



Citation: *New Brunswick (Financial and Consumer Services Commission) v J.B. Côté et Fils Ltée et al.*, 2021 NBFCST 6

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *PRE-ARRANGED FUNERAL SERVICES ACT*, S.N.B. 2012, c. 109

Docket: CA-002-2020

BETWEEN:

Financial and Consumer Services Commission,

Applicant,

-and-

J.B. Côté et Fils Ltée and André Valcourt,

Respondents.

DECISION

RESTRICTION ON PUBLICATION: This Order has been anonymized to comply with the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6.

PANEL: Mélanie McGrath, Tribunal Chair

DATE OF HEARING: March 19, 2021

WRITTEN REASONS: September 21, 2021

APPEARANCES: Michel Boudreau for the Financial and Consumer Services Commission
Émilie Plourde, Pilote & Plourde, for the respondents

I. DECISION

1. I approve the *Settlement Agreement* signed by the parties as modified by the *Amended Order* provided to the Tribunal on April 12, 2021.

II. OVERVIEW

2. J.B. Côté et Fils Ltée is an authorized funeral provider licensed as such under the *Pre-Arranged Funeral Services Act*, S.N.B. 2012, c 109 (the “Act”). André Valcourt is the authorized manager of J.B. Côté et Fils Ltée, as defined in the Act. He is also the CEO.
3. J.B. Côté et Fils Ltée signed a pre-arranged funeral services contracts with Purchaser 1, Purchaser 2 and Purchaser 3. These Purchasers asked to have the contracts assigned, and J.B. Côté et Fils Ltée refused their requests.
4. The Financial and Consumer Services Commission (the “Commission”) initiated enforcement proceedings against J.B. Côté et Fils Ltée and André Valcourt by filing a *Statement of Allegations* on August 19, 2020. In the *Statement of Allegations*, the Commission alleged that J.B. Côté et Fils Ltée refused to assign pre-arranged funeral contracts with Purchaser 1, Purchaser 2 and Purchaser 3, contrary to subsection 23(1.1) of the Act. It also violated subsection 30.6(1) of the Act by not complying with a directive from the Director of the Consumer Affairs. The Commission alleged that André Valcourt violated section 30.8 of the Act by authorizing, permitting or acquiescing to the non-compliance by J.B. Côté et Fils Ltée with the Act.
5. The parties are requesting the Tribunal to ratify a *Settlement Agreement* signed between them on January 5, 2021, with respect to the allegations described in the *Statement of Allegations*. In the *Settlement Agreement*, the parties are asking the Tribunal to ratify the following sanctions:
 - a. The respondents shall reimburse to the estate of Purchaser 1, on receipt of confirmation from the Canada Revenue Agency or from a chartered accountant, the amount of additional income tax that the estate of Purchaser 1 paid because J.B. Côté et Fils Ltée cancelled the contract instead of assigning it.
 - b. The respondents shall not violate the *Pre-Arranged Funeral Services Act*, L.N.B. 2012, c 109, in particular subsection 23(1.1) of this Act, when a request for assignment is presented by a Purchaser or the Purchaser’s legal representative;
 - c. In compliance with subsection 30.71(1) of the *Pre-Arranged Funeral Services Act* and subsection 44(1) of the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30, the respondents

shall pay \$1,500 as an administrative penalty and investigations costs.

6. The hearing for consideration of the *Settlement Agreement* was held on March 19, 2021. At the hearing, I told the parties that the Tribunal did not seem to have jurisdiction to order the respondents to repay a sum of money directly to the estate of Purchaser 1. I asked the parties to provide me with supporting case law. I also asked the parties whether they could agree on how to distribute the \$1,500 between the administrative penalty and the investigation costs.
7. Following the hearing, the parties agreed that the Tribunal doesn't have jurisdiction to order the respondents to repay a sum of money directly to the estate of Purchaser 1. On April 12, 2021, the parties provided an *Amended Order* to the Tribunal requesting ratification of the following sanctions as part of the settlement between them:
 1. The respondents shall not violate the *Pre-Arranged Funeral Services Act*, L.N.B. 2012, c 109, in particular subsection 23(1.1) of this *Act*, when a request for assignment is presented by a Purchaser or the Purchaser's legal representative;
 2. In compliance with subsection 30.71(1) of the *Pre-Arranged Funeral Services Act* and subsection 44(1) of the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c 30, the respondents shall pay \$1,500 as an administrative penalty.

