

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

- and -

IN THE MATTER OF
ALAIN BRIEN

REASONS FOR THE DECISION

Date of Hearing: April 25, 2006

Date of decision: April 25, 2006

Panel:

Paulette Robert, Panel Chair

Anne La Forest, Panel Member

Representatives:

Jacob van der Laan and Edouard LeBlanc For the staff of the New Brunswick
Securities Commission

Robin Godbout For Alain Brien

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REASONS FOR THE DECISION

1. INTRODUCTION

This matter concerns a person who:

(a) traded in the province without being registered in New Brunswick, in violation of section 45 of the *Securities Act* of New Brunswick (the *Act*);
and

(b) made a statement that was misleading or untrue or did not state a fact that was required to be stated or that was necessary not to make the statement misleading, in violation of paragraph 179(2)a) of the *Act*.

As a result of a notice of hearing dated March 1, 2006, the New Brunswick Securities Commission convened a panel to hold a hearing in this matter on April 25, 2006. The hearing was held in accordance with the provisions of section 184 of the *Act*. The panel was convened to consider:

- a. a request for orders under subsections 184(1), 185(1), 185(2), and 186(1) of the *Act* as contained in the notice of hearing,
- b. the allegations contained in the statement of allegations of the staff members of the Commission on February 9, 2006, and

- c. the proposed amicable settlement agreed upon between the parties on April 24, 2006.

At the hearing of April 25, 2006, the parties submitted a joint statement of facts and emphasized the validity of the amicable settlement. The panel approved the amicable settlement and made an order on the day of the hearing. This document contains the reasons for the decision as required by the *Act*.

2. THE FACTS

Alain Brien is an individual living in Quebec who was employed as a consultant by Services Investors Limitée/Investors Services Limited during the period in question.

At the time of the hearing, Mr. Brien was employed by AXA Financial Services Inc. /AXA Services Financiers Inc. and was registered with the Autorité des marchés financiers du Québec. Mr. Brien has never been registered with the Commission.

According to the joint statement of facts as submitted by the parties at the hearing, during the investigation, the staff of the Commission learned that Mr. Brien had traded securities for New Brunswick clients without being registered with the Commission. More specifically, while he was employed by Services Investors Limitée/Investors Services Limited, Mr. Brien traded for 16 New Brunswick clients between November 2003 and March 2005.

During the investigation, Mr. Brien sent the Commission staff statements, which, at that time, were misleading or untrue or omitted to state a fact that was required to be stated or that was necessary not to make the statement misleading in light of the circumstances in which it was made. More specifically, the staff of the Commission received a letter from Mr. Brien on April 13, 2005, in which he explained that all his New Brunswick clients had gone to Quebec to sign the necessary documents, so that he was able to give them investment advice. A

few days later, the staff received copies of application forms to open accounts for the 12 New Brunswick clients. The documents indicated that they had been signed in Quebec.

On May 17, 2005, the staff of the Commission received another letter from Mr. Brien in which he apologized for having inadvertently omitted six clients from the listed he had submitted previously.

In a letter dated May 25, 2005, accompanied by an affidavit, Mr. Brien admitted having misled the staff in his earlier correspondence about his New Brunswick clients and the location where he had met them. He said he had made an error in judgment.

From that point on, Mr. Brien cooperated with the staff during the investigation and the negotiation of the proposed amicable settlement, which is the subject of this hearing. According to the Commission staff, Mr. Brien's clients did not suffer any financial harm from having dealt with him.

In the proposed amicable settlement, the parties agreed that Mr. Brien would:

- (a) agree to pay the amount of \$10,000 toward a penalty;
- (b) accept the imposition of an order under paragraph 184 (1)(c) of the *Act*, prohibiting him from trading in any securities for a period of ten years;
- (c) accept the imposition of an order under paragraph 184(1)(d) of the *Act* that any exemptions contained in New Brunswick securities law do not apply to him for a period of ten years;
- (d) refrain from making any statement inconsistent with the statement of facts (contained in the proposed amicable settlement).

3. RELEVANT SECTIONS OF THE ACT

The staff of the Commission submitted that Mr. Brien has thus violated section 45 and paragraph 179(2) (a) of the *Act*.

