

**IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED**

- AND -

**IN THE MATTER OF RONALD ETHERINGTON
AND CREATE-A-FUND INCORPORATED**

REASONS FOR DECISION

1. The Statement of Allegations in this proceeding alleges that the Respondents, while never registered with the Ontario Securities Commission (“OSC”) in any capacity, were advising and trading in securities contrary to s. 25(1) of the *Securities Act* (the “*Act*”) and the public interest. By reason of that, Staff seeks an Order pursuant to s. 127(1) and s. 127.1 of the *Act*.
2. Most of the facts are not in issue. Starting in October of 2000, the Respondent Etherington owned and operated Create-a-Fund Incorporated (“Create-a-Fund”). It operated a web site, www.createafund.com. For a flat fee of 1%, Create-a-Fund offered to supply to its customers an initial financial plan, up-dates to the financial plan, savings strategies, asset allocation strategies, a custom portfolio of investment products, transaction management and the monitoring of the portfolio.
3. While Create-a-Fund could not itself trade in securities, the web site stated that once the specific investments had been selected by the customer, Create-a-Fund would manage the transaction process through a discount brokerage service. Staff maintained that this activity came within the definition of “trade” as set out in s. 7(1) of the *Act* in that this was a service in furtherance of a trade.
4. Mr. Etherington admitted that the services offered by Create-a-Fund came within the definition of “adviser” as found in s. 1(1) of the *Act*, which defines an adviser as: “... a person or

company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities.”

5. Staff started to investigate Create-a-Fund in the latter part of 2000 as a result of a telephone call it received regarding the status of Create-a-Fund. Initially Staff wrote to Mr. Etherington on November 13, 2000. That letter advised Mr. Etherington that the content of the web site, www.createafund.com may require its registration as an adviser under the *Act* and recommended that, until the registration status was clarified, the operation of the web site be terminated. Mr. Etherington promptly responded to this by contacting a registration officer at the Commission stating that he assumed that he probably needed to be registered as an investment counsellor and was keen to be enrolled in all the required courses in order to be registered. As a result of that call, a registration package was sent to Etherington. On November 15, 2000, Mr. Etherington wrote the Enforcement Branch stating that he had received the registration package from the Commission and, while expressing concern as to the availability of certain of the described courses, concluded by stating that the application would be filed within 30 days.

6. Mr. Etherington did not, however, file any application for registration. On January 18, 2001, Colin McCann of the Enforcement Branch wrote to Mr. Etherington pointing out that two months had lapsed since his advising of his intention to comply with the registration requirements of the *Act* and warning that the failure to do so and the continued operation of Create-a-Fund Inc. could result in the initiation of proceedings alleging a violation of s. 25(1) of the *Act*. In response to this, on January 18, 2001 Mr. Etherington faxed a response which stated:

“Please be advised that we are in the process of filing the appropriate documentation in order to meet OSC requirements.

In the interim, please note that we have temporarily suspended any operations that might be subject to OSC regulations; we are no longer offering advisement services, more importantly, we do not have any customers at this time.”

7. In order to test this assertion by Mr. Etherington, Colin McCann, on the same date that the fax was received from Mr. Etherington, used an alias named Brenda Samson to respond to the web site as a potential customer. In that response, Brenda Samson stated that she had \$200,000. as an approximate value of her investment assets and set out certain of her investment objectives.

8. An electronic response from Create-a-Fund was received by Brenda Samson on the same day, which stated:

“Thank you very much for your interest in Createafund.com.

One of our team members will be getting back to you very shortly with regards to the information you have provided us with.

Please don’t hesitate to contact us if you have any questions or concerns.”