III. ISSUES

8. In order to determine whether I should approve the *Settlement Agreement* between the parties, I must answer these three questions:
 - a) What is the test for endorsement of a settlement under the *Pre-Arranged Funeral Services Act*?
 - b) Are the sanctions proposed by the settlement within the parameters of what is reasonable?
 - c) Is the proposed settlement in the public interest?

IV. ANALYSIS

A. TEST

9. This is the first time that the Tribunal has been asked to approve a *Settlement Agreement* in a sector other than that of securities. Subsection 30.81(1) of the *Act* states that:

30.81(1) Despite any other provision of this Act or the regulations, an administrative proceeding conducted by the Financial and Consumer Services Commission, the Tribunal or the Director under this Act or the regulations may be disposed of by:

- a) an agreement approved by the Financial and Consumer Services Commission, the Tribunal or the Director, as the case may be;

[...]

30.81(2) An agreement, written undertaking or decision made, accepted or approved under subsection (1) may be enforced in the same manner as a decision made by the Financial and Consumer Services Commission, the Tribunal or the Director under any other provision of this Act or under the regulations.

10. I note that the *Act* is silent as to the test that the Tribunal must apply in deciding whether to approve a Settlement Agreement. In my opinion, case law on the approval of a *Settlement Agreement* under the *Securities Act*, L.N.B. 2004, c S-5.5 (*Securities Act*) is pertinent. In *New Brunswick (Financial and Consumer Services Commission) v Howse*, 2018 NBF CST 2, the Tribunal described as follows the test to be applied so that a *Settlement Agreement* would be approved under subsection 191(1) of the *Securities Act*:

39 In analyzing whether to approve the settlement reached by the parties, we must answer two questions:

a) Are the sanctions proposed by the settlement within the parameters of what is reasonable?

b) Is the proposed settlement in the public interest?

11. I find that subsection 191(1) of the *Securities Act* is basically identical to subsection 30.81(1) of the *Pre-Arranged Funeral Services Act*. I also note that similar clauses are found throughout financial and consumer services legislation.

12. The Tribunal added, in *Howse*, that the purpose of the *Act* should be kept in mind in determining whether a proposed settlement is within the public interest.

41. The dual purpose of the *Securities Act* should be kept in mind in determining whether a proposed settlement is within the public interest. This dual purpose is set out in section 2 of the *Securities Act*, as follows:

a) to provide protection to investors from unfair, improper or fraudulent practice, and

b) to foster fair and efficient capital and derivatives markets and confidence in capital and derivative markets.

13. The *Pre-Arranged Funeral Services Act* does not state a purpose. On the other hand, the purpose of the *Financial and Consumer Services Commission Act* is to “enable the Commission to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors”. This purpose is similar to the two purposes of the *Securities Act*. Moreover, the *Financial and Consumer Services Commission Act* applies to all legislation on financial and consumer services, including the *Securities Act* and the *Pre-Arranged Funeral Services Act*.

14. Given the similar purposes of the statutes and the similarities between the provisions of the *Securities Act* and the *Pre-Arranged Funeral Services Act*, I am of the view that the test stated in *Howse* is applicable to the request for approval of a settlement under the *Pre-Arranged Funeral Services Act*. I would add that it would be desirable that this test be applied to the approval of settlement agreements across financial and consumer services legislation.

