IN THE MATTER OF THE *SECURITIES ACT*
R.S.N.S. 1989, CHAPTER 418, as amended

- and -

IN THE MATTER OF ELECTRONIC BENEFITS INC.,
EVERETT R. STUCKLESS, and
ADVANTAGE FINANCIAL GROUP INC.

(collectively the "**Respondents**")

REASONS FOR DECISION

Commission Panel:	Mr. R. Daren Baxter, Vice-Chairman
Representing the Respondents:	Mr. Richard Melanson
Counsel for Staff of the Commission:	Ms. Heidi Schedler
Date Heard:	March 13, July 28, and October 26, 2006
Place Heard:	Halifax, Nova Scotia
Date of Decision:	March 12, 2008

Introduction

Upon the *ex parte* application of Staff of the Commission ("**Staff**") the Nova Scotia Securities Commission (the "**Commission**") issued a temporary cease trade order against the Respondents on March 8, 2006.

In the Statement of Allegations, dated Mach 9, 2006, Staff allege that the Respondents have engaged in the trading and distribution of securities in Nova Scotia contrary to sections 31 and 58 of the *Securities Act* of Nova Scotia (the "**Act**"). In particular, Staff allege that in 2005 Mr. Everett R. Stuckless ("**Mr. Stuckless**"), on behalf of Electronic Benefits Inc. ("**EBI**"), distributed approximately eight hundred letters via e-mail and regular mail to residents of Nova Scotia and other provinces of Canada for the purpose of soliciting potential investors of EBI. That letter offered potential investors a guaranteed return on investment of 8.5% with a minimum investment of $2000 over 90 days. None of the Respondents are registered with the Commission in any capacity and the Respondents did not file a preliminary prospectus or final prospectus, nor has the Commission issued a receipt for a preliminary or final prospectus.

Staff seeks an order that the Respondents:

1. Cease trading in all classes of securities in the Nova Scotia, pursuant to section 134(1) of the Act;
2. Pay an administrative penalty of $10,000, pursuant to section 135 of the Act; and
3. Pay costs in respect fo the investigation and hearing of this matter, pursuant to section 135A of the Act.

A hearing was commenced on March 13, 2006 to determine the status of the temporary cease trade order and Mr. Stuckless represented himself and the corporate Respondents. Following the introduction of evidence by Staff, Mr. Stuckless' motioned for an adjourned to afford the Respondents the opportunity to retain counsel. That motion was granted and the temporary cease trade order against the Respondents extended until a final determination is made.

The Respondents retained Mr. Richard Melanson to represent them and a hearing was reconvened on July 28, 2006. Mr. Stuckless was unable to be in attendance at that time due to a medical condition and an adjournment was granted. The hearing continued on October 26, 2006.

At the October 26, 2006 hearing Mr. Melanson acknowledged that some letters and e-mails soliciting investment were sent out and that, in this respect, EBI violated the Act. He agreed that EBI should be held responsible. He argued that Mr. Stuckless did not authorize the sending of the letters or e-mails and, as such, neither Mr. Stuckless nor Advantage Financial Group Inc. ("**Advantage**") bear any responsibility. Ms. Heider Shedler, on behalf of Staff, argued that Mr. Stuckless' evidence is not credible and that all Respondents are to be held responsible for the illegal solicitation of investments.

At my request, subsequent to the October 26th hearing further submissions were made in writing by counsel as to the standard a director is to be held for the actions of employees.

Issues

1. Whether Mr. Stuckless is to be held personally responsible for the solicitation of investments by the letters and e-mails;
2. Whether the corporate respondent, Advantage, is to be held responsible for the solicitation of investments by the letters and e-mails;
3. If so, in either case, whether the temporary cease trade order should be made permanent;
4. If so, in either case, whether an administrative penalty is appropriate and, if so, in what amount;
5. If so, in either case, whether an order to pay costs is appropriate and, if so, in what amount

Evidence

Letters

Staff introduced evidence that in December 2005 a few residents of Nova Scotia received letters written on the letterhead of "EBI Electronic Benefits Incorporated", the body of which reads as follows:

> "*Please let us introduce ourselves...*
>
> *Welcome to EBI, Electronic Benefits Incorporated. We are a brand new company offering a brand new and innovative In-House Claims Adjudication Software. There is only one other software for in-house claims management in all of Canada. EBI Staff and Management think our software is more detailed and advanced than our competition.*
>
> *The expected revenue in the first year of operation is $2.9 million with an expected revenue after five years of over $5 million. There is an guaranteed return on investment of 8.5% with a minimum investment of $2000 over 90 days which is, backed by EBI, Everett R. Stuckless and EBI's parent company Advantage Financial Group Inc.*
>
> *A Business Plan is available upon request. So please, take advantage of this incredible opportunity and call us today at the numbers listed above or return your cheque with the enclosed form.*
>
> *Sincerely,*
>
> *Everett R. Stuckless, BA, Bed, MBA*
> *President/CEO*"

It appears from the evidence that these letters were not signed.

