IN THE MATTER OF

The *Securities Act*

S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

SHIRE INTERNATIONAL REAL ESTATE INVESTMENT LTD.,
HAWAII FUND, MAPLES AND WHITE SANDS INVESTMENTS LTD.,
SHIRE ASSET MANAGEMENT LTD., and JEANETTE CLEONE COUCH
(RESPONDENTS)

REASONS FOR THE DECISION

Dates of Hearing:	7 October 2009 and 14 January 2010
Date of Order:	19 February 2010
Date of Reasons for Decision:	14 May 2010

Panel:

David G. Barry, Q.C., Panel Chair

Anne W. La Forest, Panel Member

Counsel:

Marc Wagg	For Staff of the New Brunswick Securities Commission

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(RESPONDENTS)

REASONS FOR THE DECISION

1. BACKGROUND

[1] This matter involves an application by staff (staff) of the New Brunswick Securities Commission (Commission) for an order under paragraph 184(1.1)(c) of the *Securities Act* (*Act)* against the respondents, Shire International Real Estate Investment Ltd. (Shire), Hawaii Fund, Maples and White Sands Investments Ltd. (Maples), Shire Asset Management Ltd. (Shire Asset), and Jeanette Cleone Couch (Couch) . Paragraph 184 (1.1)(c) of the *Act* provides as follows:

> **184**(1.1)In addition to the power to make orders under subsection (1), the Commission may, after providing an opportunity to be heard, make one or more of the orders referred to in paragraphs (1)(*a*) to (*d*) and (1)(*g*) to (*i*) against a person if the person
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> …
>
> (*c*) is subject to an order made by a securities regulatory authority or self-regulatory organization in Canada or elsewhere imposing sanctions, conditions, restrictions or requirements on the person…
>
> …

[2] On 30 July 2009, staff filed an application (application) and the supporting affidavit of Enforcement Legal Counsel Mark McElman (supporting affidavit)

seeking the following relief against the respondents, pursuant to subparagraphs 184(1)(c)(i) and (ii) and paragraph 184(1)(d) of the *Act*, for as long as either of the orders issued by the Alberta Securities Commission or the Saskatchewan Financial Services Commission (as from time to time extended) remain in force:

(a) all trading in securities of HAWAII FUND and MAPLES AND WHITE SANDS INVESTMENT LTD. shall cease (including without limitation, the solicitation of trades in securities or any acts constituting attempts or acts in furtherance of trading, in such securities);

(b) the respondents shall cease trading in all securities (including, without limitation, the solicitation of trades in securities or any acts constituting attempts or acts in furtherance of trading in securities); and

(c) any exemptions in New Brunswick securities law do not apply to the respondents.

[3] Staff based their application on the grounds that the respondents are subject to an order made by the Alberta Securities Commission (ASC) and to an order made by the Saskatchewan Financial Services Commission (SFSC) imposing sanctions, conditions, restrictions or requirements, and that it is in the public interest for an order to be issued in New Brunswick.

[4] A notice of application was issued by the Commission on 30 July 2009. It provided notice to the respondents of the application and the relief sought. The notice of application also advised the respondents of their right to be heard and of the requirement to notify the Commission by 14 August 2009 if they so wished to be heard. The notice of application also advised them that failure to notify the Commission might result in an order contrary to their interest being issued without further notice.

[5] Staff filed an affidavit on 27 August 2009 (affidavit of service), outlining their service on the respondents of the notice of application, the application and the supporting affidavit. As provided by subsection 5(1) of Local Rule 15-501 *Procedures for Hearings Before a Panel of the Commission*, the respondents were served by electronic transmission at the addresses provided by staff of the ASC. We were advised by the Office of the Secretary of the Commission that the respondents did not request an opportunity to be heard.

2. THE FACTS

[6] With the exception of those matters outlined in paragraphs [18] and [19], the facts outlined below are taken from the orders of the SFSC submitted by staff in the supporting affidavit.

