
Citation: *New Brunswick (Financial and Consumer Services Commission) v. Howse*, 2018 NBFCST 2

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: 2018-02-02
Docket: SE-003-2017

BETWEEN:

Financial and Consumer Services Commission,

Applicant,

-and-

Ronald Allen Howse,

Respondent.

DECISION AND ORDER

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: Judith Keating, Q.C., Tribunal Chair
Raoul Boudreau, Tribunal Member

DATE OF HEARING: November 23, 2017 and subsequent hearing in writing

WRITTEN REASONS: February 2, 2018

I. OVERVIEW

1. This matter was commenced by the filing of a Statement of Allegations against Ronald Allen Howse by the Financial and Consumer Services Commission (the "Commission") on August 22, 2017 alleging various breaches of the *Securities Act*, S.N.B. 2004, c. S-5.5 (the "*Securities Act*").
2. The parties filed a Settlement Agreement on September 22, 2017.
3. A Panel of the Tribunal conducted a hearing on November 22, 2017 to consider the proposed settlement. After hearing oral submissions from the parties at the hearing, the Panel requested that the parties revise the Settlement Agreement to include the additional agreed upon facts that were presented orally at the hearing.
4. The parties filed a revised Settlement Agreement on January 2, 2018.
5. The Panel conducted a hearing in writing in relation to this revised Settlement Agreement.
6. For the reasons that follow, the Panel approves the settlement reached between the parties.

II. FACTS

7. In 2013, Mr. Howse planned to enter the seafood processing industry to process low-value fish and green crab for export to Asian markets. He began developing a business plan with assistance from government and a local development agency.
8. Although Mr. Howse possesses a Masters of Business Administration and had been involved with several start-up ventures starting in the late 1990s, he had no experience in the seafood processing industry.
9. In 2013 and 2014, Mr. Howse incorporated three New Brunswick companies to enter the seafood processing industry: Tidalwater Seafood Company Ltd, Tidal Bio-Technology Ltd. and From the Sea to You Ltd. (collectively "the business"). He also incorporated a Delaware corporation called From the Sea to You Inc.
10. Mr. Howse was an officer, director and controlling mind of the four companies.
11. No prospectuses were filed with the Executive Director of Securities on behalf of the companies.
12. The business operations of the four companies were conducted out of a commercial building located in the City of Fredericton, Province of New Brunswick.
13. The business employed six to eight individuals. Of these individuals, only one was paid a weekly salary, while the remainder tracked their time with the intent of being compensated once the business became profitable. Two of these individuals were advanced small sums of money on the basis of need.
14. Mr. Howse spent considerable time on business travel with the intent of securing business relationships with government ministerial staff, suppliers, fishermen and fish processors, all required to enter the seafood processing industry. This included travel ranging from overnight

trips to several weeks within New Brunswick, to Nova Scotia, to Manitoba, to Toronto and to the State of Maine.

15. In late 2013 and early 2014, Mr. Howse began negotiations for the construction of a fish processing facility. These negotiations ultimately proved unsuccessful.
16. In 2014, the business focused its attention on the establishment of a green crab processing facility in the State of Maine. This also proved ill-fated.
17. The companies failed to file annual returns in 2014 and 2015 and were dissolved in the latter part of 2016. The companies are presently defunct and there is no intention to revive the companies. The corporate bank accounts were relinquished in an overdraft status.

The Solicitations

18. Mr. Howse solicited three New Brunswick investors and a Nova Scotia couple to purchase shares in the various corporations.
19. New Brunswick Investor #1 was an acquaintance of Mr. Howse. She invested \$30,000 in shares of Tidalwater Seafood Company Ltd. pursuant to three separate subscription agreements, with each transaction involving 100 shares at \$100 per share.
20. In soliciting the investment from New Brunswick Investor #1, Mr. Howse represented that the value of her shares would increase after the completion of an agreement to construct a processing facility, although this construction had only been the subject of very preliminary discussions.
21. Although Tidalwater Seafood Company Ltd. did not provide share certificates to Investor #1, these were eventually provided as part of the investigation conducted by the Commission.
22. New Brunswick Investor #1 joined the business after making her first investment and worked to revise business plans for the business, as a general business analyst, a receptionist and driver for Mr. Howse. She kept her hours with the intention of being paid once the business became profitable.
23. New Brunswick Investor #2 was the parent of an employee of the business.
24. New Brunswick Investor #2 invested \$10,000 in shares of Tidalwater Seafood Company Ltd. in late 2013. She did not receive any share certificates in respect of this investment.
25. In soliciting the investments from New Brunswick Investor #1 and New Brunswick Investor #2, Mr. Howse represented that their investments in Tidalwater Seafood Company Ltd. would qualify for the New Brunswick Small Business Investor Tax Credit. However, Mr. Howse had taken no significant steps to qualify the corporation for the tax credit other than obtaining the application forms.
26. New Brunswick Investor #3 is a research scientist. He signed an employment agreement on February 11, 2014 to start work at the business. The employment agreement specified a start

date of May 15, 2014.