Evidence of Lianne Bradshaw

Ms. Lianne Bradshaw, an investigator with the Commission, gave evidence at both the March 13, 2006 and the October 26, 2006 hearings with respect to Staff's investigation. She said she first contacted Mr. Stuckless by telephone on December 20, 2005 to discuss the above letter (the "**Letter**"). She told Mr. Stuckless that she was conducting an investigation as the sending of the Letter may be a violation of Nova Scotia securities laws. During that conversation Mr. Stuckless told her that the Letter was sent to approximately 800 or 900 clients of Advantage.

Ms. Bradshaw met with Mr. Stuckless on January 5, 2006 and a transcript of the recorded interview was entered into evidence. At that interview Mr. Stuckless said that subsequent to his telephone conversation with Ms. Bradshaw he checked his office and discovered that the letters were still there. At page 6 of the transcript he said he thought the letters were gone out, but then discovered they were held back for his signature. Mr. Stuckless said that it was his intention to sign the 800 letters. He states at page 52 of the transcript that when an employee, Shannon, showed him the Letter "to send out" he said "Okay, fine", but Shannon went off with pneumonia and the letters ended up sitting in the mail room. At page 8 of the transcript he confirmed it was his intention to send the letters, and on page 53 Mr. Stuckless said if it were not for communication from the Commission the letters probably would have gone. He estimated that only 4 or 5 unsigned copies of the letter were sent out to Nova Scotia residents and five or six to Prince Edward Island.

At the interview with Ms. Bradshaw, Mr. Stuckless' comments indicate that he did not understand that soliciting a loan was a furtherance of a trade regulated by the Act. He seemed to be of the impression that the use of the word "investment" in the Letter was the problem and explained many times that he was not offering ownership in the company or an investment, but simply asking for a loan.

Mr. Stuckless advised Ms. Bradshaw during the interview the earlier on he considered taking EBI "public" and contacted the Commission to determine what would be involved. He later abandoned this idea and decided to keep the company "private".

Ms. Bradshaw gave evidence that none of the Respondents are registered under the Act and that no prospectus or preliminary prospectus was filed with the Commission by EBI. She indicated that Mr. Stuckless was registered with the Superintendent of Insurance.

E-Mails

Staff introduced into evidence two e-mails, one received by an individual in Prince Edward Island, Mr. Patrick McCarthy, on February 15, 2006, and the other received by an individual in Nova Scotia, Mr. Allan Bryden, on February 17, 2006. Both e-mails are indicated to be from "Everett R. Stuckless [mailto:estuckless1@eastlink.ca]" to "estuckless@afgclaims.com" with the subject "short term loan for EBI". The body of each e-mail (the "**E-Mail**") reads as follows:

"*Hi There:*

EBI is raising $100,000 for a short term commitment (Electronic Benefits Incorporated). www.ebisoftware.com. The interest EBI will pay on this short term loan is 7%.

I will personally guaranteed your loan 100% and Advantage Financial Group Inc. the parent company will also. www.afgclaims.com

We are not offering any shares in EBI at this time however if someone is interested we can open discussions and when EBI goes public in the near future, we will forward the information needed straight away.

We only require these funds for 90 days, (a short term) while a lenders funds are being forwarded to us.

Please feel free to call me or ask for details by return e-mail.

Everett R. Stuckless, BA, Bed, MBA
President/CEO"

Evidence of Alan Julien

Mr. Alan Julien gave evidence at the October 26, 2006 hearing that he is a member of the Eastern Shore Fishermen's Protection Association, which association had a group benefits plan with Advantage. Mr. Julien received a Letter addressed to him in the mail sometime between December 2005 and February 2006. The Letter he received was not signed. Mr. Julien said that he did not receive any e-mails from Mr. Stuckless.