[7] Shire is an Alberta company wholly-owned by Couch that purports to carry on business as a real estate developer.

[8] Hawaii Fund is a trust established to issue units for the stated purpose of obtaining funds to buy and develop properties located in Maui, Hawaii, U.S.A.

[9] Maples is an Alberta company established to issue mortgage units for the stated purpose of obtaining funds to buy and develop certain properties located in British Columbia.

[10] Shire Asset is an Alberta company. It is the trustee and manager of Hawaii Fund and one of its promoters.

[11] Couch is an Alberta resident, and the sole director and officer of Shire, Shire Asset, and Maples as well as the directing mind of Hawaii Fund.

[12] Beginning in October 2006, the respondents contacted residents of Saskatchewan and other provinces in Canada and solicited the purchase of securities in numerous projects.

[13] The respondents began trading in the securities of the Hawaii Fund and Maples projects in November 2008 in Saskatchewan. According to the offering memoranda, the proposed closing date for the Hawaii Fund can be extended until 28 April 2010 and the Maples closing date may be determined by the corporation from time to time.

[14] The respondents failed to disclose key information regarding the Hawaii Fund and Maples, and the SFSC found that the respondents had therefore contravened the requirement to deal honestly, fairly and in good faith pursuant to section 33.1 of *The Securities Act, 1988* S.S. 1988, c. S-42.2 (Saskatchewan *Act*).

[15] The SFSC found that the respondents in the Hawaii Fund and Maples offering memoranda made statements that they knew or ought to have known were materially misleading and untrue contrary to section 55.11 of the Saskatchewan *Act.*

[16] The ASC issued a Temporary Cease Trade Order on 4 June 2009. On 15 June 1009, this order was extended by the ASC until the hearing of the matter is concluded and a decision rendered, unless otherwise ordered.

[17] The SFSC issued a Temporary Order on 23 June 2009. On 7 July 2009, this order was extended by the SFSC until such time as the SFSC is provided with satisfactory information to enable it to make a further order in this matter.

[18] Mark McElman, Enforcement Legal Counsel, is a member of the Reciprocal Enforcement Sub-Committee of the Canadian Securities Administrators Enforcement Standing Committee. This committee reviews cases with multi-jurisdictional aspects on a monthly basis. On a conference call in June 2009, Mr. McElman was informed of the orders against the respondents by Tyler Hynnes, an enforcement staff member of the ASC. Mr. Hynnes also informed Mr. McElman that the ASC had concerns that the respondents had known

connections to other Canadian jurisdictions and might pose a risk to capital markets in all Canadian jurisdictions.

[19] At the hearing on 7 October 2009, the Panel indicated that it wished to obtain further information as to why the ASC recommended that other jurisdictions should seek orders against the respondents. No further evidence was presented on this issue. The Panel had also requested information regarding the practice of other Canadian securities jurisdictions in recognizing orders of sister jurisdictions. Staff provided this information for the 14 January 2010 hearing.

3. ANALYSIS AND DECISION

Pre-conditions of paragraph 184(1.1)(c)

[20] Prior to issuing an order under paragraph 184(1.1)(c) of the *Act*, the Panel must be satisfied that the respondents were provided with an opportunity to be heard, and that each respondent is a person who is subject to an order made by a securities regulatory authority in Canada or elsewhere imposing sanctions, restrictions or requirements on the respondents. The Panel is satisfied in this case that these conditions have been met. As outlined in the *Adcapital Industries Inc. et al.* (*Adcapital*) decision issued by the Commission on 19 August 2008, at paragraph 26:

> ...once these two pre-conditions have been met, a Panel must then determine if it is in the public interest to make the order.

