FINANCIAL AND CONSUMER SERVICES tribunal DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: *New Brunswick (Financial and Consumer Services Commission) v. Pierre Emond and Armel Drapeau*, 2019 NBFCST 1

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: 2019-01-11
Docket: 2300-E1

BETWEEN:

Financial and Consumer Services Commission,

Applicant,

-and-

Pierre Emond and Armel Drapeau,

Respondents.

DECISION

PANEL:	Judith Keating, Q.C., Panel Chair Mélanie McGrath, Panel Member Gerry Legere, Panel Member
DATE OF HEARING:	September 26, 2018
WRITTEN REASONS:	January 11, 2019
APPEARANCES:	Michel Boudreau for the Financial and Consumer Services Commission Ronald LeBlanc for Armel Drapeau Pierre Emond, in his own capacity, appearing by telephone

[TRANSLATION]

I. DECISION

1. The decision in this matter is rendered under section 190 of the *Securities Act*, S.N.B. 2004, c. S-5.5 (*Securities Act*). A stay of proceedings is ordered with regard to both respondents. The temporary orders issued with respect to the respondents, Pierre Emond and Armel Drapeau, dated September 21, 2009, are set aside.

II. OVERVIEW

2. The procedures that led to this proceeding originated on June 24, 2010, with the filing of a *Statement of Allegations* by Staff of the former New Brunswick Securities Commission (Securities Commission) against Pierre Emond and Armel Drapeau.

3. On July 1, 2013, the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30 (*Financial and Consumer Services Commission Act*), integrated the administrative functions of the regulators of financial markets and consumer protection, including the securities sector, under the same statute.

4. This proceeding was hindered by many motions and delays; as a result, a hearing on the merits never took place. The last of these motions was decided on September 26, 2017, when this Tribunal ordered an adjournment *sine die* given that there were not enough members of the Tribunal who were able to hear the matter in the official language chosen by the respondents—namely, French.

5. Therefore, on August 17, 2018, over eight years after the filing of the *Statement of Allegations*, and still without a hearing on the merits, the Tribunal, on its own initiative, served on the parties a *Notice of Hearing*, asking them to justify the continuance of the Tribunal's jurisdiction over the matter, based on the interpretation of section 190 of the *Securities Act*.

III. ISSUES

6. The Tribunal has to decide whether or not it has lost its jurisdiction to continue this proceeding due to the limitation period set out in section 190 of the *Securities Act*:

    a) If it has, are both respondents subject to a stay of proceedings?

    b) Also, if it has, does the Tribunal have the jurisdiction to order the respondents to pay an administrative penalty pursuant to section 186 of the *Securities Act* and to pay investigation and hearing costs pursuant to section 44 of the *Financial and Consumer Services Commission Act* as is submitted by the Financial and Consumer Services Commission (the Commission)?

IV. POSITIONS OF THE PARTIES

Position of the Commission

7. The Commission argues that section 190 of the *Securities Act* is inoperative and does not apply to this proceeding because of the adoption of section 41 of the *Financial and Consumer Services Commission Act*, which it submits had the effect of implicitly repealing section 190 of the *Securities Act*. Also, according to the Commission, section 41 covers pretty much the same ground or the entire subject matter of section 190. It also submits that the Legislature erred in failing to repeal section 190 of the *Securities Act* when it enacted the *Financial and Consumer Services Commission Act*.

8. Moreover, the Commission argues that pursuant to the principles of statutory interpretation, the relevant provision of the more recent statute (section 41 of the *Financial and Consumer Services Commission Act*) takes precedence over the provision of the less recent statute (section 190 of the *Securities Act*).

9. Also, the Commission claims that the two-year limitation period as set out in section 190 of the *Securities Act* goes against the purpose of the *Securities Act*, which is to protect the public interest, and that maintaining section 190 would open the floodgates by giving the respondents in other cases a strong motivation to seek multiple adjournments in order to go beyond the two-year deadline. According to the Commission, several cases that are now before the Tribunal would be affected by a decision upholding the validity of section 190.

10. Finally, the Commission argues that if the limitation period under section 190 applies here, the Tribunal would keep the jurisdiction to proceed with a hearing on the merits and to order the payment of an administrative penalty pursuant to section 186 of the *Securities Act*, as well as the payment of investigation and hearing costs under subsection 44(1) of the *Financial and Consumer Services Commission Act*.