Evidence of Shelly Diana Hunt

Ms. Shelly Diana Hunt gave evidence at the March 13, 2006 hearing. She was employed as the office administrator of Advantage from August 2004 until January 6, 2006. She was familiar with the Letter. Also introduced as evidence is her written statement given to Staff on January 16, 2006 which, with one exception, is consistent with her verbal evidence. In her written statement Ms. Hunt said that Mr. Stuckless assisted with stuffing the Letters into envelops, but in cross examination she said that Mr. Stuckless did not assist in stuffing the Letters.

Ms. Hunt said that Mr. Stuckless dictated a letter to another employee, Ms. Shannon Helm, in early December, 2005, and Ms. Helm provided the letter to Mr. Stuckless who made changes. Ms. Helm went home sick before the Letter was finalized, and did not return to the office. Apparently she accepted employment elsewhere.

Ms. Hunt was not in the office the day the letter was dictated, but became aware of the letter the following day from Ms. Helm, who advised that Mr. Stuckless dictated it. The letter was addressed to persons in Advantage's client database. After Ms. Helm went home sick, Ms. Hunt started folding the printed letters in preparation for mailing when Mr. Stuckless discovered a mistake. Mr. Stuckless asked Ms. Hunt to make certain changes to the draft letter. In particular, the letter read "There is a return on investment with 8.5% percent minimum

investment of $2,000 for 90 days which is guaranteed by EBI." Ms. Hunt said Mr. Stuckless instructed her to change "guaranteed" to "backed" and to move "guaranteed" to earlier in the sentence. Ms. Hunt made the requested changes and reprinted the revised letter. This is the Letter referenced above.

Ms. Hunt said that she and another employee, Mr. Reg Lawrence, stuffed the Letter in envelopes over a 4 day period, and that Mr. Stuckless assisted in putting postage on the envelops containing the Letters.

Ms. Hunt estimates that there were seven boxes of Letters prepared, close to 700 in total. Ms. Hunt mailed two boxes of the Letters on her way home from work in the second week of December, 2005, and she saw the mail lady pick up other Letters from the office for mailing.

Ms. Hunt also saw Mr. Stuckless leave the office with boxes of Letters and assumed that he mailed those Letters. But she did not see him post the Letters. To her knowledge those Letters did not return to the office with Mr. Stuckless. About ten Letters were returned due to incorrect address, and about five people called to complain about the Letter.

In her statement, Ms. Hunt said that mailing of the Letters was a priority in the office under Mr. Stuckless's direction.

Ms. Hunt stated that throughout the time she worked for Advantage there were only four or five other employees there. She also said that there was a shredding system in the office.

Evidence of Greg Lavern

Mr. Lavern gave evidence at the October 26, 2007 hearing. He worked for EBI and was on a two day business trip with Mr. Stuckless to Prince Edward Island. While with Mr. Lavern, Mr. Stuckless received a phone call. Mr. Lavern heard Mr. Stuckless' side of the telephone conversation and gathered that Mr. Stuckless was speaking with Ms. Helm who suggested that a letter be sent to Advantage's clients. Mr. Stuckless instructed Ms. Helm to draft a letter for his review.

Mr. Lavern returned to the Bedford office with Mr. Stuckless. There were two staff in the office, Ms. Hunt and "Reg" (presumably Mr. Lawrence), who were doing something with letters. Mr. Lavern did not see the letters. Mr. Lavern heard Mr. Stuckless inform Ms. Hunt not to send the letters as he wanted to look at them and have an opportunity to revise if need be.

Evidence of Everett Roger Stuckless

The Respondent, Mr. Stuckless, gave evidence at the October 26, 2006 hearing. He confirmed that he is the President and director of both Advantage and EBI. Advantage conducts claims adjudication for health and dental insurance, and also brokers life insurance.

Mr. Stuckless said that while travelling to Prince Edward Island for a meeting with ACOA officials he received a telephone call from his office manager, Ms. Helm. She said that a large number of their clients were fishermen who seem to be always looking for investments and suggested that a letter be sent to them inviting them to lend money while ACOA money was

being sought. Mr. Stuckless liked this idea and instructed her to draft a letter for his review. While in Prince Edward Island Mr. Stuckless drafted a synopsis of what he thought the letter would be and e-mailed it from his laptop to Ms. Helm who sat at the main computer in his office.

Upon returning to his office from his Prince Edward Island trip, Mr. Stuckless saw Ms. Helm and Mr. Lawrence stuffing stacks of letters in envelopes. There was probably a couple of thousand letters. He instructed Ms. Helm not to send the letters as he had not yet reviewed them. Upon reviewing the letter he was concerned with the reference to a guarantee and instructed the letters not be sent. He then took the letters home to be composted.

