



THE MANITOBA
SECURITIES
COMMISSION

August 13, 2019

IN THE MATTER OF: THE SECURITIES ACT

- and -

**IN THE MATTER OF: MADISON STREET LIMITED PARTNERSHIP,
5218838 MANITOBA LTD., and BRENDA
ANDRE**

**REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION**

Panel:

Panel Chair:	Mr. J.T. McJannet, Q.C.
Member:	Mr. C.D. Burns
Member:	Mr. D.A. Huberdeau-Reid

Appearances:

Mr. S. Gingera)	Counsel for Commission Staff
)	On behalf of the Respondent, Brenda Andrea, no one appearing on behalf of Madison Street Limited Partnership nor for 5218838 Manitoba Ltd.
Mr. A. Stacey)	

Allegations

The allegations in this matter are against Madison Street Limited Partnership (the "Limited Partnership"), 5218838 Manitoba Ltd. ("52188") and Brenda Andre (together the "Respondents"). Mr. Gingera, appeared on behalf of Commission staff. Mr. Stacey appeared on behalf of Brenda Andre, no one appearing on behalf of the Limited Partnership nor 52188. 52188 was identified as the general partner of the Limited Partnership.

The Commission is charged with the responsibility and obligation of determining if the allegations contained in the Statement of Allegations dated the 6th day of April, 2018 are proven and to make and grant an order or orders as set forth as follows:

1. whether or not it is in the public interest to order, pursuant to subsections 148.1(1) and 148.1(1.1) of *The Securities Act* ("Act"), that Madison Street Limited Partnership, 5218838 Manitoba Ltd., and Brenda Andre pay an administrative penalty;
2. whether or not it is in the public interest to order pursuant to section 148.2 of the Act, that Madison Street Limited Partnership, 5218838 Manitoba Ltd., and Brenda Andre pay compensation for financial loss;
3. whether or not it is in the public interest to order, pursuant to subsection 19(5) of The Act, that:
 - (a) subsection 19(1) of the Act does not, with respect to such of the trades referred to in that subsection, apply to Madison Street Limited Partnership, 5218838 Manitoba Ltd., and Brenda Andre;
 - (b) subsection 19(2) of the Act does not, with respect to such of the securities referred to in that section, apply to Madison Street Limited Partnership, 5218838 Manitoba Ltd., and Brenda Andre;
4. whether or not it is in the public interest to order that Madison Street Limited Partnership, 5218838 Manitoba Ltd., and Brenda Andre pay costs of and incidental to the Hearing;

5. such further and other matters and the making of such further and other orders as the Commission may deem appropriate.

Hearing Dates

This matter came on for hearing on May 28, 29 and 30, 2019. Argument was presented by Counsel for the Commission staff and Counsel for the Respondent Brenda Andre (“Andre”) on May 31, 2019. It was agreed at the conclusion of argument on May 31, 2019 that additional argument would be allowed once this Commission had reached its decision on the validity and effectiveness of the five areas raised by Mr. Stacey as defenses to the allegations. Such argument would relate to awards, if any, for compensation to individuals suffering financial loss, costs and administrative penalties.

After adjournment on May 31, 2019, this Commission requested Mr. Gingera and Mr. Stacey, if they wished, to present written argument on the defense relating to exemptions on trades in value exceeding \$97,000 and \$150,000 and in particular, the dates when same came into effect. Written argument was received.

Evidence

This hearing revolved around three individuals namely: Mr. Pich (“Pich”), Antonio Sandro Braccio (“Braccio”) and his wife, Lynda Christine Braccio (“Mrs. Braccio”) and their purchase of units of the Limited Partnership at \$50,000 per unit (herein “Unit” or “Units”).

Pich

Pich’s evidence was to the effect that he had a friend who had purchased a limited partnership unit in a limited partnership, the general partner of which was a numbered

Manitoba company. The business of that limited partnership in which Pich's friend held a limited partnership unit was the ownership and operation of a Perkins Restaurant similar to the Perkins Restaurant to be owned and operated by the Limited Partnership. The operations of that limited partnership, through its general partner, was under the guidance and direction of Andre and supporting staff.