Positions of the respondents

11. Mr. Drapeau submits that subsection 75(2) of the *Financial and Consumer Services Commission Act* has the effect of preserving the integrity of the legislative provisions of the *Securities Act* as they applied when the new statute was enacted, and that the Tribunal must apply section 190 of the *Securities Act* regardless of section 41 of the *Financial and Consumer Services Commission Act*, section 41 having been enacted after the filing of the *Staement of Allegations*.

12. Mr. Emond did not submit legal arguments concerning the motion.

V. THE FACTS

13. Certain unchallenged facts are also relevant to the application of each of the above-mentioned provisions:

- Mr. Emond was never a registrant under the *Securities Act*.

- Mr. Drapeau was a mutual fund sales representative with Investia Financial Services Inc. His registration was revoked by Investia on March 25, 2009; therefore, he ceased being a registrant within the meaning of section 190 of the *Securities Act* on March 25, 2009.

- On February 15, 2008, the Securities Commission obtained from Mr. Emond an undertaking to not trade in securities without prior written authorization from the Securities Commission.

- On May 20, 2008, the Securities Commission obtained from Mr. Drapeau an undertaking to not trade in securities of CTIC without prior written authorization from the Securities Commission.

- The staff of the Securities Commission filed an application on August 19, 2009, in order to obtain temporary orders providing that the exemptions under New Brunswick securities law did not apply to Pierre Emond and Armel Drapeau.

- On September 21, 2009, a hearing panel of the Securities Commission, as it existed before the enactment of the new *Financial and Consumer Services Commission Act*, issued a temporary order providing that any exemptions under securities law did not apply to Pierre Emond and Armel Drapeau until further order of the Securities Commission.

- On June 24, 2010, the staff of the Securities Commission filed a *Statement of Allegations*, giving the particulars of the alleged breaches of the securities law by Pierre Emond and Armel Drapeau.

- Both respondents are still subject to these temporary orders, and the Commission did not make any recent application for a hearing to be held on the merits.

- The parties agree that if the two-year limitation period under section 190 of the *Securities Act* applies, it expired on June 24, 2012, two years after the *Statement of Allegations* was filed by the staff of the Securities Commission.

VI. ANALYSIS

Is there a conflict between section 190 and section 41?

14. Several arguments submitted by the parties during the hearing of this proceeding are based on the parties' presumption that there is an actual conflict between certain provisions of the new *Financial and Consumer Services Commission Act* and those of the *Securities Act*.

15. It is important to note that two statutes are not in conflict merely because they deal with the same subject. For a real conflict to exist, the application of one statute must explicitly or implicitly preclude the application of the other. It is only where there is an irreconcilable conflict between the statutes that the Tribunal must decide which of the statutes or provisions applies to the exclusion of the other (P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. 2000, p. 350, as cited in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591).

16. All statutory interpretation necessarily begins with a review of the statutory provisions at issue, the ordinary meaning of the words, and their underlying purpose. The *Supreme Court of Canada* has stated on a number of occasions that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21)

17. The Tribunal first considers the Commission's argument that there was an implicit repeal of section 190 and irreconcilable conflict between section 190 of the *Securities Act* and section 41 of the *Financial and Consumer Services Commission Act*.

18. Section 190 of the *Securities Act* reads as follows:

> **Enforcement orders when registration has expired or been cancelled or surrendered**
> **2008, c. 22, art. 57**
>
> 190 Notwithstanding that the registration of a registrant has expired or been cancelled or that the Executive Director has accepted the surrender of the registration of the registrant, the Tribunal may make an order under subsection 184(1) or (1.1) or section 185 within 2 years after the later of
>
> (a) the date on which the registration of the registrant expired, the date on which the registration of the registrant was cancelled or the date of acceptance by the Executive Director of the surrender of the registration of the registrant, as the case may be, and
>
> (b) the commencement of a proceeding under this Act or the regulations.

19. Section 41 of the *Financial and Consumer Services Commission Act* reads as follows:

> **Order may be made despite expiry of registration, licence or permit**
>
> 41 Despite the fact that a registration, licence or permit of a person under financial and consumer services legislation has expired, been cancelled or been surrendered, the Tribunal may make an order under financial and consumer services legislation against that person.