Mr. Stuckless' evidence is that he told Ms. Hunt he wanted the letter revised to remove reference to guarantee and replace it with the word "backed". Mr. Stuckless said:

> "*So from there, things just progressed. It was a very, very busy time for me, absolutely. I was trying to get the office going in PEI, I was trying to get the software up and running, trying to get it to coincide, trying to get the bank loans done....I mean it was just a, you know, it was just a total...at that time, nightmare of activity. And I mean nightmare. I just didn't seem to have the freedom for anything*."

Mr. Stuckless was clear that he was very busy between the time he composted the first batch of letters and the time he received the telephone call from Ms. Bradshaw in late December, 2005. He states he was shocked to hear from Ms. Bradshaw that the Letter was sent. He assumes that Ms. Hunt must have revised the Letter and sent it out without his knowledge.

In his testimony Mr. Stuckless is adamant that he did not authorize the sending of the Letter, and that he did not sign any of the Letters. Mr. Stuckless also denies that he knowingly put postage on envelops containing the Letter. He freely admitted that it was his intention to send a letter, but that he was not comfortable with the wording of the specific letter prepared by Ms. Hunt and that is why he did not authorize sending it. He said a revised draft of the letter was not presented to him for his approval and that he did not know the Letter was sent until the call from Ms. Bradshaw.

After speaking with Ms. Bradshaw and learning of the Letter being received by certain persons, he said he met with Dana Mills, an agent with whom he did some work, to discuss how the letter got sent out to some of her clients. He also checked the office and found a stack of printed letters which he then composted.

It is also Mr. Stuckless' evidence is that he did not send the E-Mail, and that he did not instruct anybody to send the E-Mail. Mr. Stuckless confirmed that the E-Mail is indicated to be from the main computer in his office and that it is addressed to his laptop computer, which he totes all over with him. He has no explanation as to how the E-Mail was received by Patrick McCarthy and Allan Bryden. He does not recall receiving the E-Mail on his laptop, despite regularly checking his e-mail. He did say that he receives "tons" of e-mails every day.

Mr. Stuckless said that staff members had access to the office computer from which the E-Mail was sent. He also said the E-Mail looked like the document he drafted and sent to Ms. Helm during his Prince Edward Island trip.

Mr. Stuckless said that the business plan that was introduced in evidence by staff was not prepared to solicit investment in his company, but rather for the purpose of obtaining conventional, institutional debt financing.

Mr. Stuckless acknowledged receiving a letter from counsel for the TD Bank addressed to EBI and Mr. Stuckless dated September 26, 2006 demanding payment on a loan in arrears.

Mr. Stuckless said that he has a Business Administration degree and a B.Ed. From the University of Manitoba, and a Masters of Business Administration from Phoenix University.

Evidence of Dana Mills

Ms. Mills contradicted Mr. Stuckless' evidence that she met with him to discuss how the Letter went out. She agrees that she met with him, but they discussed a completely different matter, not the Letter.

Analysis of the Evidence

I find that Mr. Stuckless was ignorant of the Act and did not intend to subvert it. However, the evidence is clear that the Letters and the E-Mail were sent and received by certain persons. I must determine what was Mr. Stuckless' participation in the distribution of the Letters and E-mail.

Mr. Stuckless's testimony is that it did not dawn on him that sending a letter to clients of Advantage seeking a loan was a matter regulated by the Commission. He admits that EBI could use the money and that his intentions were to send a letter to the clients of Advantage seeking loans to EBI. He just did not authorize the actual sending of the letter because he was not yet comfortable with the wording of the letter. He believes he told his staff that changes are required and the letter is not to be sent. The fall of 2006 was a very busy time for him, and before he could finalize the letter he received a call from Ms. Bradshaw inquiring about the Letter in question. He did not know that the Letter was mailed until that phone conversation with Ms. Bradshaw.

Mr. Stuckless' evidence is that he did not sign the Letter, he did not personally send any Letters, and that he did not give instructions for either the Letter or E-mail to be sent. He said that instructed the letter not to be sent. He further states that any Letters or E-mails sent where done by his staff without his express approval. Mr. Stuckless testified that he did not know that any were sent until he received the phone call from Ms. Bradshaw.

It is argued by Staff counsel that Mr. Stuckless had fully intended to send the Letters that were introduced into evidence, that he did not tell his staff not to send the Letters, that he knew the Letters were being mailed, and that he personally participated by placing postage on envelops and mailing a stack of Letters. Staff has argued that Mr. Stuckless' evidence is contrary to that of other witness and that he is not credible.