27. On February 15, 2014, New Brunswick Investor #3 invested \$10,000 in shares of Tidalwater Seafood Company Ltd. He received a form of subscription agreement, but did not receive any share certificates in respect of his investment.
28. New Brunswick Investor #3 made a second investment of \$5,000 in April of 2014 in relation to Tidal Bio-Technology Ltd. and From the Sea to You Ltd.
29. Nova Scotia Investors #1 and #2 are married. The husband was a consultant to the business on green crab. Mr. Howse solicited him to join the business, but he was unable to provide him with a satisfactory compensation package.
30. Nova Scotia Investors #1 and #2 invested \$10,000 in shares of Tidalwater Seafood Company Ltd. in January of 2014. They did not receive any share certificates in respect of this investment.

Use of the Investment Monies

31. The \$65,000 invested in the business by the investors was used for legitimate business expenses such as:
 - a) the establishment and operation of the business' Fredericton office including furniture, computers and cell phones at a cost of approximately \$15,000;
 - b) the monthly rent of the Fredericton office of approximately \$1,700;
 - c) the weekly salary of \$800 of an employee;
 - d) legal fees of approximately \$10,000;
 - e) other professional fees of approximately \$2,000; and
 - f) business travel of approximately \$20,000.
34. Mr. Howse did not receive any monies personally. He did not misappropriate funds or use them to his own benefit.
35. The investments monies are a total loss to the investors as the companies are defunct.
36. Mr. Howse is currently without employment and his income consists of Canada Pension Plan and Old Age Security pensions.

Breach of Securities Law and Proposed Settlement

37. On September 24, 2014, Mr. Howse executed an undertaking not to trade in or solicit the sales of securities to New Brunswick residents.
38. In the Settlement Agreement filed with the Tribunal on September 22, 2017 and the revised Settlement Agreement filed on January 2, 2018, Mr. Howse admits to the following breaches of the *Securities Act*:
 - a) contravening subsection 71(1) of the *Securities Act* by trading in shares of his companies without a prospectus or valid exemption from the prospectus requirement;

- b) contravening subsection 58(4) of the *Securities Act* by making misleading statements to New Brunswick Investor #1 and Investor #2 that their investments would qualify for the New Brunswick Small Business Investor Tax Credit, when Mr. Howse had not taken any significant steps to qualify the corporation for the tax credit; and
- c) contravening subsection 58(2) of the *Securities Act* by making a representation to New Brunswick Investor #1 that the value of her shares would increase significantly after the completion of an agreement to construct a processing facility, which at the time had only been subject to very preliminary discussions.

38. The Settlement Agreement proposes the following sanctions:

- a) A cease-trade order from trading in all securities and derivatives for a period of 10 years, except that Mr. Howse may trade in securities and derivatives in and for his own account through a registered securities dealer;
- b) That exemptions under New Brunswick securities law do not apply to Mr. Howse for a period of 10 years; and
- c) That Mr. Howse be prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager for a period of 10 years.

II. ISSUES

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?

III. ANALYSIS

40. The Panel is of the opinion that the proposed sanctions are within the parameters of what is reasonable and that it is in the public interest to approve the proposed settlement.

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

42. Subsection 191(1) of the *Securities Act* sets out the Tribunal's authority to dispose of an

enforcement proceeding by approving a Settlement Agreement. That subsection states:

191(1) Notwithstanding any other provision of this Act or the regulations, an administrative proceeding conducted by the Commission, the Tribunal or the Executive Director under this Act or the regulations may be disposed of by

(a) an agreement approved by the Commission, the Tribunal or the Executive Director, as the case may be [...]

191(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 Commission, the Tribunal or the Executive Director under any other provision of this Act or under the regulations.

43. Subsection 191(2) is a reference to section 184 of the *Securities Act*, which sets out the Tribunal's authority to make public interest orders and order sanctions in enforcement proceedings. Thus, in approving proposed sanctions in a settlement, the Tribunal must remain within the confines of section 184. The relevant portions of subsection 184(1) for this proceedings are:

184(1) On the application of the Commission, the Tribunal, if in its opinion it is in the public interest to do so, may make one or more of the following orders [...]