Public interest

[21] What remains is for the panel to consider if it is in the public interest to issue the order requested by staff. Subsection 184(1.1) was added to the *Securities Act* in 2007. In the Commission decisions of *Al-tar Energy Corp. et al. (Altar)*, issued on 17 December 2007; *Adcapital (supra)*; *Malsbury Investment*

Corporation et al. (Malsbury), issued 2 September 2008; and *Global Petroleum Strategies, LLC et al. (Global Petroleum)*, issued 8 September 2008, the Commission began to set the parameters of a "public interest" test when considering the issuance of orders under the auspices of subsection 184(1.1) of the *Act*. In these decisions, the Commission held that it is appropriate to grant an order under subsection 184 (1.1) when there is evidence that such an order would serve a protective purpose for New Brunswick investors and capital markets.

Altar

[22] The Commission's first decision under subsection 184(1.1) of the *Act* was in the *Altar* matter. In this matter, the Commission assessed the public interest aspect of the application of the order power of subsection 184(1.1) of the *Act*. In its analysis, the Commission referred to the decision of the ASC in *Re Sulja Bros. Building Supplies, Ltd*, 2007 ABASC 603 and *Re Oslund*, 2006 ABASC 1295. In these decisions, the ASC concluded that evidence of actual conduct or actual harm in their province is not a prerequisite to the application of the order power.

[23] In *Altar*, this Commission stated at paragraph 31:

> The Panel agrees with the Alberta Securities Commission's interpretation of the public interest requirement for reciprocal orders. Prior to the Panel granting Staff's application for an order under paragraph 184(1.1)(c), they must be satisfied that there is a compelling reason to grant an order in New Brunswick.

[24] In the *Altar* matter, evidence had been presented about some of the respondents' activities within New Brunswick. The Commission found that there was a real risk of future harm to New Brunswick investors, and that this risk was serious enough to constitute a compelling reason for an order against the respondents to be issued in New Brunswick. Although there was no direct evidence as it relates to certain of the respondents targeting New Brunswick

residents, there was substantial evidence of a close connection between all the respondents which was deemed serious enough for this Commission to find it in the public interest to include them all in its order.

Adcapital

[25] In *Adcapital*, the Commission referred to the acceptance in *Altar* of the *Re Oslund,* supra, public interest requirement for orders under subsection 184(1.1) of the *Act*. The Panel found that although a nexus was not required, the evidence should satisfy the "compelling reason" test, and satisfy the Panel that it serves a protective purpose.

[26] The Panel noted at paragraph 21:

> The purpose of subsection 184(1.1) of the *Act* is to promote the protection of relevant capital markets as effectively and efficiently as possible.

[27] The Panel also referred in paragraph 30 to the statement by the ASC in *Re Oslund* that it is "appropriate to rely on the reciprocal order provision when it would serve a protective purpose".

[28] In *Adcapital*, the Panel adopted a generous interpretation of "compelling reason" by stating at paragraph 31:

> That the BCSC issued sanctions against the Respondents is itself, in the opinion of the Panel, compelling evidence of it being in the public interest to issue the order requested by Staff. The further evidence of the Respondents' activities within New Brunswick highlights the need for such an order to protect New Brunswick investors.

[29] In the *Adcapital* matter, the evidence presented by staff consisted of orders of the British Columbia Securities Commission (BCSC), and affidavit evidence concerning the respondents' activities in New Brunswick. Staff of the

Commission had not presented the evidence led in the original BCSC proceeding. The panel of the Commission in that matter found that a Panel should not enquire into the evidence led in the original proceeding. The Panel noted at paragraphs 21 and 22:

> [21] Staff submitted that inquiring into the evidence behind the order in the originating jurisdiction original proceeding could easily lead to a re-hearing of the same evidence, necessitating investigators and other affiants from the originating jurisdiction submitting the same evidence and/or being made available for cross-examination. The purpose of subsection 184(1.1) of the *Act* is to promote the protection of relevant capital markets as effectively and efficiently as possible. Staff submitted that inquiring into the evidence behind the order in the originating jurisdiction would be counter-productive to this purpose. Staff submitted that a more appropriate approach would be for the Panel to take the issuance of an order by a recognized securities regulator as a *prima facie* basis for reciprocation under paragraph 184(1.1)(c).
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> [22] The Panel agrees with staff's submission. Inquiring into the evidence led in the original proceeding could easily lead to a re-hearing of the same evidence, necessitating investigators and other affiants from the originating jurisdiction submitting the same evidence and/or being made available for cross-examination. The purpose of subsection 184(1.1) is to avoid such duplication of resources and costs.