A classic statement of the law in regard to the assessment of credibility is articulated in the judgment of O'Halloran, J.A. in *Faryna* v. *Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) at p. 357:

> *"The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."*

I have borne this guiding principle in mind in determining Mr. Stuckless's credibility.

I observed Mr. Stuckless giving his evidence and I do not think he is a dishonest man. I accept his evidence that although he caused the letters to be prepared he did not intentionally take any overt act to send the Letters or the E-mail. I accept that he intended for the letters not to be sent until he was more comfortable with the wording and that he intended to sign the letters before they were sent.

In reaching my finding of credibility I considered that none of the Letters introduced into evidence were signed, and that there is no evidence of large amount of Letters or E-mails being received by the public. The evidence is limited to only a handful of unsigned Letters being received. When Ms. Bradshaw initially contacted Mr. Stuckless he estimated that more than 800 to 900 Letters were sent to all of Advantage's clients. His evidence is that he was shocked to learn that the Letters were sent and simply assumed that they were all sent without his knowledge. At the subsequent interview with Ms. Bradshaw he advised that upon looking into the matter further he determined that only a few Letters were actually sent and that the balance of the printed letters were still in his office. The number of Letters sent was clearly in issue during Staff's investigation. However, there is no evidence of more than a handful of Letters being received. I infer from the lack of evidence to the contrary that only a few Letters were sent. This is in keeping with Mr. Stuckless's testimony.

Staff counsel argued that Mr. Stuckless's evidence is contradictory in that he admitted during his interview with Ms. Bradshaw that he intended to send the Letter but at the hearing he denied he intended to send the Letter. This is not the way I understand the evidence. Mr. Stuckless readily admitted at the hearing that he intended to send a letter, but not the one that was actually sent. I do not find this inconsistent with the transcript of his interview with Ms. Bradshaw.

Staff counsel also argued that Mr. Stuckless contradicted himself as to when the draft letters were composted. During the interview he said they were composted when he returned from PEI, and during his testimony he said they were composted upon receiving the phone call from Ms. Bradshaw. During cross examination and upon my questioning Mr. Stuckless clarified that there were two batches of letters which he composted at separate times. This is not inconsistent with the evidence.

I also accept Mr. Struckless's evidence that before his interview with Ms. Bradshaw he did not know that sending the letter he contemplated would be a violation of the Act. In particular, he did not know that the solicitation of loans from the public was governed by the Act. Upon speaking with Ms. Bradshaw Mr. Stuckless was put on notice that soliciting investments

(including loans) from the public is problematic. In this regard, the E-mail being sent following Mr. Stuckless's interview with Ms. Bradshaw is somewhat troubling. Upon analysing the evidence, however, I accept that Mr. Stuckless did not send the E-mail nor know that it was being sent. Mr. Stuckless did say that when he was in PEI he prepared a first draft of wording for the proposed letter and sent it by e-mail to Ms. Helm (who sat at the office main computer). He says that the E-mail looks like this e-mail he sent to Ms. Helm from PEI. He also said that he receives "tons of e-mails" every day. The E-mail in question was sent from the main office computer and is addressed to his laptop. It is not addressed to Mr. McCarthy or Mr. Bryden, so it must have been "blind copied" to them. I believe that Mr. Stuckless does not recall receiving the E-mail because it was not a memorable event. There was nothing in the E-mail to indicate to him that it was sent to anyone other than him, nor that it was anything more than his draft wording being returned to him. Put this together with how busy Mr. Stuckless was at the time and his receipt of "tons" of e-mails every day, it could have been easily overlooked.

Mr. Stuckless testified that during the relevant time he was very busy. I also find that he was under financial pressure. I assume that he was stressed by his business situation in the fall of 2006.

Unfortunately Mr. Stuckless set in motion the process that led to his staff sending the Letters and E-mails in question. His staff were under the impression that the Letter was a priority and that Mr. Stuckless wanted it sent out to all of Advantage's client list. I find that Mr. Stuckless was careless in this regard and did not take adequate steps to clearly communicate with his staff nor to ensure that the Letter was not sent without his express approval. There is no evidence on how the E-mail was sent, but I conclude this was also a result of Mr. Stuckless's poor communication with his staff.

I find that Mr. Stuckless further failed to inform himself of the laws regulating the seeking of investments from the public of the type he contemplated. It is fortunate that Ms. Bradshaw contacted Mr. Stuckless before he found the time to revise the letter to his satisfaction and send it to Advantage's full client list.

Advantage participated in furtherance of a trade of securities contrary to the Act by providing its client list and using its employees to prepare the Letter.