The investment by Pich's friend was apparently successful and Pich indicated to his friend that he wanted to participate in any similar opportunity that might become available. Indeed such an opportunity did arise: the possibility of purchasing Unit(s) in the Limited Partnership. Pich, a Winnipeg bus driver, indicated that he wanted in and ultimately he raised funds by mortgaging his house to raise funds at least in part to make the investment.

Pich was introduced to Andre at a first meeting and she explained, but apparently not in great detail, the investment opportunity in the Limited Partnership in which Pich had indicated he was interested in investing. Pich met a second time with Andre at which time she provided to Pich, and he executed, a form of subscription agreement to purchase two Units of the Limited Partnership at \$50,000 each.

Pich also executed a representation letter presented to him by Andre. Pich initialed an Appendix B attached to the representation letter indicating he was:

“a close personal friend of a director, senior officer or control person of the Partnership, or of an affiliate of the Partnership”.

Pich knew that the statement on Appendix B, which he initialed, was not true. Andre also knew it was not true.

Andre

Andre's evidence with respect to her meetings with Pich was not markedly different from Pich's evidence. Some literature on the investment opportunity in the Limited Partnership was provided by Andre to Pich.

Braccio

The evidence shows that Braccio was somewhat experienced in business matters, having been an active shareholder in two incorporated companies. He was in the business of supplying and installing lighting equipment for one or more Perkins Restaurants that were owned or to be owned by limited partnerships and in which the business of the limited partnership would be run by a limited company, as general partner, and in which Andre would be the shareholder, officer and director. Braccio dealt with a Mr. Haderer who represented to Braccio that he was in charge of the construction, furnishing and establishment of the Perkins Restaurant on Madison Street. While Mr. Haderer was not recorded in various corporate document filings as a director, shareholder or officer it is clear that he represented himself as Andre's right-hand man. Andre admits that Mr. Haderer was her Vice-President (transcript of Andre interview with Terlinski). Notwithstanding, while Andre denied in her evidence that Haderer was a Vice-President in her companies and operations, we find that he was for all intent and purposes the second in command. Haderer explained from time to time to Braccio the operations of limited partnerships and particularly the Limited Partnership. We accept that Braccio falls within the category of:

“a close personal friend of a director, senior officer or control person of the Partnership, or of an affiliate of the Partnership”.

Mrs. Braccio

Mrs. Braccio's evidence was that she heard about the investment opportunity from a discussion with her husband. Braccio was considering the purchase of a Unit(s) of the Limited Partnership and we find that he persuaded Mrs. Braccio to participate with him in the purchase of Units of the Limited Partnership to the extent that she would hold ownership of two Units together with her husband.

Braccio and Mrs. Braccio met with Andre at a first meeting. Andre explained, but apparently not in great detail, the investment opportunity in the Limited Partnership in which Braccio and Mrs. Braccio had indicated they were interested. Andre provided some literature about the investment opportunity to Braccio who testified that he discussed same with his solicitor. We have no evidence that the literature was read by Mrs. Braccio. Andre provided to Braccio and Mrs. Braccio and she and her husband executed a form of subscription agreement to purchase two Units of the Limited Partnership at \$50,000 each.

Mrs. Braccio and her husband also executed a representation letter presented to them by Andre. Mrs. Braccio and her husband also initialed an Appendix B attached to the representation letter indicating she/he was:

“a close personal friend of a director, senior officer or control person of the Partnership, or of an affiliate of the Partnership”.

Mrs. Braccio knew that the statement on Appendix B which she initialed was not true. Andre also knew it was not true.

Andre

Andre, in her evidence, confirmed the evidence of Mrs. Braccio. Only one meeting took place. Andre did provide some literature on the investment opportunity in the Limited Partnership to Braccio and/or Mrs. Braccio.

Andre's Defense

Mr. Stacey, Counsel for Andre, requests that we conclude these proceedings by deciding that such proceedings should not lead to any sanction or other action against his client, Andre.

In support, Mr. Stacey advances a number of defenses in support of Andre's position:

1. Neither Pich nor Braccio nor Mrs. Braccio form part of the "public";
2. Limitation Period;
3. Due diligence;
4. The \$97,000 exemption;
5. The Family & Friends exemption;
6. Isolated trades.

