PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF the Securities Act, R.S.N.B. 1973, c.S-6, and amendments thereto;

and

IN THE MATTER OF the Registration of Clyde Woodworth.

DECISION AND REASONS

Hearing	:	April 14 and 16, 1992
Tribunal	:	Donne W. Smith, Jr., Administrator
Counsel	:	Eugene D. Westhaver, Q.C. - for staff of the Office of the Administrator
		James Anderson, Q.C. and Michael McWilliam - for Clyde Woodworth

I INTRODUCTION:

The Respondent, Clyde Woodworth, ("Woodworth") first appeared before me on January 23, 1992 at 10:00 a.m. pursuant to a Summons dated December 18, 1991. Proceedings were then adjourned to March 9, and after further submissions made to me on February 13, adjourned again to April 14, 1992 at 10:00 a.m.

The Summons to Appear, service of which Woodworth acknowledges, alleges that the Respondent, between November 29, 1988 and December 31, 1990, traded in real estate limited partnerships when his registration as a salesperson under the Securities Act (the "Act") restricted him to trading in mutual funds only.

The Summons requests me to consider, pursuant to paragraph 12(1)(c)(v) of the Act, whether it is in the public interest to suspend or cancel Woodworth's registration, or in the alternative, impose additional conditions upon his registration by reason of his failure to comply with the Act, regulations or current conditions attached to his registration.

Having given careful consideration to the evidence presented at the hearing, including testimony of the Respondent, my decision and reasons now follow.

II PRELIMINARY ISSUES:

At the onset of the hearing counsel for the Respondent submitted for my consideration 4 preliminary motions or objections: that there was bias or a reasonable apprehension of bias on the part of the Administrator by the nature of my position and involvement in the investigation and by implication, that I should not adjudicate this matter; secondly, that the Respondent was prejudiced by a failure in the Summons to adequately disclose the case to be met by the Respondent; thirdly, that this matter was beyond the six month statutory limitation period established by subsection 41(4) of the Act and, therefore, outside the jurisdiction of the Administrator; and finally, that improper procedure prejudiced the Respondent prior to and at the hearing of January 23, 1992 by denying him his right to counsel.

After a brief recess to consider the submissions, I rejected the second, third and fourth motions. However, I reserved decision with regard the issue of bias or apprehension of bias. While conscious of my duty to the Respondent, I expressed the opinion then that proceeding with the hearing would be in the public interest and not prejudicial to the Respondent so long as prior to determining other issues presented at the hearing, I rule upon the issue of bias. I acknowledged then and do so now that the issue of bias or apprehension of bias is fundamental to the question of my jurisdiction in this matter.

Counsel for Woodworth argues that my statutory duties to investigate and adjudicate render me biased or give such an appearance of bias that the Respondent's position cannot be fairly adjudicated. In support of this argument counsel makes reference to evidence submitted at the hearing, including minutes of meetings of staff of the Office of the Administrator; newspaper clippings of press releases issued by the Office of the Administrator; and testimony regarding proposed settlement negotiations.

Respondent's counsel also refers me to Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities, an as yet unreported decision of the Supreme Court of Canada, rendered on March 5, 1992 to describe the standards applicable to tribunals in determining bias:

> Those [administrative boards] that are primarily adjudicative in their functions will be expected to comply with the standards applicable to Courts. That is to say that the conduct of members of the Board should be such that there could be no reasonable apprehension of bias....(page 13)

Particular emphasis is made by counsel to the appropriate test of bias which should be applied here. As described at page 11 of this decision it is: "whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator."

Counsel for staff of the Office of the Administrator, in contrast, cites the leading decision of the Supreme Court of Canada in Brosseau v. Alberta Securities Commission [1989] 1 S.C.R. 301 in arguing that an adjudicator may act as both investigator and trier in the same case so long as the adjudicator does not go beyond his statutory duties. This position derives from the unique role of a securities regulator, as recognised by the court in the Brosseau decision at page 314:

> Securities acts in general can be said to be aimed at regulating the market and protecting the general public.... This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

Bias is a lack of neutrality on the issue to be decided. A reasonable apprehension of bias is one held by a person familiar with the decision-making process that governs a tribunal and with the facts relevant to the alleged bias.

Like the securities legislation that is at issue in Brosseau, the New Brunswick Securities Act has as its purpose the protection of the general public. In carrying out its protective role the Act delegates unique and onerous investigative and administrative

powers, duties and responsibilities which must be considered in assessing any apprehension of bias. For example, section 21 empowers the Administrator, or his delegate, to ascertain whether fraudulent activities contrary to the Act have occurred, are occurring, or might occur. Pursuant to section 12 the Administrator is given a discretion to consider whether it is in the public interest to take administrative action against registrants.