20. The Tribunal rejects the Commission's argument that there is a conflict between section 190 of the *Securities Act* and section 41 of the *Financial and Consumer Services Commission Act*. The *Securities Act* and the *Financial and Consumer Services Commission Act* are two separate statutes that are in force and are applicable to the specific objectives set out by the Legislature. The ruling on this motion is based on the interaction between the *Financial and Consumer Services Act* and the *Securities Act*.

21. The Tribunal notes at the outset that there is no provision in the *Financial and Consumer Services Commission Act* stating that the provisions of this statute take precedence over incompatible provisions of the *Securities Act*. However, section 53 of the *Financial and Consumer Services Commission Act* contains such a precedence provision concerning the *Right to Information and Protection of Privacy Act*. In our opinion, this fact is indicative of the Legislature's intention; the Legislature did not want the *Financial and Consumer Services Commission Act* to take precedence over regulatory statutes pertaining to financial and consumer services, including the *Securities Act*.

22. In this analysis, it is important to first properly identify the purpose of both statutes. The purpose of the enactment of the *Financial and Consumer Services Commission Act* was to bring together, under the governance of one commission and for administrative purposes, all the financial and consumer sectors in New Brunswick, including the securities sector. Thus, the *Financial and Consumer Services Commission Act*, while replacing the Securities Commission, created the Financial and Consumer Services Commission as well as a Financial and Consumer Services Tribunal and set out the parameters of the new Commission and Tribunal. The *Financial and Consumer Services Commission Act*, which is, for obvious reasons, a more recent statute than most of the many statutes governing the specific areas of regulation it was intended to integrate, was meant, when it was adopted, to harmonize and consolidate the administrative and general functions of the regulators of the financial and consumer sectors while securing the establishment of one common Tribunal for all. The intention was not to modify the various regulatory regimes.

23. The 21 statutes listed in section 1 of the *Financial and Consumer Services Commission Act*, under the definition of "financial and consumer services legislation", continue to operate under the particular regulatory regime applicable to them (emphasis ours). As an example, the *Securities Act* is specifically designed for the regulation of the securities sector. The procedures introduced with regard to the respondents, as well as this proceeding, were started under the ambit of the *Securities Act* and not under the *Financial and Consumer Services Commission Act*.

24. It is within this context that we must analyze section 190 of the *Securities Act* and section 41 of the *Financial and Consumer Services Commission Act*.

25. Section 41 of the *Financial and Consumer Services Commission Act* is a general provision which applies to the overall legislation on financial and consumer services. It is necessary to properly understand this section in the context of the adoption of a totally new statute under which the general jurisdiction of the new Tribunal to issue an order was certainly meant to extend to all the new regulatory sectors without the Legislature having to amend each of the many statutes that were then coming under the administrative control of a single statute. Section 41, like the statute that prescribes it, is of a generic and universal nature, and its purpose is to secure an effective transition of the decision powers granted to certain entities under the former regime of the *Securities Act* to that of the new *Financial and Consumer Services Tribunal*.

26. Even though the wording of section 41 of the *Financial and Consumer Services Commission Act* is very similar to the wording of section 190 of the *Securities Act*, it must be noted, in light of the words used and as reflected by the French heading of the provision, "**Pouvoir de rendre des ordonnances** . . ." (**Order may be made** . . . in English), that what the new statute was meant to recognize was the general power of the newly established Tribunal to make orders . . . "under" [financial and consumer services] legislation. In light of the creation of a Tribunal to replace a hearing panel of the Securities Commission, it was essential to confirm the jurisdiction of this new Tribunal to make an order regarding all the new regulatory sectors under the regime of the applicable regulatory statute. The section is clear in that it entrenches the Tribunal's general authority to render a decision regardless of a former decision of another entity concerning a permit or registration. The purpose of the section is not to modify the legislative framework of the other statutes; on the contrary, the words of section 41, *"[d]espite the fact that a registration, licence or permit of a person under . . . legislation has expired*", support such a conclusion.