9. On January 19, 2001, Ronald Etherington sent a further message to Brenda Samson thanking her for her interest in their services and inquiring as to what format she was able to read e-mail files. Attached to this was an Asset Allocation Strategies chart. On February 9, 2001, Brenda Samson e-mailed Ronald Etherington at Create-a-Fund and asked whether they would be recommending a “specific self-directed RRSP representing the appropriate mix of stocks, bonds, etc. or just a sector mix or index fund arrangement?”. Mr. Etherington responded on February 10 by e-mail in which he stated:

“... our job is to recommend specific investment products that fit your needs, whether in or out of an RRSP, this usually means stocks, bonds and money market products, but NOT mutual funds, we are an alternative to mutual funds and offer two key benefits; a personal portfolio and lower fees, our fee is a 1% MER, most mutual funds are at about 3%

the 1% fee includes basic financial planning, selection of the specific securities and the transaction costs to place the order through a discount broker (we strongly suggest enorthern although we can work with most)

the next step, which we will undertake without obligation to you is an asset allocation strategy, this will serve as a blueprint for the specific securities selection process, we will send this to you in the next 24 hours and we should review this before we go further

once we agree on the AA model, we will need to look at your current investments to see what we should keep and what needs to be replaced, often the initial portfolio includes some current investments and some new ones, along with a divestation strategy that gradually migrates to 100% new investments, again, to achieve the key benefits of a personal portfolio and lower fees (in some

cases we simply replicate an existing mutual fund and the customer saves about 2% in MER fees)”

10. On the 13th of February, 2001, Etherington e-mailed Brenda Samson, stating:

“thanks for submitting the initial objectives and resources form, from this we can get a pretty good snapshot of where you are and where you want to be in turn, this allows us to start our process of preparing a personal portfolio of specific investments which should meet these goals

we are attaching to this email several documents, we would ask that you review these and provide us with your comments, if all is in order there are only a few more steps to complete the process

attached you will find an ‘asset allocation chart’ this shows the anticipated returns for a number of different allocation strategies

you will also find an asset allocation table which we think is most appropriate for you, this table shows, in significant detail, the various investment categories we suggest, it also shows the anticipated return on a year by year basis (as well as the time to accumulate \$1million and the balance at age 65)

also attached is a detailed proposal based on this model, this goes into more detail and lists specific companies, number of shares and cost (as of yesterday’s close) **THIS IS NOT A FINAL PROPOSAL**, the main objective is to provide you with some insight as to what securities the asset allocation model drives us towards

as noted above, we ask that you review these documents and provide us with your comments, this can be by email or by telephone or even in person if required

after this discussion there are two fairly easy steps to complete the process, first we will need to get a pretty good idea of your current investments, and then match this to the final proposal, in most cases we find that our customers retain some of their current investments and our job is more to ‘balance’ or ‘focus’ their strategy

then, once this is completed we need to discuss the execution of the orders, as you may have noted in our web site, our fee includes all transaction costs through our preferred discount partner, enorthern securities

i trust this provides you with a better understanding of our service and we look forward to your comments”

11. Mr. McCann testified that he did not have Brenda Samson pursue the inquiries with Create-a-Fund beyond this point.

12. On October 31, 2001, Staff again wrote Mr. Etherington about the lack of registration and indicated that the activities of Create-a-Fund may constitute, “acts in furtherance of a trade” which require registration as well as the fact that the web site on October 24, 2001 continued to indicate that advisory activities were being conducted. By fax dated October 31, 2001 Create-a-Fund responded advising that Createafund Inc. had ceased operations, is not accepting customers nor responding to any inquiries or other requests. To test this Staff used a second alias, Robert Charles, who responded to the web site on February 18, 2002. While there was an automatic response acknowledging the inquiry, no further contact was made with Robert Charles by Create-a-Fund.

13. On February 19, 2002, Mr. Etherington sent a fax to Colin McCann, which stated:

“Earlier today I sent a reply to the specific requirements in your fax from this same date, at this time I would like to provide you with some additional, more generic information.

Createafund Inc. is/was little more than a concept; an internet based financial services firm that would help investors who use discount brokerage accounts by providing some sort of financial advice.

When I launched the company, in the fall of 2000, I had recently completed the Certified Financial Planner Course offered by the Canadian Institute of Financial Planners. I felt, at that time, that this course provided me with sufficient credentials to offer these services; the course materials include financial planning and portfolio construction and theory.

You may know that the CSI is a totally different entity than the Canadian Institute of Financial Planners, however at the time I launched Createafund I had no firm idea of what the CSI, OSC and IDA were all about.