Bias or apprehension of bias may be statutorily excused when legislation empowers the same body or person to act as an investigator, prosecutor and judge. The bias is excused but only, as the Brosseau decision emphasises, so long as the adjudicator acts as investigator or prosecutor within the framework of his statutory duties.

Counsel for the Respondent argues that the test for bias has been narrowed by the recent decision in Newfoundland Telephone. I fail to see, however, how this case restricts or "tightens", to use counsel's words, any statutory exemptions to bias upon which the Brosseau case is founded. Clearly, the facts distinguish these cases and the evidence of bias is more blatant in the more recent one.

While counsel submitted in evidence records of staff meetings attended by the Administrator there is no evidence of any specific

involvement in the actual investigations or decisions surrounding them. Using the test proposed by the Respondent a reasonably informed bystander might just as likely conclude that the press releases about which the Respondent complains are of an informational nature only; that the employer of the Respondent is just as entitled as the Respondent to discuss his employee with the investigator; or that settlement negotiations between the investigator and the employer by themselves might not prejudice the Respondent when any final decision can only be made by a third party.

For all of these reasons I am not able to accept the Respondent's arguments of bias or apprehension of bias and rule that I have jurisdiction to consider the matters in issue.

III ISSUES:

Having concluded that I have jurisdiction to consider the evidence and render a decision in this matter, it now remains for me to determine, as alleged in the Summons, whether the Respondent, in fact and in law, traded in securities for which he was not licensed to trade, contrary to the Securities Act. Furthermore, if I so find I must also determine whether in my opinion it is in the public interest to suspend, cancel or otherwise attach conditions to the registration of Woodworth.

IV EVIDENCE:

During this hearing, which lasted one and one half days, three witnesses gave testimony and eighteen exhibits were entered into evidence. In most instances, the evidence was uncontradicted.

The Respondent, Clyde Woodworth, sought and obtained registration as a salesman under the Securities Act. A certificate of registration was first issued on December 5, 1988 to expire on October 31, 1989. Subsequently, renewal certificates were issued for the periods December 7, 1989 to October 31, 1990; November 1, 1990 to October 31, 1991; and November 1, 1991 to October 31, 1992. Woodworth's original application for registration, as well as each of the certificates of registration, discloses that Woodworth is employed by Money Concepts Group Capital Corp. ("Money Concepts").

Money Concepts is registered under the Act as a broker. Its first certificate of registration, issued on May 2, 1988, restricted its activities to the sale of mutual funds registered for distribution in New Brunswick. While its registration was renewed each subsequent year, only its current certificate of registration, set to expire on October 31, 1992 continues to disclose the nature of its restriction, namely, the sale of mutual funds.

J.M. Veilleux Income Property Inc./Société Immobilières J.M. Veilleux ("Veilleux") was registered between March 21, 1989 and October 31, 1990 as a broker restricted to the distribution of real estate limited partnership investment contracts.

On December 5, 1988 Marilyn Pollock ("Pollock") became registered as a salesperson with Veilleux Charlesbois and Associates Inc., the predecessor in title to Veilleux. Her registration certificate expired on October 31, 1989. There is no evidence regarding any renewals.

Between 1988 and 1991 security issuer certificates were issued by the Office of the Administrator for various real estate limited partnership securities entitling them to be distributed in New Brunswick during the lifetime of the certificate. These included the Hunt Club Limited Partnership (Certificate 88-432, December 20, 1988 to December 20, 1989); the Juliana Limited Partnership (Certificate 89-93, March 30, 1989 to March 30, 1990); the Longueuil Limited Partnership (Certificate 89-239, August 3, 1989 to August 3, 1990); the Windsor and Company Limited Partnership (Certificate 89-353, December 21, 1989 to December 21, 1990); and the Hunt Club II and Company, Limited Partnership (Certificate 90-1150, June 20, 1990 to June 20, 1991).

Counsel for staff of the Office of the Administrator lead evidence at the hearing to explain the relationship between Veilleux, Pollock, Woodworth, and Macrob Holdings Inc. ("Macrob"), a company incorporated by Fernand Robichaud and Donald MacKay. The testimony of Pollock was particularly credible.

In November, 1988 Pollock was a mutual fund salesperson employed by Money Concepts at its Moncton office. Because she had successfully completed the Canadian Securities Course she was proficient, though not registered, to also sell limited partnerships. Robichaud and MacKay incorporated Macrob to facilitate an arrangement with Veilleux to sell real estate limited partnerships and recruited Pollock to become the registered salesperson with Veilleux. Though she became registered, Pollock understood her primary responsibility to be general manager of Macrob.