[30] The decision in the *Global Petroleum* case adopted this approach.

[31] Turning to the present case, it is important to begin by stating that the matter before this Panel is factually distinct from the cases of *Altar*, *Adcapital* and *Global Petroleum*. Although there was an indication by staff that the ASC had concerns that the respondents had known connections to other Canadian jurisdictions, very limited information was provided in this regard and there was

no evidence of any connection to New Brunswick residents. The question that this Panel has had to consider is whether mutual support and cooperation between sister provinces in relation to the exercise of securities jurisdiction is a sufficient basis upon which to issue an order. To ground our answer to this question, we refer to the legislative history of subsection 184(1.1).

[32] On June 30, 2007, the New Brunswick Legislature amended the *Securities Act* for the first time. The amendments were intended to harmonize the provisions in the *Act* with those in other provinces and territories. The amendments included a new Part 15.1 titled *Interjurisdictional Cooperation*, which provided the Commission with the required powers to implement the principal regulator system, or Passport system, of securities regulation. The intent of the Passport system was not only to provide a single point of entry for filers and registrants in dealing with securities regulators but also to add to the acts of the participating Canadian Securities Administrators powers to allow the decisions made by the principal regulator to be accepted by all other jurisdictions. A number of Passport system-related amendments were also made to other parts of the *Act. These* include the addition of subsection 184(1.1) which, as noted, provides that the Commission may make certain "reciprocal orders" against a person under subsection 184(1) if a person is subject to an order made by a securities regulatory authority in Canada or elsewhere.

[33] In our view, the plain language of subsection 184(1.1) of the *Act* does not limit the provision to the protective purpose that was directly at issue in *Altar, Adcapital,* and *Global Petroleum*. Rather, it reasonably extends to recognizing the orders of a securities regulatory authority in another jurisdiction. Subsection 184(1.1) was implemented as part of the Canadian Securities Administrators efforts to ensure the protection of the capital markets across the country and reinforces our view that the public interest test to be applied should be broad in scope. Stated in other words, a narrow approach to subsection 184(1.1) of the *Act* does not, in our view, fully comply with the legislative intent of the 2007 legislative amendments.

[34] Subsection 184(1.1) provides that the Commission **may** make one or more of the orders referred to in paragraphs 184(1)(a) to (d) and (g) to (i). The word "may" provides discretion to the Commission when exercising its authority to recognize an order of another securities regulator. In our view, it is in the public interest for the Commission to exercise its discretion to recognize the order of another securities regulatory authority when the Commission is satisfied that there is a real and substantial connection between that securities regulator and the subject matter of the order. We are supported in this interpretation by the jurisprudence of the Supreme Court of Canada in *Morguard Investments Ltd.* v. *De Savoye*[1], which addressed the recognition and enforcement of judgments interprovincially. In this decision, the Supreme Court of Canada speaks of Canada's structure as a federal state and the realities of modern commerce:

> However that may be, there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other provinces where necessary to meet the ends of justice; see *Re Wismer and Javelin International Ltd.,* (1982), 136 D.L.R. (3d) 647 (Ont. H.C.), at pp. 654-55; *Re Mulroney and Coates,* (1986), 27 D.L.R. (4th) 118 (Ont. H.C.), at pp. 128-29; *Touche Ross Ltd. v. Sorrel Resources Ltd.* 1987 CanLII 2693 (BC S.C.), (1987), 11 B.C.L.R. (2d) 184 (S.C.), at p. 189; *Roglass*

