IN THE MATTER OF

THE SECURITIES ACT
S.N.B. 2004

- and -

IN THE MATTER OF

INTERCONTINENTAL TRADING GROUP S.A., RON WALLACE AND GARY MCCORY (RESPONDENTS)

Date of Hearing:	November 18, 2009
Date of Order:	November 18, 2009
Date of Reasons for Decision:	December 23, 2009

Panel:

Guy G. Couturier Q.C., Panel Chair

Robert M. Shannon, Panel Member

Sheldon Lee, Panel Member

Appearances:

Marc C. Wagg Esq.	For Staff of the New Brunswick Securities Commission

No appearances for Respondents

Reasons for Decision

1. On November 3, 2009, the New Brunswick Securities Commission ("Commission") issued a temporary order against the Respondents under section 184(5) of the Securities Act ("*Act*"). The Commission's Staff had initiated the proceeding by filing a Statement of Allegations by way of an Ex Parte Motion with the Commission on October 26, 2009, in accordance with subsections 6(7) and 13(1) of the Commission's Local Rule 15-501 *Procedures for Hearings Before a Panel of the Commission.*

2. The Commission considered the evidence in support of the Motion and decided that it was appropriate to issue a temporary order. The decision was principally based on the fact that the time required to convene a hearing upon notice to the Respondents could have been, in the opinion of the Commission, prejudicial to the public interest. The temporary order expired on November 18, 2009.

3. During the interim period the Respondents were respectively served with a Notice of Hearing for a formal proceeding set for November 18, 2009. The Notice was accompanied with the original affidavit evidence and the Statement of Allegations of October 26, 2009. The Respondents did not file a response in this proceeding. On November 18, 2009, the Commission convened a hearing to consider the evidence and submissions to determine whether an Order under sections 184 (1) (c) (ii) and 184 (1) (d) of the *Act* was justified.

Context

4. According to the affidavit evidence of Ed LeBlanc, Senior Investigator of the Enforcement Division of the Commission ("LeBlanc") dated October 23, 2009, and October 29, 2009, DP a resident of New Brunswick was solicited by telephone by representative of Intercontinental Trading Group S.A. ("ITG") during the month of October, 2009.The individual identified himself as Ron Wallace ("Wallace") .He called DP to propose an investment in heating oil options. Wallace described the investments as having a potential return of 200% within a 90-day period. Following the initial solicitation, the Respondent Gary McCory, ("McCory") followed up Wallace's efforts by calling DP's home and leaving a message with DP's wife, saying that he wanted DP to contact him about the investment opportunity Wallace had described.

5. On October 22, 2009, Wallace transmitted a number of documents to DP by e-mail related to ITG's activities and heating oil investments in general. On this occasion Wallace solicited the sum of $5,000.00 from DP, indicating that it would provide a "*leverage amount of 210,000 gallons of heating oil, which is a leverage dollar amount of $425,000.00 at today's market price."*[1]

6. DP wisely contacted the Commission's Enforcement Staff about the proposition. On October 23, 2009, LeBlanc contacted McCory by telephone. At that time, according to LeBlanc`s affidavit, McCory told LeBlanc that both he and ITG were registered with the Securities Regulatory Authority of Panama.

7. According to the affidavit evidence, LeBlanc later investigated the Respondents and discovered that in fact ITG was not registered with the Panamanian Regulatory Authority. Nor were any of the Respondents registered under the *Act* to trade in securities, nor were they exempted from compliance with any provision of the *Act*.

[1] Exhibit #1 – Affidavit – October 23, 2009

Analysis and decision

8. Sections 184(1)(c)(ii) and 184(1)(d) of the *Act* state:

> *"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:*
>
> *(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"*

9. Section 17 of the *Interpretation Act of New Brunswick* requires the Commission to interpret its enabling legislation to ensure the attainment of its object. The purposes of the *Act* are set out in section 2:

> *"2 The purposes of this Act are:*
>
> (*a) to provide protection to investors from unfair, improper or fraudulent practices, and*
>
> *(*b*) to foster fair and efficient capital markets and confidence in capital markets."*

10. As indicated in ***First Alliance Management Inc. and Ted Freeman***[2] in order to acquire jurisdiction over the Respondents the evidence must demonstrate that the product being promoted is indeed a ``security`` as defined in the *Act*. Here the Respondents proposed a financial investment to DP suggesting plainly exaggerated

[2] December 11, 2008

returns. It was proposed to DP as an investment contract and thus it is clear to the Commission that it does qualify as a security under subparagraph (n) of the definition of ``security`` found in section 1(1) of the *Act*.