Your initial letter of November 13, 2000 provided that clarity, it did not take me long to determine that the ‘financial advice’ part of the service I offered was in fact in violation of ‘the act’. I immediately undertook a number of initiatives;

- I tried to find partners who could assist me in filing an IDA application
- I enrolled in the appropriate CSI courses
- I attempted to negotiate 'sub contracting' the 'advice' to another party
- I did not sign any customer agreements

I replied to your letter by stating that it was our intention to comply with the requirements of the 'act' which was my true intent at that time.

By mid January we had still not solved this puzzle, at that time it looked like filing an application ourselves was unlikely, and that the best strategy was to form an alliance with a member firm who would be responsible for the advice component.

We did continue to operate the company, it was our intent that, when we did get customers, we would 'share' the work with other companies who were duly authorized to provide the appropriate services. For example, we would find customers, take them to the point of the asset allocation, and then find another party to take the file forward.

This effort failed, and shortly thereafter we stopped operating completely. In March of 2001 I joined CIBC as a Financial Advisor.

We did not reply to a letter dated July 30, 2001 simply because we did not receive the letter, we had closed the company, and moved.

We did receive, by fax, a copy of the October 31 letter from Felicia Tedesco. Our reply was brief; we had ceased operations, the site was 'alive' as part of our effort to sell the brand and we were not offering any 'advice'.

On October 29th, I had joined RBC Investments as a Financial Advisor Trainee, I had completed the CSC and CP&H course by that time, my goal was to complete the 90 day training and become a fully licensed investment advisor.

I learned on or about January 30th that my application was to be declined, apparently due to concerns about operating previously without a license. When my application was declined, my employer terminated me for cause.

This entire matter, to me, seems to be an incredible irony; the reason why I took the appropriate courses, and joined a member firm, was in respect of the appropriate regulatory requirements.

When I learned what I was doing was wrong I stopped, when I learned what I needed to do, I did it. I have spent the past three years studying and learning about the financial services industry, I have earned very little in terms of remuneration (all with either CIBC or RBC) I need to work, I am qualified, and of course I need a license.

Please let me know if you would like any additional information, I really need your office to support my application for registration. I need to work.”

14. On February 26, 2002 the OSC ordered, pursuant to clause 2 and 3 of subsection 127(1) of the Act that the Respondents, Create-a-Fund and Etherington, cease all tradings in securities and that any exemptions contained in Ontario securities law do not apply to them.

Respondents' Position

15. The Respondents appeared without counsel. Mr. Etherington gave evidence and made submissions on behalf of both Create-a-Fund and himself. Essentially their position was that Create-a-Fund was started in October 2000 with the intent to offer a service to the public for which he did not realize that registration with the OSC was necessary.

16. Mr. Etherington testified that once contacted by the OSC in November 2000 and made aware of the registration requirements under s. 25 of the *Act*, he investigated those requirements. When he realized that he could not comply with them, he “walked away” from the business on March 1, 2001.

Analysis

17. A problem with the Respondents' position is that it is not consistent with the facts. Contrary to their position, even after the Respondents became aware of the requirements for registration, they continued to operate Create-a-Fund and solicit customers through the web site. As noted earlier, after the initial contact by the OSC in November 2000, the Respondents stated that they would be seeking registration. They never did. Rather, they continued to operate the web site notwithstanding that the OSC had advised that the web site should be shut down until they had dealt with registration requirements.

18. In January 2001, when Staff inquired about the application for registration not having been received, the Respondents replied stating that they had “temporarily suspended operations that might be subject to OSC regulations.” However, on the very same day as that communication, when Brenda Samson responded to the web site, the Respondents pursued this inquiry and were ready and willing to offer to her the services being promoted on the web site.

