

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

- and -

IN THE MATTER OF

**NNR N. NATURAL RESOURCES INC., INT. TELEWORLD INC., FLASH FUNDING INTERNATIONAL
CORP., FNT FOREVER NEW TECHNOLOGIES, INC., GLOBAL CAPITAL & FINANCIAL CORP.,
PRUDENTIAL GLOBAL REAL ESTATE CORP., GLOBAL BONDS FUND INC., LUMINARY MINERALS
LTD., and RAK MARINE INTERNATIONAL INC.**

(The Respondents)

REASONS FOR DECISION ON ADJOURNMENT MOTION

Date of Hearing on Motion in Writing: 13 July 2012

Date of Reasons for Decision: 16 July 2012

Panel:

Anne La Forest, Panel Chair
Denise A. LeBlanc, Q.C., Panel Member
Ken Savage, Panel Member

Counsel:

Mark McElman

For Staff of the New Brunswick
Securities Commission

Robyrt R. Regan

For respondents NNR N. Natural
Resources Inc., Int. Teleworld Inc., FNT
Forever New Technologies, Inc., Global
Capital & Financial Corp., Prudential
Global Real Estate Corp., Global Bonds
Fund Inc., and RAK Marine International
Inc.

IN THE MATTER OF

NNR N. NATURAL RESOURCES INC., INT. TELEVORLD INC., FLASH FUNDING INTERNATIONAL CORP., FNT FOREVER NEW TECHNOLOGIES, INC., GLOBAL CAPITAL & FINANCIAL CORP., PRUDENTIAL GLOBAL REAL ESTATE CORP., GLOBAL BONDS FUND INC., LUMINARY MINERALS LTD., and RAK MARINE INTERNATIONAL INC.

(The Respondents)

REASONS FOR DECISION ON ADJOURNMENT MOTION

1. BACKGROUND

[1] On 2 May 2012, Staff of the New Brunswick Securities Commission ("Staff") filed a motion seeking a temporary order (the Interim Relief Motion). The temporary relief sought is a cease trade order pursuant to sections 184(1)(c)(i) and 184(1)(c)(ii) of the *Securities Act (Act)*; and (ii) a denial of exemptions under New Brunswick securities law pursuant to section 184(1)(d) of the *Act*.

[2] In summary, staff allege in their Interim Relief Motion that the Respondents are not legitimate businesses and that they pose an undue risk of being used in abusive investment schemes.

[3] A Notice of Hearing on the Interim Relief Motion was issued on 9 May 2012 scheduling the matter for 28 May 2012. A request for an adjournment was received from counsel for FNT Forever New Technologies, Inc. on 23 May 2012 to allow sufficient time to review materials. Staff did not oppose the request for adjournment and

the hearing was rescheduled. An Amended and Consolidated Notice of Hearing of Motion was issued on 24 May 2012, rescheduling the hearing for 18 July 2012.

[4] On 11 July 2012, counsel for the Respondents NNR N. Natural Resources Inc., Int. Teleworld Inc., FNT Forever New Technologies, Inc., Global Capital & Financial Corp., Prudential Global Real Estate Corp., Global Bonds Fund Inc., and RAK Marine International Inc. (the Represented Respondents) filed a Notice of Motion (in writing) (the Adjournment Motion), which was amended on 12 July 2012, seeking:

1. an Order to adjourn the hearing presently scheduled for 18 July 2012;
 - 1.1 an Order that Jake van der Laan be produced for cross examination on his affidavits sworn 26 April 2012 and 10 July 2012;
 - 1.2 an Order that Gordon Fortner be produced for cross examination on his affidavit sworn 9 July 2012;
 - 1.3 an Order that the Commission produce for inspection the originals of all documents and file materials used in the making of the affidavit referred to in paragraphs (b) and (c); and
2. an Order that a timetable for all further steps in this proceeding be instituted.
3. In the alternative, an order:
 - (a) striking the affidavit of Jake van der Laan, sworn 26 April 2012 ;
 - (b) striking the affidavit of Gordon Fortner, sworn 9 July 2012; and
 - (c) striking the affidavit of Jake van der Laan, sworn 10 July 2012.

