: (1) the appellants had provided an undertaking not to engage in selling securities; (2) the appellants had not started the lawsuit, but were rather named as co-defendants with the Commission in the lawsuit; (3) the conduct of the civil action was out of the appellants' hands; and (4) there was a significant overlap between the allegations in the civil action and the administrative proceedings before the Commission.

[22] There is one similarity between the *Curtis* matter and the within proceedings. In the within matter, the Respondents provided undertakings in 2008 not to trade in securities.

[23] However, there are three important distinctions between the within proceedings and the *Curtis* matter.

[24] First, since July 1, 2013, the adjudicative functions of the former New Brunswick Securities Commission have been transferred to the Financial and Consumer Services Tribunal. The *Financial and Consumer Services Commission Act* specifically states at section 30 that "[i]n the performance of its adjudicative functions, the Tribunal is independent of the Commission." The *Financial and Consumer Services Commission Act* further provides for the appointment of separate Tribunal members, distinct from the members of the Commission.

- [25] The second distinction of note between these proceedings and *Curtis* is that in *Curtis*, the civil action had been commenced by a party who was not a party to the proceeding before the Commission and consequently the conduct of the civil proceeding was out of the Commission or Crocus' control. In these proceedings, both Mr. Drapeau and the Commission have commenced legal proceedings against each other. The conduct of those two civil actions is within their control. There does exist a third legal proceeding, the Kavanaugh action, which was started by parties who are not parties to the proceedings before the Tribunal. However, the evidence before the Tribunal seems to indicate that the Kavanaugh action is progressing, albeit slowly. That is not the case of the Drapeau action and the Commission action, which have been at a standstill since August 2013.
- [26] Third, the Drapeau action and the Commission action are not based on the same facts and allegations as the proceedings before the Tribunal. The Drapeau action is an action for damages based on allegations of breach of the duty of good faith, interference with contractual relations, and breach of contract. The Commission action is for contribution and indemnity should the Commission be found liable in the Kavanaugh action. As for the Kavanaugh action, the Tribunal was not provided with the pleadings in that action and no evidence was led by the parties regarding its facts or allegations.
- [27] When this matter eventually proceeds to a hearing on the merits, the Tribunal will be called upon to determine whether the Respondents breached the *Securities Act*. While the civil actions and these proceedings will share some facts, there does not appear to be a significant overlap between the allegations in these proceedings and those in the Drapeau action or the Commission action.
- [28] Two other decisions are of assistance in this matter.
- [29] The first is *Robinson v. Ontario (Securities Commission)*, [1993] O.J. No. 3042 in which the Ontario Securities Commission refused to stay the proceedings before it pending the outcome of a criminal matter. That decision was appealed to the Ontario Divisional Court, which rejected the appeal. The Divisional Court stated at paragraph 18 that "[a] regulatory proceeding should not be stayed except in extraordinary and exceptional circumstances; it is within the tribunal's discretion".
- [30] The second decision is the decision of the Mutual Fund Dealers Association of Canada in *Scribnock, Re*, 2014 CarswellNat 3358. The Mutual Fund Dealers Association relied on *Robinson v. Ontario (Securities Commission)* in refusing to stay its proceedings pending the outcome of criminal proceedings. The hearing panel stated at paragraphs 12 to 14:

12 It is clear from the above decisions that the Panel has discretion whether to adjourn because of a pending criminal case, but it is also clear that this discretion should be exercised only 'in extraordinary or exceptional cases'. This language comes from the 1973 case of *Stickney v. Trusz* ([1973] O.J. No. 2279 (Ont. H.C.) at para 9) an Ontario High Court decision of Zuber J., involving a motion to stay a civil proceeding until after the criminal case has been tried, a decision which was affirmed by the Ontario Court of Appeal and for which leave to appeal to the Supreme Court of Canada was refused. [...]

13 The Panel agrees with MFDA Counsel that in the circumstances of the present case, a stay or adjournment should not be granted. This is not an extraordinary or exceptional case. A regulatory body like the MFDA has a strong interest in

proceeding expeditiously in regulating persons connected with the industry. Confidence in capital markets depends, to a considerable extent, on confidence in how those in the industry are regulated. Individuals who have been harmed by improper conduct have a particularly strong interest in seeing that disciplinary action is taken reasonably promptly. We are also influenced by the fact that the Respondent has not cooperated with the investigation.

14 This is not a case where the criminal proceedings are being heard at almost the same time. **There is no certainty as to when the criminal trial will be heard and concluded, including various possible appeals. It could be years before the criminal proceedings are over.** [our emphasis]

- [31] If administrative proceedings can proceed despite criminal proceedings, then in the Tribunal's view, they can certainly proceed despite civil proceedings.
- [32] As previously outlined, there has been no progress of the Drapeau action and Commission action since August 2013. As with the *Scribnock, Re*, matter, there is no indication as to when the civil actions will be concluded; it could be years before these civil actions are over.
- [33] Counsel for the Commission argued that in the within matter, confidence in the capital markets is not in issue as the Respondents have provided undertakings not to operate in securities and temporary orders prohibiting the Respondents from trading in securities have been in effect since September 21, 2009.
- [34] However, the Tribunal is of the view that temporary orders, such as the one issued in this matter on September 21, 2009, are meant to be just that – temporary. The reason is simple – these orders are granted without a full hearing on the merits and without affording the Respondents the opportunity to present full answer and defence.
- [35] In addition, the mere existence of parallel proceedings does not constitute exceptional circumstances. If that were the case, respondents in administrative proceedings would simply start a civil action in order to suspend the administrative proceedings.
- [36] Coming back to the issue of reasonable apprehension of bias, in the Tribunal's view, a reasonable member of the public would not think that the Tribunal might, in the exercise of its decision-making responsibility, be tempted to cast blame upon the Respondents in an effort to absolve the Commission of any potential responsibility for the financial problems that befell the investors who allegedly purchased securities from the Respondents Armel Drapeau and Pierre Emond. The Tribunal is independent of the Commission in its adjudicative functions. The Tribunal's members are not members of the Commission.
- [37] In *Curtis*, the Commission was going to hear the administrative proceeding and was a party to a civil action. However, in the within proceeding, the Tribunal will hear the administrative proceedings, but the Commission is a party to the civil actions. The Tribunal distinguishes *Curtis* on this basis.

- [38] The Tribunal concludes there is no reasonable apprehension of bias or any other extraordinary or exceptional circumstances which would justify further adjourning these proceedings.
- [39] Finally, the Tribunal is of the view that confidence in the capital markets would decrease should disciplinary proceedings be adjourned indefinitely pending the outcome of civil proceedings. Investors who have sustained harm by allegedly improper conduct have a strong interest in seeing that regulatory proceedings proceed expeditiously.

VI. CONCLUSION

- [40] For the reasons set out above, the Tribunal concludes that it is in the public interest to vacate the adjournment of these proceedings.

Dated this 27th day of August, 2015.

ORIGINAL SIGNED BY
Christine M. Bernard

Enrico A. Scichilone, Panel Chair

ORIGINAL SIGNED BY
Christine M. Bernard

Jean LeBlanc, Panel Member

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Christine M. Bernard

Gerry Legere, Panel Member