(c) an order that

(i) trading in or purchasing cease in respect of any securities, derivatives, class of securities or class of derivatives, or [...]

(d) an order that any exemptions contained in New Brunswick securities law do not apply to a person permanently or for such period as is specified in the order; [...]

(j) an order that a person is prohibited from disseminating to the public, or authorizing the dissemination to the public of, any information or material of any kind that is described in the order.

44. In considering the purpose of securities law, the Supreme Court of Canada found in the case of *Cartaway Resources Corp. (Re)*, [2004]1 SCR 672, 2004 SCC 26 (CanLI) as follows:

"Public interest" is not defined in the Act. This Court considered the scope of a securities commission's public interest jurisdiction in *Asbestos, supra*. At issue in *Asbestos* was the Ontario Securities Commission's jurisdiction to intervene in Ontario's capital markets, for purposes of protection and prevention, if it is in the public interest to do so pursuant to s. 127(1) of the *Securities Act*, R.S.O. 1990, c. 5.5. This Court held that the discretion to act in the public interest is not unlimited. In exercising its discretion the Commission should consider "the protection of investors and the efficiency of, and public confidence in, capital markets generally" (*Asbestos, supra*, at para. 45). Because s. 127 is regulatory, its sanctions are not remedial or punitive, but rather are preventative in nature and prospective in application. As a

result, this Court held that s. 127 could not be used to redress misconduct alleged to have caused harm to private parties or individuals: *Asbestos, supra*, at paras. 41-45. It should be observed that our Court was not considering the function of general deterrence in the exercise of the jurisdiction of a securities commission to impose fines and administrative penalties nor denying that general deterrence might play a role in this respect.

45. Part 9 of Local Rule 15-501 *Proceedings before the Tribunal* deals with the settlement of an enforcement proceeding. Paragraph 9(3) stipulates that a settlement has no legal effect unless it is approved by the Tribunal pursuant to subsection 191(1)(a) of the *Securities Act*.

46. In *Park, Re*, dated January 20, 2009, a panel of the former New Brunswick Securities Commission discussed the test applicable to approving a Settlement Agreement. It stated at paragraph 16:

[16] [...] In deciding whether or not to approve a settlement agreement under paragraph 191(a), the Panel must ensure that the sanctions are within the parameters of what is reasonable. As stated in *MCJC Holdings Inc., Re* (2002), 25 O.S.C.B. 1133 at para. 4, the Commission must be satisfied that the sanctions proposed in the Agreement “are proportionately appropriate with respect to the circumstances facing the particular respondents.”

47. *Park, Re* also provides guidance on the factors to consider in deciding on the appropriateness of a proposed settlement. We turn now to our analysis of these factors.

a) The Seriousness of the Allegations Proved

48. We are dealing with a low level violation of securities law. Mr. Howse was not willfully attempting to defraud investors. His illegal conduct results rather from a lack of knowledge of the requirements of securities law.

b) The Respondent’s Past Conduct

49. Mr. Howse has no regulatory history relevant to this matter.

c) The Respondent’s Experience and Level of Activity in the Capital Markets

50. Mr. Howse has no experience in the capital markets. Although he readily admits that he should have known, he did not realize that his actions were in breach of the *Securities Act*.

d) Recognition of the Seriousness of the Improper Activity

51. Mr. Howse accepts responsibility for his conduct. He admits to breaching subsection 58(2), 58(4) and 71(1) of the *Securities Act*.

52. Mr. Howse admits that he ought to have known that he lacked the required business, industry and technical experience to bring his venture to fruition and that soliciting investments in this context exposed the investors to an unreasonable risk of failure; and

e) Benefit Received as a Result of the Improper Activity

53. Mr. Howse did not receive any monies personally; he did not receive a salary in relation to his role in the business. He did not benefit personally from the improper conduct. The money obtained from the investors was used for the legitimate expenses of the business such as the office expenses, salaries, professional fees and business travel.

f) Risk to Investors and Capital Markets

54. The proposed settlement will prohibit Mr. Howse from dealing directly with investors. As such, the proposed settlement will eliminate any risk to investors and to capital markets.

g) Damage Caused to the Integrity of the Capital Markets

55. Mr. Howse's conduct was a result of his inexperience and lack of knowledge rather than fraudulent activity. The business was a start-up business that was mismanaged. In addition, Mr. Howse made careless representations regarding the potential of the business to certain investors. In that regard, his conduct, per se, would not cause the investing public to lose faith in the integrity of the capital markets.