[5] On 12 July 2012, staff filed a response to the Adjournment Motion by way of an affidavit of Jake van der Laan sworn on 12 July 2012 along with submissions.

2. EVIDENCE

[6] This Panel reviewed the Adjournment Motion materials on 13 July 2012, which consisted of the following documents:

Filed by Counsel for the Represented Respondents:

- Notice of Motion, filed on 11 July 2012;
- Factum, filed on 11 July 2012;
- Affidavit of Laura Honsinger, sworn and filed on 11 July 2012;
- Amended Notice of Motion, filed on 12 July 2012; and
- Supplementary Affidavit of Laura Honsinger, sworn on 11 July 2012 and filed on 12 July 2012.

Filed by Staff:

- Submissions on Adjournment, filed on 12 July 2012; and
- Affidavit of Jake van der Laan, sworn and filed on 12 July 2012.

[7] The affidavit evidence of Laura Honsinger, sworn and filed on 11 July 2012 provides detail on the difficulties faced by the Represented Respondents in assembling documentation requested by staff, namely as part of an Investigative Order they received on or about 31 May 2012. Such difficulties include the need for language translation for certain documents of NNR N. Natural Resources Inc., INT. Teleworld Inc. Global Capital & Financial Corp., Prudential Global Real Estate Corp. and Global Bonds Fund Inc.; issues in obtaining documents from RAK Marine International Inc. due to its principal travelling abroad; and issues with parcel post delivery for documents of FNT Forever Technologies.

[8] The supplementary affidavit evidence of Laura Honsinger, dated 11 July 2012 and filed on 12 July 2012 attests that each of the Represented Respondents retained Robyrt Regan as their counsel on various dates between 22 May and 25 May 2012, at which time their counsel sought a first adjournment of the Interim Relief Motion to prepare their defences. This affidavit evidence further notes that the rescheduled date of 18 July 2012 was perceived by counsel for the Represented Respondents to be

“optimistic and unrealistic, given the amount of material he anticipated having to review in order to deliver the Respondents’ defense materials and deal with cross-examination of Mr. van der Laan and any procedural issues which might arise from same”.

[9] This same affidavit evidence further states that because of concerns about some of the allegations contained therein, on or about 22 June 2012, counsel for the Represented Respondents requested that Mr. van der Laan be made available for cross-examination on his affidavit of 26 April 2012. In particular, the Represented Respondents allege that in several instances, Mr. van der Laan's affidavit did not fairly or accurately state the facts or relied on inaccurate or outdated information or reports or statements of individuals without making enquiry into the veracity of same.

[10] The affidavit evidence of staff also attests that on 22 June 2012, counsel for the Represented Respondents requested an opportunity to cross examine Mr. van der Laan on his affidavit sworn 26 April 2012. Staff counsel responded by way of email on 25 June 2012 referring to the relevant section of Local Rule 15-501 *Procedures for Hearings before a Panel of the Commission* and noting that the request should be directed to the hearing Panel. After noting that the request must be directed to the Panel, staff counsel notes being amenable to making Mr. van der Laan available for cross-examination but without further delay to the motion scheduled for 18 July 2012. Later that day, staff counsel sent a further email to counsel for the respondents noting that following a review of case law in New Brunswick, staff would need to assess the respondents’ evidence on the Interim Relief Motion before consenting to the cross-examination.

[11] The evidence further shows that on 30 June 2012, counsel for the Represented Respondents again wrote to staff counsel at which time he asked that Mr. van der Laan be made available for cross-examination for a full-day at a mutually convenient place and time and noted that should the substance of Mr. van der Laan’s response dictate same, he may require that undertakings be given. He noted that any delay in providing

Mr. van der Laan for a cross-examination may result in transcripts of same not being available by 18 July 2012, which would necessitate an adjournment of the hearing.

[12] On 3 July 2012, staff indicated they were prepared to consent to cross-examination, provided same took place expeditiously and offered availability on any of 5, 6, 9, 10 or 11 of July 2012.