Payment by Veilleux to Pollock for her sales of securities was convoluted. Veilleux sent 2 commission cheques to Pollock for each successful sale. One cheque identified Pollock as the payee. The other in an equal amount was made out to Macrob. Pursuant to instructions from the officers of Macrob both cheques were deposited to a Royal Bank account in the name of Macrob. Subsequently, a cheque was issued from Macrob to Pollock. While technically a registered salesperson employed by Veilleux, but in fact general manager of Macrob, Pollock was not privy to the reasons for this arrangement.

Pollock also described the involvement of Woodworth in the sale of real estate limited partnerships. In some instances Woodworth referred clients to seminars conducted by Pollock. From a list submitted in evidence of purchasers of various real estate limited partnerships, she identified those sales for which Woodworth played a role. In response to direct examination by Mr. Westhaver, Pollock described payments to Woodworth:

> Q. Okay. So I show you Exhibit 13. That...I take it, the...that Mr. Woodworth were paid...was paid fees for doing the work with limited partnerships?
>
> A. He would have been paid fees depending on the amount of work that he did...
>
> Q. Yes.
>
> A. ...with people.

Pollock also indicated that there may have been one or two occasions when Woodworth, instead of bringing clients individually to Pollock to discuss limited partnerships, may have done so on his own leaving Pollock no direct contact other than via telephone or written correspondence. Pollock stressed that only she was registered to sign the forms required of purchasers of limited partnerships, and to her knowledge, only she did so.

Various banking documents and bank statements analyses were submitted in evidence. These included copies of cheques of Macrob

to Woodworth as payee. Also, a bank statement analysis lists the deposits to the account of Macrob Holdings Inc. in the Royal Bank of Canada, Main Street branch, 644 Main Street, Moncton, New Brunswick. This analysis identifies substantial deposits from Veilleux and Pollock. A similar analysis describes payments from the same account to Woodworth for "consulting fees and "referral fees". The period of the bank analysis extends from October 1, 1989 to November 13, 1990. Total payments to Woodworth amount to $15,289.26.

In his testimony Woodworth describes himself as an account executive and financial planner having no connection or relationship with Veilleux other than as an investor. He is particularly proud that during the last 12 years he has never received a complaint of any kind but, to the contrary, has many letters of appreciation from his clients.

Woodworth expresses particular ire regarding the manner in which he was investigated by the staff of the Office of the Administrator. He states that it was his original understanding that Macrob, not himself, was under investigation and he responded openly to the staff of the Office of the Administrator. He did not hide or conceal information. He acknowledges that he was cautioned about his right to counsel when he was told that his statement would be recorded.

Woodworth agrees that he "sold" his clients on Jean-Marc Veilleux, the promoter of the various real estate limited partnership projects. He further acknowledges receiving fees. The following exchange took place in cross-examination:

Q. Mm-hm. Okay. Now did you get a fee for referring them or doing what--...did you get referral fees or whatever kind of fees? Consulting fees from Macrob Holdings for referring the members of your family?

A. What--...whatever was issued, was issued the same for everybody..

Q. So what you're saying...

A. ...irregardless [sic] of...

Q. Yes.

A. ...whether it was my family or any--...

Q. Yes. I'm not...partic--...

A. Yes.

Q. You brought your family into this, not me.

A. Yeah.

Q. And I'm only asking you one question.

A. Yeah. No problem.

Q. You got the referral fees for that?

A. Yes.

Q. As well as for the others?

A. Yes, sir.

Q. Okay. That's all I'm asking.

A. Yes, sir.

Q. And these people bought into limited partnerships, did they not?

A. I do believe they did.

Woodworth claims his involvement in the sale of the limited partnerships was as a financial planner. In response to a question on his involvement he appropriately identifies the main issue for consideration today:

Q. I...you are not licensed to...to participate in the sale of limited partnerships.

A. It depends on, sir, what you call participating.

For Woodworth, participating included investigating J.M. Veilleux to determine his credibility as a manager, investing himself in limited partnership securities, referring clients to seminars and personally attending them. He did not believe it was relevant to discuss with his clients the fees obtained in return, nor did he interest himself in the financial arrangements between Macrob and Veilleux.

V SUMMARY ARGUMENT:

Closing submissions of both counsel concentrate upon the issues previously identified as being before this tribunal. In addition to arguments on bias or apprehension of bias, with which I have already dealt, counsel for the Respondent also addresses the issue of the public interest. He argues that there has been a lack of procedural fairness on the part of staff of the Office of the Administrator in carrying out its investigation. While acknowledging that technical breaches of trading occurred on the part of the Respondent, he suggests there is no evidence of actual harm to the public interest. The true fault lies with Woodworth's employer who failed to properly supervise him and other registrants. Punishing Woodworth eliminates the effect not the cause of any alleged public harm.