27. The Tribunal acknowledges that section 41 of the *Financial and Consumer Services Commission Act* is modelled on section 190 of the *Securities Act*. However, this does not strengthen the Commission's implicit repeal theory. On the contrary, it is important to note that when the *Financial and Consumer Services Commission Act* was adopted, no other regulatory statute that was considered to be integrated into the new financial and consumer services legislation contained a disposition similar to section 190 of the *Securities Act*. The Tribunal considers this as an important fact. The Legislature was clearly inspired by section 190 of the *Securities Act* when it drafted the new section 41 of the *Financial and Consumer Services Commission Act*. This explains the significant similarities between these provisions. Furthermore, when the *Financial and Consumer Services Commission Act* was adopted, the Legislature specifically repealed section 185 of the *Securities Act* as well as the reference to section 185 that was in section 190. One cannot fail to mention, either, the additional fact that section 190 of the *Securities Act* was amended by the addition of the word "Tribunal" when the new *Financial and Consumer Services Commission Act* was adopted. For all these reasons, the Tribunal finds that if the Legislature had intended to repeal the limitation period found in section

190, it would have done so. The parties have not submitted any evidence, such as the Journals and Debates of the Legislative Assembly, demonstrating an intention to the contrary.

28. Therefore, the Tribunal rejects the Commission's argument that the adoption of section 41 of the *Financial and Consumer Services Commission Act* amounted to an implicit repeal of section 190 of the *Securities Act.* There is no merit, either, to the Commission's argument that the Legislature forgot to repeal section 190 of the *Securities Act* when it enacted the *Financial and Consumer Services Commission Act*. The Legislature clearly had section 190 of the *Securities Act* in mind when it drafted the new section 41 of the *Financial and Consumer Services Commission Act*. All of this supports the intention of the Legislature, whose main purpose, in enacting the *Financial and Consumer Services Commission Act*, was to establish a new Commission integrating the various financial and consumer markets and not to reform the various regulatory sectors, including the securities sector.

29. Section 190 is a stand-alone regime that is an integral part of the *Securities Act*, a statute of a specific and regulatory nature, in force since it was adopted in 2004. In addition to defining the Tribunal's authority to issue certain orders, section 190 also specifies, through a reference to subsections 184(1) and (1.1), the whole range of orders that can be issued notwithstanding the expiry, cancellation or surrender of the registration. Secondly, section 190 sets a time frame for the exercise of the Tribunal's decision-making authority by imposing a two-year limitation period. It is this part of section 190 that is determinative of the issue of the continuance of the Tribunal's jurisdiction over this matter.

B. Limitation period

30. This brings us to the issue of the limitation period set out in section 190, which acts as a restriction of the exercise of the Tribunal's decision-making power.

31. In its arguments, the Commission essentially relies on the claim that the limitation period in section 190 of the *Securities Act* is contrary to the public interest as well as to the purposes of the *Securities Act* in order to justify invalidating this section.

32. The Tribunal totally rejects the Commission's argument that the limitation period in section 190 is contrary to the purposes of the *Securities Act*. It is therefore necessary to provide reasons in support of this.

33. Section 190 of the *Securities Act*, as well as the limitation period that is part of it, came into force on the same date as the *Securities Act*—namely, June 8, 2004. This section was also amended in 2008, c. 22, art. 57, with the repeal of the word "voluntar[il]y", without any change to the limitation period. The limitation period is even reiterated. Finally, the word "Tribunal" was added to section 190 when the new *Financial and Consumer Services Commission Act* was enacted in 2013. Once again, the limitation period was left intact.

34. The case law recognizes that limitation periods are part of securities regulatory regimes and seek three objectives—certainty, preservation of the evidence, and diligence. In the case of proceedings with serious consequences, these objectives ensure fairness to persons who might have to defend against claims that are based on stale evidence. Limitation periods acknowledge that the passage of time "*dims memories and erodes evidence*" (*Canadian Imperial Bank of Commerce v. Green*, [2015] 3 S.C.R. 801, at paras. 57-58). The Tribunal has already found that there is stale evidence in this proceeding (*New Brunswick (Financial and Consumer Services Commission) v. Pierre Emond and Armel Drapeau*, 2016 NBFCST 8).

35. In the application of the "fundamental principles" recognized in section 5 of the *Securities Act*, the Commission itself admits that "*effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act and the regulations by the Commission*". The limitation periods as set out in sections 190 and 192 of the *Securities Act* exist for these purposes.