Members of the Public

At this stage, we address the issue raised by counsel for the Respondent Andre that these trades in Units of the Limited Partnership were not:

"trades that are made for purpose of distributing securities "to the public"."

In essence do Pich, Braccio and Mrs. Braccio fall into the definition of “the public” as that word applies in distribution of securities. We note the excerpts set forth in “Securities Regulation in Canada” (Gillen) with specific reference to page 240 and reference to a United States case: “Securities and Exchange Commission v. Ralston Purina” and quote in part:

“The key question in the view of the court was whether the persons who were offered the security need to know the kinds of information a prospectus would provide.”

And we note the writer at page 241 references the Canadian decision in R. v. Piepgrass 1959. 29. WWR. 218(Alta. T.A.).

We also note reference to R. v. Buck River Resources Ltd. (1984.25 B.L.R. 209, Alta. Prov. Court)), and reference to the headnote and reference to the McKillop case (R. v. McKillop 1972. 1.O.R. 164, Ont. Prov. Court)

“the word “public” is appropriate to denote those outside the immediate circle of those who control the company.”

There was no association with Andre. In our view, Pich and Braccio and Mrs. Braccio were members of the “public”. At the same time the fact that Braccio was a close friend of Mr. Richard Haderer does not mean that he was not a member of the “public”. We will address that issue under the argument that the Family and Friends Exemption places Braccio and perhaps Mrs. Braccio into a separate class.

The Limitation Defense

Mr. Stacey submits that, by virtue of the provisions of Section 137 of the Act, these proceedings are out of time, that the proceedings are statute barred and this panel has no jurisdiction in these proceedings.

Section 137 of the Act sets forth time limitations solely for proceedings that may arise under Part XIII of the Act. Had the Manitoba legislature intended to set time limitations with respect to matters similar in nature to the matters in this proceeding it could have set out such time limitations in plain and simple language. It did not do so. Accordingly, it is not the responsibility of this Commission to establish time limitations in these proceedings. It is the responsibility of the Manitoba legislature.

Due Diligence

Mr. Stacey argues that Andre exercised adequate due diligence, having consulted with her lawyer with respect to how to proceed with respect to the sale of Units to Pich and the Braccios. He referenced the exchange of emails between Ms. Andre, Ms. Cychowski and Mr. Davey of the Fillmore, Riley law firm and in particular, emails entered in these proceedings as Exhibit 13. We do not accept this argument as a defense to the allegations in these proceedings.

The onus to prove that Andre is entitled to an exemption rests upon Andre. Andre must be aware of the exemption and exercise her right of exemption at the time she makes a trade i.e. at the time when she sells the Units in the Limited Partnership to Pich and to the Braccios. In fact we find that the exemption Andre was relying upon was the Family and Friends Exemption and no other.

\$97,000 Exemption

Mr. Stacey suggests that if we do not accept the Family and Friends Exemption then we may excuse Andre by reason of the availability of the \$97,000 exemption. While that exemption requires Andre to file a report with the MSC of any such transaction Mr. Stacey submits and refers to the Ontario Securities Commission bulletin 13-503 (presumably 13-502 – Tab 4 – Brief of Law and Book of Authorities on behalf of Brenda Andre) as authority that the penalty for the non-filing of such a report is a fine and not the loss of the exemption.

We address the provision of Section 90(1) of MR. 491/88R:

“Notwithstanding subsection 19(3) of the Act and subject to subsection 4 of this section and section 7 of this regulation, sections 6 and 37 of the Act do not apply to a trade where the purchaser is an individual who purchase as principal for investment only and not with a view to resale or distribution, if the trade is in a security that has an aggregate acquisition cost to that purchaser of not less than \$97,000.”

Exhibit 13 is an exchange of emails between Andre and her legal counsel – Mr. Davey (“Davey”) and Andre’s assistant, Lisa Anne Cychowski (“Cychowski”) and Davey.

1. August 10, 2006: Andre sends to Davey an attached Subscription Agreement which she states is adopted from the Subscription Agreement she used for Regina and asks Davey to check it over for “Madison” – “to make sure it makes sense”. The attached Subscription Agreement refers to “aggregate acquisition cost --- not less than \$97,000.”