[1] [1990] 3 S.C.R. 1007 (*Morguard*)

Consultants Inc. v. Kennedy, Lock 1984 CanLII 421 (BC C.A.), (1984), 65 B.C.L.R. 393 (C.A.), at p. 394.[2]

[35] Other federations, for example, the United States and Australia have a "full faith and credit" clause and members of the European Economic Community entered into the 1968 *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* where the mutual recognition of judgments is seen to flow from the nature of a common market. The Supreme Court of Canada agrees with this approach:

> A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, **the courts in one province should give full faith and credit**, to use the language of the United States Constitution, **to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action**. [3] [Emphasis added]

[36] The Supreme Court of Canada then further stated that:

> If... it is reasonable to support the exercise of jurisdiction in one province, it would seem equally reasonable that the judgment be recognized in other provinces. This is supported by the statement of Dickson J. in *Zingre*, cited *supra*, that comity is based on the common interest of both the jurisdiction giving judgment and the recognizing jurisdiction. Indeed, it is in the interest of the whole country, an interest recognized in the Constitution itself[4].

[37] The "real and substantial connection" test required by Morguard to establish the proper exercise of jurisdiction balances the rights of the parties and protects respondents against having orders issued in New Brunswick based upon orders

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[2] *Ibid*., at page 24.
[3] *Ibid*., at page 28.
[4] *Ibid*., at page 32.

where there may have been an improper or inappropriate exercise of jurisdiction. We are of the view that this is the correct approach to take in the enforcement of securities law given that securities infractions are often interjurisdictional. We are particularly of that view given the express language of subsection 184(1.1) of the *Act* which, as noted, was added for the specific purpose of ensuring the protection of capital markets across the country.

[38] In the instant case, we accept the evidence included in the supporting affidavit. As noted in the *Adcapital* and *Global Petroleum* decisions (paras. [29] and [30]), inquiring into the evidence led in the original proceeding could easily lead to a re-hearing of the same evidence resulting in duplication of resources and costs. That evidence demonstrated a real and substantial connection between the province of Saskatchewan and the province of Alberta with respect to the respondents. Three of the respondents are Alberta companies, one is a trust with an Alberta resident as its directing mind and one respondent is a resident of Alberta. Saskatchewan residents were contacted and solicited by the respondents. Both Alberta and Saskatchewan have a real and substantial connection to the action and their securities regulators have properly exercised jurisdiction in the action. The reality of the modern world of commerce is such that it is in the broader public interest for jurisdictions to cooperate with each other to ensure the protection of investors and confidence in Canada's capital markets.

[39] For the reasons outlined above, we are of the view that an order should issue under paragraph 184(1.1)(c) of the *Act* consistent with the intent of the Alberta and Saskatchewan orders upon which the application was based.

[40] One final matter that requires clarification is the statement in *Adcapital* and *Global Petroleum* that the existence of an order of another jurisdiction is a *prima facie* basis for reciprocation under paragraph 184(1.1)(c) (see paragraphs [29] and [30] above). While, as noted, we are of the view that we should not look behind the evidence led in the original proceeding, the mere existence of an order of another securities regulator should not be accepted as *prima facie*

evidence that the jurisdiction of the regulator was properly or appropriately issued. Evidence that there was a real and substantial connection between the jurisdiction issuing the order and the subject matter of the order must be submitted in support of an application. In many instances, sufficient evidence of that connection may well be part of the order.

[41] The above constitutes the Panel's reasons for the decision for its order issued on 19 February 2010 pursuant to paragraph 184(1.1)(c) of the *Act.*

Dated this 14th day of May, 2010.

"original signed by"
David G. Barry, Q.C., Panel Chair

"original signed by"
Anne W. La Forest, Panel Member

New Brunswick Securities Commission
Suite 300, 85 Charlotte Street
Saint John, New Brunswick E2L 2J2
Tel: 506-658-3060
Fax: 505-658-3059