36. Section 190 of the *Securities Act* is not an anomaly. Rather, section 192 of the same statute also provides a limitation period which imposes on the staff of the Commission a six-year deadline to commence its proceeding aimed at implementing the statute. This proceeding aimed at implementing the statute was commenced within this period. In fact, the Commission does not argue that the limitation period under section 192 is contrary to the purposes of the *Securities Act*.

37. The Commission's claim that several cases that are now before the Tribunal would be affected by a decision upholding the validity of section 190 is indefensible as well. The Tribunal currently has no pending case, except the present one, that would be at issue because of the expiry of the limitation period.

38. The purpose of the limitation periods set out in sections 190 and 192 of the *Securities Act* is to ensure a balance between public interest and the respondent's right to procedural fairness when defending against claims based on stale evidence. In the area of securities, the evidence is often complex; it is therefore important for it to be dealt with as soon as possible. This is the reason why limitation periods are an integral part of the area of securities and the New Brunswick Legislature chose to adopt them in its own legislation.

39. The protection of New Brunswick investors is a matter of public interest which must be maintained in conjunction with the upholding of the rules of procedural fairness and the just and fair conduct of the proceedings undertaken by the Commission in its role of prosecutor. Limitation periods have a justifiable moderating effect on regulatory authority.

40. Although the primary purpose of the *Securities Act* is the protection of the public, it still remains that public interest also requires that regulatory proceedings be conducted as expeditiously as possible so that the decision be rendered on the basis of the best evidence and so as to meet the certainty requirement. The Tribunal has a duty to issue orders in the public interest. It goes without saying that the public interest is not served when a regulatory proceeding lasts nine years without a

resolution, as is the case here. We reiterate that Mr. Emond and Mr. Drapeau have been subjected to interim orders since September 21, 2009. It is precisely to avoid situations such as this that limitation periods are entrenched in the *Securities Act*.

41. In *R. v. Jordan*, 2016 SCC 27, the *Supreme Court of Canada* ruled on the impact of the delay on the fairness of the trial. The Tribunal acknowledges that *Jordan* dealt with a criminal trial. However, in its analysis of the purpose of limitation periods, the Tribunal cannot cast aside the application of the same principles of fairness designed to do justice in the context of an administrative proceeding that results in disciplinary measures having significant consequences on the personal and professional life of the respondents. Although respondents who are subject to the regulatory framework of administrative law do not run the risk of imprisonment, it still remains that just as in the criminal context, a significant delay has similar consequences on the hearing and on the respondents' right to a fair process. The Supreme Court ruled as follows:

> *Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.* (*R. v. Jordan*, 2016 SCC 27, at para. 20)

42. Maintaining the limitation period in section 190 is absolutely in keeping with the public interest and the rules of procedural fairness. It cannot have been the Legislature's intention, in view of the penalties imposed for a violation of the *Securities Act*, that the proceedings brought against alleged offenders continue endlessly.

C. Section 75 of the Financial and Consumer Services Commission Act

43. We still have to analyze Mr. Drapeau's argument that subsection 75(2) of the *Financial and Consumer Services Commission Act* renders inoperative section 41 of the same statute while preserving the integrity of section 190 of the *Securities Act*. Mr. Drapeau argues that subsection 75(2) serves to protect the provisions of the statute as they applied to him immediately before the adoption of the *Financial and Consumer Services Commission Act*, and that, as a result, it renders inoperative section 41 of the new statute. To properly identify the purpose of subsection 75(2), it is important to reproduce section 75 in its entirety:

> **Ongoing hearings and reviews – New Brunswick Securities Commission**
>
> 75(1) After the commencement of this section, a hearing panel of the New Brunswick Securities Commission may deal with and complete a hearing or review that it began before the commencement of this section despite that the Tribunal would deal with and complete the hearing or review if it was begun after the commencement of this section.
>
> 75(2) A hearing or review dealt with and completed by a hearing panel under

subsection (1) shall be dealt with in accordance with the law as it existed immediately before the commencement of this section.

75(3) If a hearing panel completes a hearing or review in accordance with subsection (1), the members of the hearing panel, including a former supplementary member of the New Brunswick Securities Commission referred to in subsection 79(1), shall be compensated in accordance with the law as it existed immediately before the commencement of this section.