h) Deterrence and Education

56. This decision will be public and posted to the Tribunal's website and to the CanLII website. The reporting of the decision and the sanctions will serve to deter and educate individuals in similar circumstances to the regulatory requirements of securities law when raising capital to fund a private company. In the past, the Commission has on occasion issued press releases in relation to decisions; these press releases also further the objectives of education and deterrence.
57. In terms of general and specific deterrence as discussed in *Cartaway Resources Corp. (Re)*, the proposed sanctions serve the desired effect for the type of conduct in issue. We are not dealing with a willful intent to disregard the law; it is rather a case of ignorance of the law. Mr. Howse was not misappropriating the funds or using them for his own benefit. Mr. Howse has no previous regulatory history.

i) Previous Decisions Made in Similar Circumstances

58. The parties were unable to find caselaw depicting similar circumstances.
59. This matter has therefore been approached on the basis of remedial action required to prevent a similar situation from occurring.

j) Mitigating Factors

60. There are several mitigating factors which must be weighed in determining whether the proposed settlement is in the public interest. These include:
- Mr. Howse did not personally benefit from the investments; there is no element of greed;
 - Mr. Howse showed remorse for his illegal conduct, by admitting that he exposed investors to an unreasonable risk of failure and by acknowledging the harm to the five investors caused by his actions;

- Mr. Howse cooperated with enforcement staff of the Commission;
- Mr. Howse signed an undertaking on September 24, 2014 not to trade in or solicit the sale of securities to New Brunswick residents;
- Mr. Howse has no ability to pay an administrative penalty. He and his spouse live on CPP and OAS pensions and live month-to-month with no surplus income. They do not own neither a house nor an automobile and have no reasonable prospect of paying an administrative penalty;
- As the investments were made in the corporations, which are now defunct, there is no money for disgorgement to the investors; and
- The investors were not pure speculators but were involved with the business in some capacity, either before or after their purchase of shares.

61. The Panel agrees with the rationale of the Alberta Court of Appeal in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 that:

[165] Monetary penalties are most often imposed in the criminal or regulatory context. While the analogy is not exact, there are overlapping considerations. One purpose of fines, at least, is to remove the profit from offences. That sort of penalty must be large enough so that it does not simply become a “licencing fee” for the offence. General deterrence is also a legitimate consideration, but at some point the monetary penalty must be proportionate to the circumstances of the individual offender: *R v. Tracy* (1992), 12 BCAC 150, 71 CCC (3d) 329. As was said in *Magna Carta*:

20. For a trivial offence, a freeman shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood...

62. After review of the evidence, the Panel agrees with the parties that imposing an administrative penalty on Mr. Howse would not be in the public interest as it would effectively deprive him of his livelihood.

IV. DECISION AND ORDER

63. The Panel finds that it is in the public interest to approve the Settlement Agreement as both the proposed settlement and sanctions agreed to by the parties are within reasonable parameters, taking into consideration the whole of the circumstances. The proposed settlement and sanctions will further provide for the making of an appropriate protective and preventative order, as well as appropriate specific and general deterrence.

64. However, the Panel is of the view that the calculation of time for the proposed sanctions should take into account the undertaking given and respected by Mr. Howse on September 24, 2014 not to trade in or solicit the sales of securities to New Brunswick residents.

65. The Panel hereby orders that:

- a) The settlement reached between the parties, as set out in the Settlement Agreement filed on January 10, 2018, is approved pursuant to paragraph 191(1)(a) of the *Securities Act*;
- b) Pursuant to clause 184(1)(c)(ii)(A) of the *Securities Act*, Ronald Allen Howse shall cease trading in all securities and derivatives, directly or through any agent, for a period of 10 years ending on September 24, 2024, except that he may trade in securities and derivatives in and for his own account through a registered securities dealer;
- c) Pursuant to paragraph 184(1)(d) of the *Securities Act*, exemptions under New Brunswick securities law do not apply to Ronald Allen Howse for a period of 10 years, ending on September 24, 2024;
- d) Pursuant to paragraph 184(1)(i) of the *Securities Act*, Ronald Allen Howse is prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager for a period of 10 years, ending on September 24, 2024; and
- e) There will be no costs in this matter.

DATED at the City of Saint John this 2nd day of February, 2018.

Judith Keating, Q.C.

Judith Keating, Q.C. Tribunal Chair

Raoul Boudreau

Raoul Boudreau, Tribunal Member