[13] The same date, counsel for the Represented Respondents advised he was unable to conduct the examination on any of the dates proposed, due to pre-existing commitments and/or the unavailability of flights to Saint John. He also noted that even with the dates, there would be insufficient time to obtain the examination transcripts, review them and confer with his clients in any meaningful way before the hearing on 18 July 2012.

[14] The affidavit evidence of the Represented Respondents further claims that the Commission is "estopped from refusing to produce Mr. van der Laan since it has already consented to produce him on two occasions".

[15] Following this, two further affidavits were filed by staff in support of the Interim Relief Motion, one from Jake van der Laan sworn 10 July 2012 and one from Gordon Fortner sworn 9 July 2012. In their Adjournment motion, the Represented Respondents are also seeking cross-examination on these two affidavits.

3. ANALYSIS AND DECISION

a. Request for Adjournment and Orders for Cross-Examination and Production of Documents

[16] The Represented Respondents are seeking an adjournment of the hearing of the Interim Relief Motion to permit time for their counsel, prior to the hearing, to cross-examine deponents to affidavits submitted by staff, more precisely on affidavits of Jake van der Laan sworn 26 April 2012 and 10 July 2012 and an affidavit of

Gordon Fortner sworn 9 July 2012. It is the submission of the Represented Respondents that this process is regulatory and quasi-criminal and that they are entitled at this stage to test the evidence of staff. In particular, they allege that they are entitled to seek and have undertakings fulfilled as well as transcripts of the cross-examination and discovery of all documents supporting the affidavits before having to submit evidence.

[17] Staff counsel submits that the Interim Relief Motion is seeking interim relief of an administrative nature under s. 184 of the *Act* and, in such circumstances, cross-examination should not be ordered in the absence of inconsistency between affidavit evidence filed by staff and affidavit evidence filed by the Represented Respondents.

[18] The question to be determined by the Panel is whether based on the facts before it, it is appropriate to order cross-examination on affidavits submitted in support of an Interim Relief Motion prior to the hearing of the motion.

[19] We begin by noting that we are in agreement with the submission of staff counsel that it is inappropriate to allow hearings on motions to become mini-trials. In making this submission, staff counsel relies upon Chief Justice Drapeau in the the case of *Smith v. Agnew* 2001 NBCA 83 (CanIII) at paragraph 54, which we note was also taken into account by Justice William T Grant in the case of *Couillard v. Budget Rent-A-Car and Lackie* 2004 NBQB 87(CanIII).

[20] This statement is particularly apt in the context of a motion to adjourn a proceeding seeking interim relief under s. 184 of the *Act*. Section 184 provides relief that is administrative in nature and is neither quasi-criminal in character nor a civil process between private parties.

[21] As stated by this Commission in the Reasons for Decision on motion in the matter of George Wayne Mallett (a.k.a.: "Wayne Mallett"), Villabar Real Estate Inc., St. Clair Research Associates Inc., Ronald A. Medoff and Mayer Hoffer, released 12 April 2012:

[33] There can be no doubt that a hearing before a panel of the Commission has a flavour akin to a judicial proceeding as do hearings before other regulatory bodies but it does not follow that such hearings are “prosecutions” or prosecutorial in nature. We agree with the assertion of Miller, D.C.J. in the case of **U.A. Local 488 v. Alberta (Industrial Relations Board)** (1975), 60 D.L.R. (3d) 690, to the effect that

“while it might therefore follow that all “prosecutions” could be called “actions” it does not follow that all “actions” can be called “prosecutions”...”.

[40] in this matter, Staff are seeking public interest remedies under sections 184 and 186 of the *Act*. The remedies being sought are administrative remedies.

[22] The Commission has considered and described its public interest jurisdiction in several decisions, namely in the *Tycoon Energy Inc. et al.* decision released on 8 April 2011. *Tycoon* sets out that along with protecting investors from “unfair, improper or fraudulent practices”, “the Commission’s public interest jurisdiction is protective and preventative, **and is intended to be exercised to prevent likely future harm to capital markets**”. (Emphasis added)

[23] Interim relief is typically sought by way of motion for this exact purpose, that of preventing future harm and of doing so in a **timely manner**. This means that the Panel must take into consideration the very intent of its legislation; in this case, that is that the Commission’s powers must be exercised so as to give its public interest jurisdiction its full meaning and intent.