2. August 16, 2006: Cychowski sends email to Davey to “advise --- the status on the Subscription Agreement” and later on that day Davey sends “revised draft of the Subscription Agreement with our changes blacklined.” In the blacklined copy 97 is change to 150 to read \$150,000. Cychowski, later on August 16, 2006 sends more questions to Davey – one asking about the change to \$150,000.
3. August 21, 2006: Davey replies to Cychowski with an explanation of the increase in the minimum exemption to \$150,000 and states:

“anyone who invests less than that needs to be an “accredited investor” or able to rely on the “friends and family exemption”.

Finally, Davey reminds Cychowski of filings to be made at the Manitoba Securities Commission “within 10 days after any sale is completed”.

Section 90(1) of MR. 491/88R includes the words:

“subject to ----- section 7 of this regulation”.

Had Andre been relying on the provisions of section 90(1) then she is required, by section 7(1) to file a written report within 10 days after the sale. By virtue of Section 7(5), where the trade to Pich and Braccio is not reported, Andre is not entitled to the benefit of any exemption from registration conferred by section 90(1) of the regulation.

Section 7(5) is explicit and does not allow the exemption and failure to file such a report cannot be rectified by a fine as may be the case, according to Mr. Stacey, in the Province of Ontario.

We find that Andre is not entitled to any \$97,000 exemption, whether in regard to the sale of a Unit to Pich, Braccio or Mrs. Braccio.

Family & Friends Exemption

To reiterate: Pich, Braccio and Mrs. Braccio executed a Subscription Agreement presented to them by Andre. That Agreement incorporated all of the Terms and Conditions of Subscription, as attached, and included the Representations, Warranties and Covenants of the Purchaser. Paragraph 4(d) sets out a representation of the Purchaser that certain criteria (in the alternative) is fully complied with. One alternative (sub-paragraph (i)) is the \$150,000 cost exemption for individuals and the other (sub-paragraph (iv)) is the Family and Friends Exemption. It also makes reference to a Representation Letter attached as Schedule A. In turn, Schedule A has an Appendix B attached.

Pich executed the Subscription Agreement, the Terms and Conditions attached and Schedule A – the Representation Letter. He also initialed paragraph (iv) of Appendix B attached to the Representation Letter.

Braccio & Mrs. Braccio together executed and initialed a similar set of documents.

The sale then was made on a representation made by Pich which Andre knew was untrue and absolutely false. She had just met Pich on two occasions. Pich never had

a chance to evaluate Andre's abilities and trustworthiness in her position of controlling the General Partner and operating the business for which the Limited Partnership was created. In fact, Mr. Stacey acknowledges that this exemption does not apply to Pich.

Braccio & Mrs. Braccio's two Unit purchase is somewhat different. They executed the same documents as Pich but not separately from each other. Their Representation Letter (Schedule A) sets out that they are entitled to rely upon the Family and Friends Exemption and together they initialed Appendix B to their Representation Letter and while not an "accredited investor" they claim they are:

"a close, personal friend of a director, senior officer or control person of the Partnership..."

According to Braccio he was a "close personal friend" of Mr. Haderer who he understood to be a responsible, high-level executive of the General Partner, an associate of Andre. Mr. Haderer was represented as being in charge of the construction and development of the Perkins Restaurant and Bar to be owned and operated by the Limited Partnership. In our view, Mr. Haderer was held out to Braccio as an officer of the General Partner and Braccio relied on same. Braccio was introduced by Mr. Haderer to the Madison Street development and to Andre. He reviewed documentation which he received from Andre with his lawyer and was a business man of some experience. We conclude that Braccio falls under the Family and Friends Exemption but the question is: does that extension extend to the purchase of one or two Units? Was Mrs. Braccio simply accommodating her husband's decision to buy two Units for \$100,000 by executing the Subscription Agreement and initialing Appendix B?

Mrs. Braccio only met Ms. Andre through her husband on one occasion. Her evidence was to the effect that she had little knowledge of the Limited Partnership, its organization and its anticipated business.

The difficulty here is the fact that the documents were signed by Braccio and Mrs. Braccio. As Braccio falls under the Family and Friends Exemption does the Exemption cover the two Units for \$100,000 or only \$50,000 for one Unit. We find that, in fact, Braccio was purchasing two Units for his own account assisted by his wife, Mrs. Braccio, as to joint ownership, the reason for which were not presented in any evidence at this hearing. Therefore, we find that the Family and Friends Exemption relates to the total purchase of \$100,000 or two Units.