15. In my opinion, a hearing panel should also take into account the following when deciding whether or not to approve a *Settlement Agreement*:

- whether the allegations in the *Settlement Agreement* fall within the Tribunal's jurisdiction;
- whether enough evidence is provided in the *Settlement Agreement* to establish the allegations, because the only evidence admissible at a hearing into a settlement is that in the Statement of Facts in the *Settlement Agreement*;
- whether the sanctions proposed in the *Settlement Agreement* fall under the jurisdiction of the Tribunal;
- whether the sanctions called for are neither remedial nor punitive, but rather preventative in nature and prospective in application [*Howse, supra*, para. 44];
- that a *Settlement Agreement* arises out of negotiations between Commission staff and the respondents and therefore significant weight should be given to the agreement reached between parties, given that a balancing of factors and interests has already taken place in reaching that agreement; and
- that settlements serve the public interest by resolving enforcement proceedings quickly, efficiently and with certainty and by avoiding the significant resources that would be committed to a contested proceeding.

B. PROPOSED SANCTIONS

16. In my opinion, the sanctions proposed in the *Settlement Agreement*, as amended by the *Revised Order* provided to the Tribunal on April 12, 2021, are within the parameters of what is reasonable.

17. In *Howse, supra*, the Tribunal listed 10 factors to be analyzed in determining whether sanctions are within the parameters of what is reasonable. I will now analyze these factors.

(i) The Seriousness of the Allegations

18. I conclude that the seriousness of the allegations is at the low end of the scale. Although the respondents violated the *Act* three different times, these violations were based on the mistaken belief that the *Act* did not apply to the contracts signed with Purchaser 1, Purchaser 2 and Purchaser 3.

19. The *Act* stipulates that the provider shall assign the contract at the request of the Purchaser or the Purchaser's legal representative:

23(1.1) A licensed funeral provider shall, at the request of the Purchaser or the Purchaser's legal representative, assign a pre-arranged funeral contract to another licensed funeral provider with notice in writing of the assignment to the financial institution maintaining the account on behalf of the licensed funeral provider making the assignment.

20. In 2004, J.B. Côté et Fils Ltée concluded a pre-arranged funeral contract with Purchaser 1. On July 18, 2019, Purchaser 1 presented a request to assign the pre-arranged funeral services contract. J.B. Côté et Fils Ltée refused to assign the contract and cancelled it instead.
21. J.B. Côté et Fils Ltée told Purchaser 1 that the firm was refusing the assignment because the contract had been concluded before the new *Pre-Arranged Funeral Services Act* came into effect in 2012 and Form 2, the standardized pre-arranged funeral contract, was adopted. The new *Act* and Form 2 stipulate that, when presented with a request to assign the contract by the Purchaser, the provider shall repay to the Purchaser, or pay to the Purchaser's legal representative, all sums held in trust, including capital and interest, after deducting a financial penalty not to exceed \$250.
22. On October 25, 2000, J.B. Côté et Fils Ltée concluded a pre-arranged funeral plan with Purchaser 2. On December 17, 2019, Purchaser 2 presented a request to assign the pre-arranged funeral plan. J.B. Côté et Fils Ltée refused to assign the contract, and on January 21, 2020, it advised the Purchaser that it was going to cancel the contract. J.B. Côté et Fils Ltée based its conduct on the same reasons as were given to Purchaser 1.
23. On October 25, 2000, J.B. Côté et Fils Ltée concluded a pre-arranged funeral plan with Purchaser 3. On December 17, 2019, Purchaser 3 presented a request to assign the pre-arranged funeral plan. J.B. Côté et Fils Ltée refused to assign the contract, and on January 21, 2020, the firm advised Purchaser 3 that it was going to cancel the contract. Again, J.B. Côté et Fils Ltée based its conduct on the same reasons as were given to Purchaser 1 and Purchaser 2.
24. The respondents believed that they were justified in their refusal to assign the contracts because the latter had been signed before the new *Act* and Form 2 came into effect in 2021. This belief was erroneous. Although the *Act* was only adopted in 2012, it was still applicable to the contracts between J.B. Côté et Fils Ltée and Purchaser 1, Purchaser 2 and Purchaser 3.
25. The Director of Consumer Affairs and the staff of the Commission repeatedly directed the respondents to assign the contracts in accordance with subsection 23(1.1) of the *Act*. Between July 2019 and the beginning of May 2020, the respondents resisted the attempts by the Director and the Commission to enforce the *Act*.
26. However, beginning on May 8, 2020, the respondents cooperated with the Commission. On May 8, 2020, J.B. Côté assigned as requested Purchaser 2 and Purchaser 3's contracts. It was no longer possible to assign Purchaser 1's contract because the latter was already deceased.
27. André Valcourt admitted to having violated section 30.8 of the *Act*, which reads as follows:

30.8 If a person other than an individual violates or has not complied with this Act or the regulations, a director or officer of the person who authorized, permitted or acquiesced in the violation or non-compliance shall also be deemed to have violated or not complied with this Act or the regulations, whether or not any proceeding has been commenced against the person under this Act or the regulations or any order has been made against the person under section 30.7.

28. Mr. Valcourt admitted to having authorized, permitted or acquiesced in the violation or non-compliance with subsection 23(1.1) of the *Act* by J.B. Côté.

29. With respect to this factor, it is important to note that Purchasers 2 and 3 have suffered no related negative financial consequences. The estate of Purchaser 1 may possibly suffer negative tax consequences in the future, but they would be minimal, a matter of a few hundred dollars.

(ii) The Respondent's Past Conduct

30. The *Settlement Agreement* does not mention any history.

(iii) The Respondent's Experience and Level of Activity in the Pre-arranged Funeral Services Industry

31. I note that the respondents have a high level of experience, that is, at least 20 years of experience in the pre-arranged funeral services industry.

(iv) Recognition of the Seriousness of the Improper Activity

32. The respondents recognize that they violated the *Act*. They admit that their refusal to assign the three contracts constitutes violations of subsection 23(1.1) of the *Act*. Finally, as an officer of J.B. Côté et Fils Ltée, André Valcourt admits to having violated section 30.8 of the *Act*; authorized, permitted or acquiesced in the violation or non-compliance with the *Act* by J.B. Côté et Fils Ltée.

(v) Benefit Received as a Result of the Improper Activity

33. The respondents did not receive any benefit from contravening the *Act*. Cancelling a contract gives no direct tax advantage to the respondents compared to assigning the same contract.

(vi) The Risk to New Brunswickers

34. The risk to New Brunswickers is low. The respondents provided an undertaking to the Commission on October 19, 2020, to not violate the *Act* and to comply with subsection 23(1.1) of this *Act* when a Purchaser or the legal representative of a Purchaser presents a request for assignment. There is no evidence that the respondents have not respected this undertaking.

35. Also, the *Settlement Agreement* concluded between the parties includes an order prohibiting the respondents from violating subsection 23(1.1) of the *Act* in the future, and this should protect persons who have signed, or will sign, contracts with J.B. Côté et Fils Ltée and request the assignment of their contracts.

(vii) Damage Caused to the Integrity of the Pre-arranged Funeral Services Sector

36. The damage to the pre-arranged funeral services industry is minimal and will be corrected with the approval of the *Settlement Agreement*.

(viii) Deterrence and Education

37. In considering the sanctions in the *Settlement Agreement*, I must analyze whether they constitute appropriate particular and general dissuasive measures. [Howse, para 44] This decision will be made public and published on the website of the Tribunal and on CanLII. Such a measure will have the dissuasive and educational effect desired under this test. Also, the Commission habitually publishes press releases on the approval of settlements by the Tribunal.