75(4) A decision, ruling, order, temporary order or direction made or action taken by a hearing panel in accordance with subsection (1) shall be deemed to be a decision, ruling, order, temporary order or direction or action of the Tribunal**.**

44. Subsection 75(2) must be read in accordance with the purpose of the adoption of the *Financial and Consumer Services Commission Act*, which is to amalgamate the sectors of financial and consumer services into a single administrative entity. As indicated previously, the statute also recognizes the need for an independent decision-making process in these sectors, and it creates the Tribunal for this purpose. Section 75 of the *Financial and Consumer Services Commission Act* is a transitional provision that was necessary to ensure that a hearing panel of the former New Brunswick Securities Commission, to which a matter was referred at the time when the *Financial and Consumer Services Commission Act* was adopted and the Tribunal was created, kept its jurisdiction to complete the hearing. Such a transitional provision is commonly used in the legislative framework to ensure the transition of already-commenced proceedings from one entity to another, as well as the continuance of the repealed statute during the transition period. In fact, subsection 75(2) was used in the present case, during the hearing of a motion by the hearing panel of the former New Brunswick Securities Commission on April 17, 2013, and the decision issued on August 27, 2013, after the creation of the Tribunal. Without subsection 75(2), the hearing panel would not have had the authority to render its decision.

45. Now, although the proceedings introduced against the respondents originated before the *Financial and Consumer Services Commission Act* came into force, the Tribunal is of the view that subsection 75(2) no longer applies to the present proceeding. There is no longer a hearing in progress before the hearing panel of the former Securities Commission, and, therefore, the transition period is over. The Tribunal now has full jurisdiction over this proceeding. That being said, an analysis of section 75 is not very relevant in view of the Tribunal's findings on the application of section 190 of the *Securities Act* and section 41 of the *Financial and Consumer Services Commission Act*.

D. Application of Section 190 to the Respondents

46. Having concluded that section 190 of the *Securities Act* is applicable here, the Tribunal must now determine if it applies both to Mr. Drapeau and to Mr. Emond.

47. The Commission submits that if section 190 applies, it only applies to Mr. Drapeau and not to

Mr. Emond, since the latter was never a registrant within the meaning of the *Securities Act*.

48. The Tribunal is of the view that section 190 is clear and unambiguous and that it applies to both respondents. The interpretation of section 190 is based on its first words. The French version of section 190 begins with the words "*Même si une inscription a expiré ou a été annulée ou que le directeur général a accepté la renonciation à l'inscription d'une personne inscrite, le Tribunal peut rendre une ordonnance . . .*". [In English, "*Notwithstanding that the registration of a registrant has expired or been cancelled or that the Executive Director has accepted the surrender of the registration of a registrant, the Tribunal may make an order . . .*"] The expression "*même si*" is not restrictive and is not a condition precedent to the Tribunal's power to make an order. It is permissive in its application. "Même si" is a conjunctive phrase. Its grammatical and ordinary sense is "even if, even when". This conjunctive phrase is used to indicate that regardless of whether a situation is true or false, the other elements surrounding it remain unchanged (*Nouveau Petit Robert,* 2008; https://www.linternaute.fr/dictionnaire/fr/définition/même-si/). The grammatical and ordinary sense of "notwithstanding" in the English version of section 190 is the same. It means "in spite of the fact that" or "even though" (Oxford Dictionary online; see also the Collins Dictionary online).

49. In this case, the situation that can be true or false is the respondent's registration status. The other element that remains unchanged is the Tribunal's power to make an order within two years after the later of the events set out in paragraphs 190(a) or 190(b). The use of the word "même si" in section 190 gives jurisdiction to the Tribunal to make an order against two types of respondents: those who were never registrants, and those whose registration has expired or been cancelled or surrendered, provided that the decision is made within two years after the later of the events set out in paragraphs 190(a) or 190(b). Therefore, the word "même si" has the effect of including Mr. Emond in the application of section 190.