Fortunately, no one accepted the solicitation to loan monies to EBI and no members of the public have been harmed by the Respondents' violation of the Act.

Responsibility of Mr. Stuckless

Mr. Stuckless is the sole officer and director and was at all material times the directing mind of EBI and Advantage. Mr. Melanson has properly pointed out that unlike in other jurisdictions, the Nova Scotia *Companies Act* does not spell out the standard or care required of a director.

Upon my review of the relevant law I conclude that Mr. Stuckless, as a director, has a duty to act carefully and on an informed basis and to exhibit the diligence and skill that a reasonably

prudent person would exercise in comparable circumstances.[1] Directors are liable for failing to meet this standard if there is evidence that they were not diligent.[2]

In *Soper* v. *Canada*[3], the court made the following observation regarding duties of directors in connection with the due diligence defence available under section 227.1 of the *Income Tax Act*;

> "*It would be silly to pretend that the common law would stand still and permit directors to adhere to a standard of total passivity and irresponsibility….[T]he law today can scarcely be said to embrace the principle that the less a director does or knows or cares, the less likely it is that he or she will be held liable. Further to this point, the statutory standard of care will surely be interpreted and applied in a manner which encourages responsibility.*''

In *Re Standard Trust Co. Ltd.*[4], the Ontario Securities Commission (the "**OSC**") held that officers and directors will be held to a higher standard for purposes of securities law than that found in corporate law generally.

In *Re Slightham*,[5] the British Columbia Securities Commission stated as follows about a director's regulatory obligations:

> *"In summary, though there may be a dearth of case law in Canada on the issue of the duty of care of directors, there is sufficient law from which we care derive certain basic principles. Those principles certainly take us beyond the standards established for English directors in* Re City Equitable Fire Ins. Co. *They impose on directors a duty to put in place adequate systems for management of the company, which would include the flow of information that is necessary to the directors and upon which they will base their decision. Should that information generate concerns or otherwise out the directors on inquiry, they must take the necessary steps to resolve those concerns or initiate the appropriate inquiry. In short, the directors, all the directors, have a duty to ensure that the affairs and business of the company are being properly managed."*

The OSC also discussed the standard of care applicable to directors and officers in the *Banks*[6] decision. In *Banks* the OSC referred to Justice Robertson's decision in *Soper* referring to the actual duty of care expected of inside directors, meaning those involved in the day to day management of the company and who influence the conduct of its business affairs:

> *"For such individuals, it will be a challenge to argue convincingly that, despite their daily role in corporate management, they lacked business acumen to the extent that that factor should overtake the assumption that they did know, or ought to have known, of*

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[1] Directors' Duties in Canada, 3rd ed, Barry Reiter, 2006 CCH Canadian Limited, at page 53

[2] Corporate Governance in Canada, A Guide to the Responsibilities of Corporate Directors in Canada, Fourth Ed. ,September 2005, ed. Shelley Obal and Julie Walsh, Osler Hoskins Harcourt.

[3] [1998] 1 F.C. 124 (C.A.).

[4] (1992), 15 O.S.C.B. 4322

[5] August 2, 1996.

[6] *In the matter of Jack Banks a.k.a Jacques Benquesus*, OSC decision dated April 23, 2003.

both remittance requirements and any problem in this regard. In short, inside directors will face a significant hurdle when arguing that the subjective element of the standard of care should predominate over its objective aspect."

The OSC stated in their decision that the statement quoted above is even more applicable in the *Banks* case where the director is also a chairman of the board, the president and (with his wife) the controlling shareholders of a company with few employees.

The OSC also quoted the Alberta Securities Commission decision in *Re Cartaway Resources Corp.* [7] to support the principle that more is required of a senior officer of the company as follows:

> The CEO will normally be held to a higher standard than the board and the rest of management because the CEO bears direct responsibility for establishing the standards of behaviour and processes of the corporation. The CEO may delegate duties to the rest of management, but the CEO will always remain primarily responsible for overseeing the performance of such duties, especially in junior companies that generally lack documented procedures.

Accordingly, the *Banks* decision supports the proposition that both an objective and subjective standard should be used in determining the directors or officers liability and whether they met the standard of care expected of them for securities law purposes.