Isolated Trade

Mr. Stacey argues that the sale of Units to Pich and the Braccios are “isolated trades” which do not require Andre be registered under Section 6 of the Act. In fact, in addition to the four Units sold to Pich (2) and the Braccios (2) we have no evidence of how an additional 16 units of the Limited Partnership were sold to 11 other limited partners; and whether such 11 limited partners fall under any of the exemptions. We only know, by reference to the Limited Partnership Agreement that, in addition to Pich and the Braccios, there are 11 more limited partners in the Limited Partnership. We do not accept Mr. Stacey’s position.

The Commission

In our view it is common knowledge that the responsibility of this Commission is to act in the public interest and that our mandate, is clearly enunciated in *Bluestream Capital Corporation* 38 OSCB 2333, by Chair Alan J. Lenczner, in para. 14:

“The Commission’s mandate in upholding the purposes of the Act (the Ontario Securities Commission Act) is:

- a) to provide protection to investors from unfair, improper or fraudulent practices; and
- b) to foster fair and efficient capital markets and confidence in capital markets;

and in reference to jurisdiction we agree quoting J. Lenczner, at para. 16:

“the purpose of the Commission’s public interest jurisdiction is neither remedial nor punitive; it is protective and preventative

Section 6(1) of the Act states the requirement to be registered when trading in securities. Section 37 states the requirement to file a prospectus and to obtain a receipt for that prospectus during a primary distribution of such securities described in the prospectus.

The certified Statement of the Director of the Manitoba Securities Commission confirms that:

1. Neither Madison Square Limited Partnership, 5218838 Manitoba Ltd. nor Brenda Andre have ever been registered in any capacity under provisions of the Act; have not at any time filed a preliminary prospectus or prospectus with the Manitoba Securities Commission and receipts for preliminary prospectus for Madison Street Limited Partnership securities have not ever been issued; that exemption orders have never been issued by the Manitoba Securities Commission and neither Madison Street Limited Partnership nor 5218838

Manitoba Ltd. nor Brenda Andre have filed any reports under clause 7 of the Regulation to the Act or any notice under clause 91 or 92 of the Regulation with respect to any trades.

We conclude, from the evidence, that the transaction in the matter before this Commission involved a security; that the Respondents were engaged in trading, as defined; that the Respondents were not registered under the Act to trade in securities; and that “a security was traded by the Respondents in the course of a primary distribution of such securities to the public. Finally, we conclude that no prospectus was filed. Reference is made to definitions in the Act and the decision in *Bluestream*.

Conclusion

In summary, we find:

- a. That Pich and the Braccios are members of the public and the sale of units was an issue made to the public;
- b. That the limitation time in Section 137 of the Act does not apply nor does the Limitation of Actions Act (MB) apply to the issues before us;
- c. That due diligence is not a defense to the issue before us;
- d. That the \$97,000/\$150,000 Exemption is not applicable;
- e. That Pich does not fall within the exemption of “Family and Friends”;
- f. That Braccios (and Mrs. Braccio’s) purchase of two Units falls within the Family and Friends Exemption;
- g. That this was not an isolated trade or trades,

We conclude that it is in the public interest to order and do hereby order:

- a) that subsection 19(1) of the Act does not, with respect to such of the trades referred to in that subsection, apply to Madison Street Limited Partnership, 5218833 Manitoba Ltd. and Brenda Andre; and
- b) that subsection 19(2) of the Act does not, with respect to such of the securities referred to in that section, apply to Madison Street Limited Partnership, 5218838 Manitoba Ltd. and Brenda Andre.

Compensation, Costs, Administrative Penalties

As stated, (see “Hearing Dates” herein) this Commission will now hear arguments from both Counsel on the question of awarding compensation to individuals suffering financial loss and with regard to assessing costs and administrative penalties.

“J.T. McJannet, Q.C.”

J.T. McJannet, Q.C.

Panel Chair

“C.D. Burns”

C.D. Burns

Member

“D.A. Huberdeau-Reid”

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Member