50. Also, excluding Mr. Emond from the application of section 190 would create an absurdity, the results of which would go against the purpose of the *Securities Act*. The Legislature does not intend to cause absurd consequences such as irrational distinctions or treating respondents differently for inadequate reasons (*Rizzo & Rizzo Shoes Ltd. (Re*), [1998] 1 S.C.R. 27; *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275). Making a distinction between the availability of the limitation period in section 190 on the ground that Mr. Drapeau was a registrant and Mr. Emond was not amounts to offering Mr. Drapeau an additional defence and greater procedural fairness. Such an interpretation is absurd inasmuch as one type of respondent would benefit from a two-year limitation period while another would be unable to avail himself of it with regard to the same allegations of misconduct. The former Securities Commission did not make any distinction between the two respondents when it secured undertakings from them to not trade in securities. Finally, the hearing panel of the Securities Commission did not make any distinction, either, between the respondents when it granted the interim order stipulating that no exemption provided by securities law applied to either Mr. Emond or Mr. Drapeau until further order of the Commission.

51. Limitation periods must apply uniformly to all respondents, since the principles of fairness require that similar proceedings be treated in a similar manner. Moreover, the distinction that is proposed by the Commission is contrary to the purposes of limitation periods, which are to promote certainty, integrity of the evidence, and diligence. The distinction is also contrary to the purposes of the *Securities Act* with regard to the protection of the public interest. It would not be in the public interest to apply different regulatory regimes to respondents based on their registration status. This cannot be the intention of the Legislature. Therefore, section 190 applies to both Mr. Drapeau and Mr. Emond.

52. The Commission also submitted at the September 26, 2018, hearing that the heading of section 190, which reads "Enforcement orders when registration has expired or been cancelled or surrendered", means that this section only applies to a person who was registered before. According to the Tribunal, this argument is without merit. Pursuant to section 16 of the *Interpretation Act*, R.S.N.B. 1973, c. I-13, headings "form no part of an Act or regulation but are inserted for convenience of reference only". However, the Tribunal acknowledges that headings can be used as a tool in the interpretation of a provision (*Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106; *R. v. Lohnes*, [1992] 1 S.C.R. 167; *R. v. Davis*, [1999] 3 S.C.R. 759). The New Brunswick Court of Appeal made the same point (*Allen v. The Law Society of New Brunswick,* 2017 NBCA 32).

53. In *Allen v. The Law Society of New Brunswick,* the Court of Appeal was called to analyze whether or not the heading "Sanctions" expressed the intention that all of the measures listed in subsection 60(1) of the *Law Society Act, 1996*, S.N.B. 1996, c. 89, be considered as sanctions. Following a review of this provision, the Court of Appeal found that this was not the case. Therefore, in *Allen*, the heading was not determinative of the legislative interpretation. The same rationale applies to the heading preceding section 190. Since there is no ambiguity in section 190, it would be inappropriate to use the heading to change the meaning of this section.

54. In conclusion, the requirements of section 190 of the *Securities Act* are met. Paragraph 190(b) applies in the instant case. This proceeding was instigated on June 24, 2010, against Mr. Drapeau and Mr. Emond. Pursuant to paragraph 190(b), an order under subsection 184(1) had to be made before June 24, 2012. Since this was not done, the Tribunal has lost the jurisdiction to do so. As will be explained in part E of these reasons, this means that the Tribunal no longer has jurisdiction to hear the case on its merits.

E. Jurisdiction to order sanctions

55. The Tribunal finds that it does not have the jurisdiction to order sanctions in this proceeding.

56. The Commission argues that even if the Tribunal lost its jurisdiction under s. 190, this applies only to the orders under subsections 184(1) and 184(1.1) of the *Securities Act*. According to the Commission, the Tribunal retains the jurisdiction to proceed with a hearing on the merits and to order the payment of an administrative penalty under section 186 of the *Securities Act*, as well as the payment of

investigation and hearing costs under subsections 44(1) of the *Financial and Consumer Services Commission Act.*

57. Mr. Drapeau submits that the Tribunal cannot order sanctions, since this proceeding is statute-barred under section 190 of the *Securities Act*.

58. Mr. Emond did not submit legal arguments concerning this issue.

59. Subsections 184(1) and 184(1.1) are expressly referred to in the wording of section 190 of the *Securities Act*. The Tribunal's authority to make an order in the public interest comes from section 184. Since the limitation period established in section 190 is expired, it goes without saying that the authority to make a decision in the public interest is lapsed as well. Since the Tribunal can no longer issue orders in the public interest, it can no longer hold a hearing on the merits. Moreover, a determination of the public interest is one of the conditions precedent to the exercise of the Tribunal's power to order the payment of an administrative penalty within the meaning of section 186, and this condition cannot be met without a prior hearing on the merits.