Perhaps the leading case on the subject of directors' duties and liabilities is *Peoples Department Stores Inc. (Trustee of)* v. *Wise*[8]. Here the Supreme Court of Canada held directors' duty of care should be tested against an objective standard, but provided that the standard is not perfection. The Court stated as follows:

> "*Directors and officers will not be held to be in breach of the duty of care … if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.*"

Because the standard of care is measured against the objective standard of what a reasonably prudent person would do in comparable circumstances, this requires directors to devote the necessary time and attention to bring their own judgment to bear on the matter and make an informed decision.

Having to be diligent in discharging their duties does not mean that directors will be liable for every error. Rather, they must discharge their duties with the same diligence as a reasonably

[7] (2000), 9 A.S.C.S. 3092 at 3126.

[8] [2004] 3 SCT 461.

prudent person would use in comparable circumstances. Failure to meet the standard often stems from passivity and a failure to inquire. Directors have a responsibility to inquire into and oversee corporate activities.

The objective test provides that directors are not be allowed to escape responsibility on the grounds that their levels of skill, knowledge and ability fell below the norm, nor may directors escape responsibility on the basis of ignorance of matters of which they are reasonably expected to be informed. The subjective element imposes a higher standard on directors who have a particular education, knowledge, skill or experience relevant to the issues at hand.

As the sole officer and director of EBI and Advantage Mr. Stuckless was the operating mind of each entity. He is educated in business and has a Masters in Business Administration. His earlier enquiry with the Commission and his registration with the Superintendent of Insurance demonstrates that he is aware that financial business is regulated in the Province. I find that Mr. Stuckless failed to meet the standard expected of him in these circumstances.

I conclude from the evidence that the fall of 2006 was a busy time for Mr. Stuckless, he was under financial pressure and was stressed. I conclude that Mr. Stuckless was careless in the conduct of the business of EBI and Advantage. In particular, he did not take the proper time to consider the implications of seeking financing from the clients of Avantage. Simply put, Mr. Stuckless was ignorant of the restrictions in the Act in this regard, and did not make any inquiries. As a director of EBI and Advantage it was his duty to inform himself of the laws of this Province with respect to offering investments to the public of the type contemplated. He failed to do so.

Mr. Stuckless also had a duty to adequately supervise the staff of EBI and Advantage. I find he failed to do so. Although I accept that Mr. Stuckless did not intend for the Letters to be sent until he was satisfied with the wording and that he did not knowingly give instructions to send the Letters, his staff thought otherwise. His staff were under the impression that sending the Letter was a priority. This impression was the result of Mr. Stuckless' own actions and words, or lack thereof. He was the only person directing Advantage's staff. Notwithstanding that Mr. Stuckless did not turn his mind to the applicable laws, it would have been obvious to him that sending such a letter to all of the clients of Advantage would have an impact upon the reputation of Advantage. This should have been an important matter to him and he should have taken more active steps to be clear with his instructions and to ensure that his instructions were followed.

Mr. Stuckless did not act carefully and on an informed basis nor did he exhibit the diligence and skill that a reasonably prudent person would exercise in comparable circumstances. As a result the Letters and E-mail in question were sent to members of the public. Mr. Stuckless's carelessness resulted in the Act being violated, albeit unintentionally.

I find that EBI contravened or failed to comply with the provisions of the Act by sending the Letter and E-mail, and that Advantage also contravened or failed to comply with the provisions of the Act by participating in the sending of the Letter and E-mail. The answer to the second issued noted above (whether corporate respondent, Advantage, is to be held responsible for the solicitation of investments by the letters and e-mails) is yes.

I also find that Mr. Stuckless, as an officer and director of EBI and Advantage, permitted or acquiesced in a contravention of or failure to comply with the provisions of the Act by EBI and Advantage. The answer to the first issue noted above (whether Mr. Stuckless is to be held personally responsible for the solicitation of investments by the Letters and E-mails) is yes.

Disposition

In light of these findings I must now address the remaining three issues noted above:

- whether the temporary cease trade order should be made permanent;
- whether an administrative penalty is appropriate and, if so, in what amount; and
- whether an order to pay costs is appropriate and, if so, in what amount?

The Commission's mandate is to provide investors with protection from practices and activities that tend to undermine investor confidence in the fairness and efficiency of capital markets and, where it would not be inconsistent with an adequate level of investor protection, to foster the process of capital formation[9].

Subsection 134 (1) of the Act provides that where the Commission considers it to be in the public interest, the Commission, after a hearing, may order, among other things, that any person or company cease trading in a specified security or in a class of security; that any or all of the exemptions contained in Nova Scotia securities laws do not apply to a person or company permanently or for such period as is specified in the order; or that a person or company be reprimanded.