19. In *Re Jesse J. Hogan*, [2002] BCSECCOM 537, the British Columbia Securities Commission, in dealing with the definition of “adviser” as found in the *Securities Act*, RSBC 1996, C. 418, which is a similar definition to that found in the *Act*, made reference to *Re Robert Anthony Donas*, [1995] 14 BCSC, Weekly Summary 39, where it was stated at page 44 that:

“As indicated by the decision of “advice”, the nature of the information given or offered by a person is the key factor in determining whether that person is advising with respect to investment in or the purchase or sale of securities. A person who does nothing more than provide factual information about an issuer and its business activities is not advising in securities. A person who recommends an investment in an issuer or the purchase or sale of an issuer’s securities, or who distributes or offers an opinion on the investment merits of an issuer or an issuer’s securities, is advising in securities. If a person advising in securities is distributing or offering the advice in a manner that reflects a business purpose, the person is required to be registered under the *Act*.”

20. As noted previously, Mr. Etherington admitted that the services being promoted by Create-a-Fund on the web site came within the definition of “advising” as found in s. 1(1) of the *Act*.

21. Even if we accept Mr. Etherington’s evidence that when Create-a-Fund was started in October 2000 he was not aware of the requirement for registration, there was no justification for the continued operation of the web site after having been made aware of the requirement. Also very troubling is the fact that when Staff made inquiry in January 2001 of Mr. Etherington about the continued web site operation without registration, he responded that there had been a temporary suspension of “any operations that might be subject to OSC regulations” when, in fact, through the website, Create-a-Fund, was still offering services that require registration and prepared to deal with customers in regard to those services. It was only after a covert operation by Staff,

necessitated by Mr. Etherington's lack of forthrightness, that it was ascertained that Create-a-Fund was continuing to offer these services.

22. Mr. Etherington, in his submissions, spoke of his desire to be registered with the Commission so he could pursue a career for which he feels he is highly qualified. In so doing, he showed no appreciation for the Respondents' inappropriate conduct in knowingly operating Create-a-Fund without registration both before and after advising the Staff that the operation had been suspended.

23. We find that the Respondents have acted contrary to Ontario securities law and the public interest, and that pursuant to s. 127(1) of the *Act* it is in the public interest that they be sanctioned.

24. In considering what sanctions would be appropriate, in addition to the foregoing, we have taken into consideration the following:

- Mr. Etherington was a certified financial planner and until staff at the Commission first approached him in November of 2000, he was not aware that his financial planning activities might be in breach of the registration provisions of the *Act*.
- Create-a-Fund never acquired any clients or customers.
- Mr. Etherington did, during the relevant period, attempt to acquire the training necessary to permit him to become a registrant under the *Act*.
- There is no evidence to show that any person suffered any financial loss as a result of the activities of Mr. Etherington or Create-a-Fund.

25. Pursuant to s. 127(1) and s. 127.1 of the *Act*, we find it is in the public interest to order:

Create-a-Fund

- (i) Create-a-Fund shall be reprimanded;
- (ii) Create-a-Fund shall cease trading in securities permanently or for such time as the Commission may direct;

- (iii) Create-a-Fund shall permanently, or for such time as the Commission may direct, not have the benefit of any exemptions contained in Ontario securities law.

Ronald L. Etherington

- (i) Mr. Etherington shall be reprimanded.
- (ii) Mr. Etherington shall cease trading in securities until the earlier of the expiration of two (2) years from the date of this Order and the date he becomes a registrant under the *Act* save and except for trading for his own account in securities beneficially owned by him.
- (iii) The exemptions under the Act shall not be available to Mr. Etherington until the earlier of the expiration of two (2) years from the date of this Order and the date he becomes a registrant pursuant to the provisions of the Act save and except for the exemptions available to him under section 35(1)10 of the *Act* in respect of trades permitted under (ii) above.
- (iv) Mr. Etherington shall resign any office that he holds as a director or officer of any issuer.
- (v) Mr. Etherington is prohibited from becoming or acting as a director or officer of any issuer until the earlier of two (2) years from the date of this Order or the date he becomes a registrant under the *Act*.

- (vi) Mr. Etherington shall pay the amount of \$7,500.00 on account of the costs of the investigation.

Dated at Toronto this 25th day of July, 2002.

“H. Lorne Morphy”

“Robert L. Shirriff”

“Mary Theresa McLeod”