[24] Having stated our views on the Commission’s protective and preventative role, the Panel now has to consider whether it may be justified in the circumstances to delay the hearing of the Interim Relief Motion – requested as a preventative measure - to allow cross-examination on affidavits. Or, put in other words, would procedural fairness

be impeded by refusing at this time to order a cross-examination of deponents to staff's affidavits? The Panel's answer to this question is no.

[25] The Represented Respondents claim in their affidavits and submissions that staff prepared their evidence in the Interim Relief Motion without all the facts. The very purpose of responding affidavits is to present facts from the perspective of the opposing party. Here, the Represented Respondents have failed to provide satisfactory evidence of their assertions. Although the affidavit of Ms. Phipps – a law clerk in the office of counsel for the Represented Respondents – attempts to discredit Mr. van der Laan's affidavit sworn 26 April 2012, we are of the view that it does not provide relevant or sufficient evidence to corroborate the statements and discredit Mr. van der Laan's affidavit. Rather, what the Represented Respondents are seeking to do here is use cross-examination rather than submitting their own evidence prior to the Interim Relief Motion.

[26] The Panel is not satisfied that the Represented Respondents have submitted satisfactory evidence to justify delaying the hearing of the Interim Relief Motion and accordingly believes that it is in the public interest that it proceed on 18 July 2012.

[27] Further, the Panel stresses that, at this time, they are not ruling on the question of whether, in the context of s. 184 of the *Act*, cross-examination of deponents on affidavits, whether it be prior to or during the course of a hearing, is appropriate even if there is contradictory evidence in opposing affidavits.

[28] The Represented Respondents also alleged that because staff consented to Jake van der Laan being cross-examined on his Affidavit evidence, the Panel is now estopped from refusing to produce Mr. van der Laan by reason of the fact that the Commission has already consented to produce him on two (2) occasions. On the first occasion, 25 June 2012, staff made it clear that any such request must be directed to the hearing Panel and that while they were amenable to cross-examination, they would not consent to any further adjournment of the 18 July 2012 hearing. Less than an hour later, staff advised the Represented Respondents that following a review of New

Brunswick case law, staff would need to assess the Respondents' evidence on the Interim Relief Motion before consenting to the cross-examination. It is difficult in this context to see what detriment has been suffered by the Represented Respondents that arises as a result of this revocation of consent which was limited at the outset by a statement that any such request would need to be made to the Panel. As to the second occasion on 3 July 2012, the agreement to produce Mr. van der Laan for cross-examination was given provided that the cross-examination be held on certain dates. The Represented Respondents did not agree to the conditions upon which the consent was given. As such, the Represented Respondents cannot now rely upon staff's consent which was vitiated by the actions of the Represented Respondents themselves.

[29] As it relates to the Represented Respondents' request for the production for inspection of the originals of all documents and file materials used in the making of the affidavits of Gordon Fortner, sworn 9 July 2012; and that of Jake van der Laan, sworn 10 July 2012, it appears to the Panel that all exhibits referenced in the affidavits were attached thereto. If the Represented Respondents are alleging that they were somehow prejudiced as a result of "originals" not being attached, this can be argued at the hearing.

b. Request for Order that Timetable for Further Steps Be Instituted

[30] As the Represented Respondents have not yet submitted their response to the Interim Relief Motion, the Panel is of the view that it is also premature to set a timetable for further steps in this matter. The Commission dismisses this request.

c. In the Alternative, Request for Orders Striking Affidavits

[31] The Represented Respondents having not yet submitted their response to the Interim Relief Motion, the Panel is not in a position to consider such request. The Commission also dismisses this request.

[32] The above constitute the Commission's Reasons for their Decision.

Dated this 16th day of July, 2012.

"original signed by"

Anne La Forest, Panel Chair

"original signed by"

Denise A. LeBlanc, Q.C., Panel Member

"original signed by"

Ken Savage, Panel Member

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