Section 135 of the Act provides that where the Commission, after a hearing,

> "(*a) determines that:*
>
> > *(i) a person or company has contravened or failed to comply with any provision of Nova Scotia securities laws, or*
> >
> > *(ii) a director or officer of a person or company or a person other than an individual authorized, permitted or acquiesced in a contravention or failure to comply with any provision of Nova Scotia securities laws by the person or company;*
>
> *and*
>
> *(b) considers it to be in the public interest to make the order,*
>
> *the Commission may order the person or company to pay an administrative penalty of not more than one million dollars for each contravention or failure to comply.*"

Section 135A of the Act provides that the Commission may, after a hearing, order a person or company against whom an order has been made pursuant to Section 134 or 135 to pay costs in connection with the investigation and conduct of the proceeding.

[9] Subsection 1A(1) of the Act.

The sanctions available to this Panel under the Act are regulatory and they are "not remedial or punitive, but rather are preventative in nature and perspective in application" as stated by Le Bel J. in *Cartaway Resources Corp*.[10] *Cartaway* also provides that a securities regulator is permitted to consider general deterrence when making an order under the provision of a *Securities Act*.[11]

In imposing sanctions I consider the words of the OSC[12]:

> "*We have a duty to consider what is in the public interest. To do that, we have to take into account what sanctions are appropriate to protect the integrity of the marketplace... In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that proposed sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents. We should not just look at absolute values..."*

Counsel for Staff has drawn my attention to the decision of the British Columbia Securities Commission in *Re Ronald Stephen Barker and Double Eagle Investments Inc*.[13] Here the British Columbia Securities Commission referred to an earlier decision, *Re Enron Mortage Corp.*[14] which sites a non-exhaustive list of factors that are usually relevant to making orders against a person under provisions substantially similar to sections 134 and 135 of the Act. They are:

- the seriousness of the person's conduct;
- the harm sufferred by investors as a result of the person's conduct;
- the damage done to the integrity of the capital markets by the person's conduct;
- the extent to which the person was enriched;
- factors that mitigate the person's conduct;
- the person's past conduct;
- the risk to investors and the capital markets posed by the person's continued participation in capital markets;
- the person's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to issuers;
- the need to demonstrate the consequences of inappropriate conduct ot those who enjoy the benefits of access to the capital markets;
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct; and
- orders made by the Commission in similar circumstances in the past.

The conduct of the Respondents and the violation of the Act is a very serious matter. Fortunately, no investors suffered any financial harm, and I do not think that the capital markets in the Province suffered any material damage as a result of the Respondents' conduct. If it were not for the timely intervention of Ms. Bradshaw, however, it is possible that more Letters

[10] [2004] SCC 26 at para 58.

[11] Supra, at page 697. Although referring to the Ontario Securites Act, the Commission has adopted these statement as applicable to the Act in the decisions *In The Matter of Bruce Patrick Schriver*, December 20, 2006, and *In The Matter of Bruce Elliot Clarke*, June 28, 2004. These later decisions are available on the Commission's web site.

[12] *M.C.J.C. Holdings and Michael Cowpland* (2002), 25 O.S.C.B. 1133, at page 1134 (the "first Cowpland case")

[13] 2005 BCSECCOM

[14] [2007] 7 BCSC Weekly Summary

would have been distributed and that investors could have put monies at risk. Again, the Commission considers the Respondents' violations very serious.

Mr. Stuckless did not intentionally set out to circumvent the Act and he cooperated with the Staff investigation and testified at the hearing. Although he did not initially understand the seriousness of the situation, he ought to now know of the restrictions in the Act and the seriousness of their violation. I think it unlikely that Mr. Stuckless will again violate the provisions of the Act, whether knowingly or unknowingly.

The Respondents were not enriched by their breach of the Act, nor is there evidence of prior problems.

Therefore, considering it to be in the public interest, I order:

1. The temporary cease trader order against EBI be made permanent;

2. The temporary cease trader order against Advantage be extended for 24 month period from the date of the initial temporary cease trade order (March 2006) and expiring today;

3. The temporary cease trader order against Mr. Stuckless be extended for a 24 month period from the date of the initial temporary cease trade order (March 2006) and expiring today;

4. That EBI pay an administrative penalty in the amount of $10,000;

5. That the Respondents, EBI, Advantage and Mr. Stuckless, jointly and severally, pay costs of or related to the investigation and hearing in the amount of $7,500.

DATED at Halifax, Nova Scotia this 12th day of March, 2008.

"*R. Daren Baxter*"
R. Daren Baxter
Vice-Chairman

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