> **Administrative penalty**
>
> 186(1) On the application of the Commission and after conducting a hearing, the Tribunal may order a person to pay an administrative penalty of not more than $750,000 if the Tribunal
>
> (a) determines that the person has contravened or failed to comply with New Brunswick securities law, and
>
> (b) is of the opinion that it is in the public interest to make the order.

60. Section 44 of the *Financial and Consumer Services Commission Act*, on the other hand, supports the Tribunal's jurisdiction to order the payment of investigation and hearing costs.

> **Payment of hearing and investigation costs**
>
> 44(1) After holding a hearing, the Tribunal may order a person whose affairs were the subject of the hearing to pay the fees and expenses prescribed by regulation for the costs of any investigation and the costs related to the hearing that were incurred by or on behalf of the Commission if the Tribunal
>
> (a) is satisfied that the person has not complied with, or is not complying with, financial and consumer services legislation, or
>
> (b) is of the opinion that the person has not acted in the public interest.

61. Again, the words of these provisions must be read according to the modern method of interpretation,

that is, in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of the Legislature. (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27)

62. The Tribunal is of the view that the interpretation proposed by the Commission is incompatible with the purposes of the *Securities Act* and the *Financial and Consumer Services Commission Act*.

63. Subsections 186(1) of the *Securities Act* and 44(1) of the *Financial and Consumer Services Commission Act* include conditions that must be met before the Tribunal can order the payment of an administrative penalty or hearing and investigation costs. Subsection 186(1)(a) requires that the Tribunal, after conducting a hearing, "*determines that the person has contravened or failed to comply with the . . . securities law".* Also, subsection 186(1)(b) requires that the Tribunal, after conducting a hearing, be satisfied that it is in the public interest to order the payment of an administrative penalty. At the same time, paragraph 44(1)(a), which deals with hearing costs, contains similar requirements—namely, that the Tribunal, after holding a hearing, be "*satisfied that the person has not complied with, or is not complying with, financial and consumer services legislation*" or that the person has not acted in the public interest. In any case, the Tribunal cannot reach such conclusions before holding a hearing on the merits, which has never taken place in the instant case. The Tribunal considers this as a condition precedent requiring the Tribunal to hold a hearing on the merits and to make a finding of liability against the respondents before it can order the payment of an administrative penalty or hearing and investigation costs. The Tribunal cannot come to any other conclusion.

64. In our opinion, therefore, section 186 of the *Securities Act* and section 44 of the *Financial and Consumer Services Commission Act* cannot apply in a situation such as this, when a hearing on the merits did not take place and the Tribunal cannot conclude, either, that legislation was violated or that the public interest is at stake. Both the words and the intention are clear. Both subsections 186(1) and s. 44(1) require the Tribunal to make a finding of liability against the respondents before it can order the payment of an administrative penalty or costs. In this way, sections 186 and 44 codify the principle that there cannot be any sanction without a finding of liability (*nulla poena sine lege*). Since a hearing on the merits never took place and the Tribunal no longer has jurisdiction to hold a hearing on the merits given its finding with respect to section 190, the Tribunal is not in a position to find that the respondents failed to comply with the legislation applicable to them. Moreover, there is no evidence that the respondents did not act in the public interest, because this would require a finding of liability. The condition precedent cannot be met, and the Tribunal does not have jurisdiction to order the payment of an administrative penalty or hearing and investigation costs.

VII. CONCLUSION

65. In view of the Tribunal's decision, the interim orders of September 21, 2009, against Armel Drapeau and Pierre Emond are set aside. It would also be desirable that the Commission cancel the undertakings given by Pierre Emond and Armel Drapeau.

66. A stay of proceedings is ordered with regard to both respondents.

DATED this 11th day of January 2019.

Judith Keating, Q.C.

Judith Keating, Q.C.
Chair of the Tribunal

Gerry Legere

Gerry Legere, Panel Member

Mélanie McGrath

Mélanie McGrath, Panel Member