(ix) Previous Decisions Made in Similar Circumstances

38. The parties did not present any caselaw relevant to the pre-arranged funeral services industry. However, several decisions by the Ontario Financial Services Tribunal dealing with a breach of the obligation of life insurance agents to provide liability insurance may be of limited assistance. In these proceedings, as is the case here, no individual suffered any harm, and the Ontario Financial Services Tribunal awarded administrative penalties varying from \$1,650 to \$2,200, as shown below:

Decision	Duration of the violation	Administrative penalty
<i>Vasquez v Ontario (Superintendent of Financial Services)</i> , 2017 ONFST 9	18.5 months	\$2,200
<i>Srivastava v Ontario (Superintendent of Financial Services)</i> , 2017 ONFST 11	12.5 months	\$1,650
<i>Khan v Ontario (Superintendent of Financial Services)</i> , 2018 ONFST 3	16 months	\$1,700
<i>Dennis v Ontario (Superintendent of Financial Services)</i> , 2016 ONFST 18	14 months	\$1,700

(x) Mitigating Factors

39. There are several pertinent mitigating factors. I note that after an initial refusal to comply with the *Act*, the respondents subsequently cooperated with the Director and staff of the Commission. The respondents finally assigned the contracts of Purchaser 2 and Purchaser 3. Also, the respondents' continuing cooperation led to the signature of the *Settlement Agreement*.

40. I also note that the respondents did not receive any monetary or other benefit from violating the *Act*.

41. Moreover, Purchaser 2 and Purchaser 3 have not suffered any negative tax consequences. The estate of Purchaser 1 has not yet suffered any negative tax consequences, although there could be tax consequences amounting to a few hundred dollars in the future. J.B. Côté et Fils Ltée has provided an undertaking to repay, on receipt of confirmation from the Canada Revenue Agency or from a chartered accountant, the amount of any additional income tax that the estate of Purchaser 1 will have to pay because the contract was cancelled instead of being assigned.

42. J.B. Côté et Fils Ltée also provided an undertaking to the Commission to comply with subsection 23(1.1) of the *Act* when a request to assign a pre-arranged funeral services contract is presented by a Purchaser or the Purchaser's legal representative.

C. PUBLIC INTEREST

43. In order to determine whether it is in the public interest to approve the settlement, I analyzed the factors laid out in *Howse* and determined that the sanctions called for in the *Settlement Agreement* are within the parameters of what is reasonable for the circumstances of the case. I would add that the infractions of the *Act* in this case are at the lower end of the scale of seriousness and that the Purchasers have not, as of this date, suffered any monetary or tax consequences.
44. In my opinion, the sanctions will have an important effect of dissuasion on the respondents and on the industry in general. The *Settlement Agreement*, along with the undertaking by J.B. Côté et Fils Ltée to reimburse the estate of Purchaser 1 for any tax consequences caused by the cancellation of the contract, hold the respondents responsible for their actions and foster the purposes of financial and consumer services legislation.
45. For these reasons, I find that the *Settlement Agreement*, as amended by the *Amended Order* of April 12, 2021, serve the public interest.

V. ORDER

46. In conformity with the agreement between the parties, I hereby order that:
- a) The *Settlement Agreement* concluded between the parties and amended by the *Revised Order* of April 12, 2021, is approved under section 30.81 of the *Pre-Arranged Funeral Services Act*;
 - b) The respondents shall not violate the *Pre-Arranged Funeral Services Act*, in particular subsection 23(1.1) of this *Act*, when a request for assignment is presented by a Purchaser or the Purchaser's legal representative;
 - c) Pursuant to subsection 30.71(1) of the *Pre-Arranged Funeral Services Act* and subsection 44(1) of the *Financial and Consumer Services Commission Act*, the respondents shall pay an administrative penalty of \$1,500.

DATED this 21st day of September 2021.

Mélanie McGrath

Mélanie McGrath, Tribunal Chair