Section 45 of the *Act* sets out that:

- 45 Unless exempted under this Act or the regulations, no person shall:
- a) trade in a security or act as an underwriter unless the person is registered as a dealer, or is registered as a salesperson, as a partner or as an officer of a registered dealer and is acting on behalf of the dealer.

The wording of paragraph 179(2) (a) of the *Act* sets out that:

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:

- a) makes a statement in any information or material submitted, provided, produced, delivered or given to or filed with the Commission, the Executive Director, a compliance officer, an investigator or any person acting under the authority of the Commission or the Executive Director that is misleading or untrue or does not state a fact that is required to be stated or that is necessary not to make the statement not misleading.

4. DECISION

The panel was convened to a hearing to examine the terms of the proposed settlement agreement between the parties in order to determine whether they are in the public interest. At the hearing, the staff of the Commission made some

comments in support of the proposed settlement submitted. Mr. Brien's lawyer confirmed his client's agreement with the aforesaid proposed agreement.

The parties agree that there was a violation of New Brunswick securities law. Although the information on the penalties imposed in previous decisions may be useful and may help us in our deliberations, the circumstances of each case should dictate the order that is required and that is in the public interest.

The Ontario Securities Commission listed a number of factors to consider in imposing penalties in *Belteco Holdings Inc., Re* (1998), 21 O.S.C.B. 7743 (Ontario Securities Commission), *MCJC Holdings Inc., Re* (2002), 25 O.S.C.B. 1133 (Ontario Securities Commission) and also repeated in *options Xpress Inc., Re*, (2005), 28 O.S.C.B. 7957 (Ontario Securities Commission, jointly with other securities commissions). These factors include:

- (a) the seriousness of the allegations proved,
- (b) the restraint of future conduct that is likely to be prejudicial to the public interest (with reference to past conduct),
- (c) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets,
- (d) any mitigating factors.

In the matter of *options Xpress Inc., Re*, the securities commissions making the decision added:

"The role of a Commission panel reviewing a settlement agreement is not to substitute the sanctions it would impose for what is proposed in the settlement agreement. Rather, the Commission should ensure that the agreed sanctions are within acceptable parameters."

The panel asked for clarification on the establishment of the amount of \$10,000 as a penalty. The staff of the Commission indicated that this amount had been established partly in accordance with the amounts that would have been paid to the Commission to allow Mr. Brien to deal with New Brunswick clients during the period in question, costs related to the investigation, and a lump sum for misleading or false statements. However, the parties did not provide a specific amount for each of the components.

We determined that Mr. Brien's conduct was prejudicial to the public interest. Financial market participants trading in securities must comply with the requirements of the *Act*. This compliance with the rules is essential to the integrity of financial markets in New Brunswick.

The agreement of the parties is not binding on the Commission. However, we have carefully considered the terms of the amicable settlement. We are satisfied that overall, the proposed amicable settlement as submitted by the parties satisfies the criterion of the public interest and have therefore ratified its content. We have taken the following extenuating circumstances into account. As of May 25, 2005, Mr. Brien cooperated with the staff during the investigation and the negotiation of the proposed amicable settlement, and hence Mr. Brien's clients have not suffered any financial or other loss through his actions.

Although we do not consider the amount of the penalty a precedent in this case, we believe this penalty, along with a prohibition against trading in any securities for a period of 10 years and the imposition of restrictions against taking advantage of exemptions set out by securities law for the same period constitute an appropriate penalty in this case and will act as a deterrent. For these reasons, our panel agreed to issue an order in accordance with this conclusion on April 25, 2006.

The agreements between the parties facilitate the resolution of law enforcement files, which benefits the securities regulatory system. Although Mr. Brien's

conduct violated the *Act*, we believe that by reaching an amicable settlement, Mr. Brien and the staff of the Commission have eliminated the need for a long administrative hearing, resulting in a saving of time and money, not only for the Commission, but for the public. We would like to thank them for their efforts in that respect.

« Paulette Robert »

Paulette Robert, (Panel Chair)

« Anne La Forest »

Anne La Forest, (Panel Member)