11. Having established general jurisdiction over the matter, the Commission, in interpreting the provisions of section 184(1), must then determine whether, in its opinion, it is in the public interest to intervene. The legislation does not define the expression "public interest". In ***Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)***[3] the Supreme Court of Canada, with Justice Iacobucci writing for the Court, states at paragraphs 41, 42, and 43 of the decision the following;

> "41. *However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.*
>
> 42. *Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127*

[3] 2001 SCC 37

powers is consistent with the previous jurisprudence of the OSC in cases such as Canadian Tire, supra, aff'd reflex, (1987), 59 O.R. (2d) 79 (Div. Ct.); leave to appeal to C.A. denied (1987), 35 B.L.R. xx, in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see R. v. Wholesale Travel Group Inc., 1991 CanLII 39 (S.C.C.), [1991] 3 S.C.R. 154, at p. 219.

43. Furthermore, the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: Re Albino (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest), in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: Re Mithras Management Ltd. (1990) 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, Canadian Securities Regulation (2nd ed. 1998), at pp. 209-11."

12. It is called for, and expected, that the Commission consider the treatment of investors as well as the effect of the impugned activities upon the capital markets and the public's confidence therein. It is worthy of note that the evidence before the Commission deals with a random solicitation in the form of a "cold call" made from, what is commonly referred to as, a "boiler room" to a member of the general public.

Consequently the Commission's comments on the documentation provided by the Respondents are made from that perspective. Therefore, on the initial point of consideration, an examination of the documentation provided to DP by ITG, through McCory, contains a document of particular interest. It is entitled the "Account Application"[4]. This document is comprehensive. It includes an "Options Risk Disclosure Statement", a "Client Account Agreement", an "Account information" sheet as well as a "Discretionary Trading Authorization/Power of Attorney" in addition to a review of market oil activity.

13. The first of these instruments details the pure speculative and risky nature of derivative options. This contract contains a number of expressions, including *derivative option contracts, straddles, strangles, covered calls , covered puts, deep-out –of-the-money options, circuit breakers* all of which would obviously be foreign to any layman and indeed find no suitable definition in the *Oxford Dictionary of English.* In other words, they would likely be familiar to no one other than a sophisticated investor. The contract further calls for a high degree of risk to be assumed by the investor and goes on to expose some of these inherent dangers.

14. Under the heading "Substantial Fees and Costs", the possibility of incurring significant fees and commissions as a result of frequent trading activities is raised. It further indicates the possibility of other fees and costs, of undefined origin, being imposed. It also suggests, under the headings of "Liquidity Risk" and "Risk of Insolvency", that the investment is not to be insured and that the possibility of a complete loss of the funds invested is a reality and that the inability to perform trades can occur. It further declares, under the heading "Lack of Regulation", that ITG is not regulated by any regulating agency and does not enjoy the protection such registration inherently provides.

[4] Exhibit #2 – Affidavit – October 23, 2009

15. The "Client Account Agreement" and the "Discretionary Trading Authorization/Power of Attorney", in combination, assign to ITG exceptional rights to make investment decisions on behalf of the investor without recourse. Indeed the latter instrument provides comfort to ITG by including an indemnity given by the investor to ITG against any investment decision which causes loss to ITG.

16. Overall the language of the documents is opaque and it fails, and in many respects runs contrary, to the representations made by Messrs. Wallace and McCory to DP. The contracts are not plainly written, nor are they equitable in their terms. They are indeed patently unfair in their nature and import. The documents offer no basic or fundamental protection to the investor. In order to prevent catastrophic and likely irreversible, financial consequences to trusting investors it is justified that the Commission intervene.

17. In addition, regarding the second aspect set out in *Asbestos,* the evidence that the Respondent, McCory, misled LeBlanc as to their registration goes to the underlying reliability of the Respondents and their investment scheme. The limited facts that the investigator was able to query, including the assertion that ITG was registered under Panamanian Regulatory Agency, proved to be false. The random and uninvited manner of public solicitation to invest funds without having first submitted to, and been approved under, the regulatory scheme in New Brunswick demonstrates the Respondents lack of integrity in their affairs. The exaggerated and unsubstantiated promise of a 200% return within 90 days of investment is without foundation. A reasonable inference for the Commission to make in the circumstance is that such harmful conduct would have the probable effect of lessening confidence in the capital markets of the Province. The Commission, as suggested by the Supreme Court in *Asbestos,* finds that the enterprise pursued by ITG and its agents Wallace and McCory, does not contribute to the fair and efficient capital markets, nor inspires confidence in these markets.

18. Overall the Commission is of the opinion that it is in the public interest that the Respondents ITG, Wallace, and McCory cease trading in all securities and further that it be ordered that any exemptions in New Brunswick securities law do not apply permanently to any of the Respondents, pursuant to sections 184(1)(c)(ii) and 184(1)(d) of the *Act*. It further directed that a Notice of the Order in respect of same be delivered to the Respondents.

Dated this 23rd day of December, 2009.

"original signed by"
Guy G. Couturier, Panel Chair

"original signed by"
Robert M. Shannon, Panel Member

"original signed by"
Sheldon Lee, Panel Member

New Brunswick Securities Commission
85 Charlotte Street, Suite 300
Saint John, NB E2L 2J2
Telephone: 506-658-3060
Fax: 506-658-3059
www.nbsc-cvmnb.ca