In his turn, counsel for staff of the Office of the Administrator argues that the legislature, having seen fit to override the interest of any single individual, has provided the Administrator and his staff with very onerous responsibilities and far reaching powers whose paramount purpose is to protect the public interest. The evidence, he submits, particularly the "paper trail" of documents, proves that the Respondent involved himself in a scheme of distribution of securities for which he received payment when he knew he was not registered to do so. He suggests that this is a

scheme which is just as detrimental to the public interest as the one described by the New Brunswick Ombudsman in his report on the collapse of the Principal Group of Companies.

VI DECISION:

The Securities Act establishes the fundamental principle that those firms and individuals who wish to sell or trade securities in New Brunswick must be registered to do so. Standards of proficiency and business conduct which are fundamental to registration have been accepted by those in the industry, as being vital to the integrity of capital markets and investor confidence. As was remarked at this hearing substantial authority has been legislated to the Administrator not only to establish those standards but also to enforce them. While I have a great deal of discretion, my actions are circumscribed by the parameters of the statute which creates my position. Nevertheless, my authority is broad.

For example, as mentioned previously, pursuant to section 21, the Administrator or any person to whom he delegates his authority, may examine any person to ascertain whether any fraudulent activity has occurred, is occurring or is about to occur that is contrary to the Act. Powers of search and seizure can be combined with the freezing or impounding of bank assets, or the issuance of public warnings regarding registrants. Interim registration suspensions

can occur. Experts are available and witnesses can be subpoenaed. Confidentiality can be enforced on all those involved in the investigation.

What is a fraudulent act which precipitates the use of these powers is defined in the Act and regulations. Fraud includes any violation of the Act relating to trading in securities. It is clear that Section 5 prohibits any person from trading in a security unless that person is registered to so trade. An issue at this hearing is whether the Respondent committed a fraud by trading in a security for which he was not licensed or registered to do. The definition of "trading" includes:

> any solicitation or obtaining of a subscription to, disposition of, transaction in, or attempt to deal in, sell or dispose of a security or interest in or option upon a security for any valuable consideration....and any act, advertisement, conduct or negotiation directly or indirectly in furtherance of any of the foregoing....

There are essentially no disagreements amongst the parties relating to the facts. The Respondent, Woodworth, was at all material times registered with Money Concepts, a broker restricted to selling mutual funds only. Mutual funds are not real estate limited partnership securities. The evidence is clear that certain real

estate limited partnerships were registered for distribution in New Brunswick between 1988 and 1991 including the Hunt Club Limited Partnership, The Juliana Limited Partnership, The Longueuil Limited Partnership, The Windsor and Company Limited Partnership and The Hunt Club II and Company, Limited Partnership.

The evidence is also uncontradicted that, while the securities were distributed by a registered real estate limited partnership dealer, namely, J.M. Veilleux Income Property Inc., acting through its registered salesperson, Marilyn Pollock, an arrangement or scheme was in place to pay commission for sales of these securities to a third party, namely, Macrob Holdings Inc. Macrob in turn paid commission to the registered salesperson, Pollock, as well as various amounts of money to Woodworth. These payments were designated consulting or referral fees.

As Woodworth noted in testimony, "what you call participating" is a key issue in this matter. The definition of trading clearly includes any act in furtherance of a trade for valuable consideration. In my opinion, recommending to clients that they attend seminars at which securities will be offered for sale, and receiving money in return for such sales, is participating in the furtherance of a trade and is a registerable activity.

The evidence indicates that Woodworth traded under the Act in limited partnerships and in so doing, I find he contravened the provisions of his registration. At all material times his sales activities should have been restricted to the same activities as his employer, Money Concepts. While the certificates of registration of Money Concepts may not always have identified the exact nature of its restrictions, the evidence is uncontroverted that in both 1988 and 1992 the same restrictions applied, namely, the privilege to deal only in mutual funds, not real estate limited partnership securities. There is no evidence to conclude that between 1988 and 1992 the restrictions were ever altered or amended.

Throughout this hearing, both during examination of witnesses and in argument, submissions were made that the investigative procedures followed by staff of the Office of the Administrator have been unfair to the Respondent, thereby prejudicing him before this hearing. There may in fact be some question regarding the timeliness of cautioning the Respondent when he was interviewed. However, the Respondent acknowledges that he was given the opportunity to obtain counsel before formal statements were taken. I cannot find any breach of fundamental justice so prejudicial to the Respondent to nullify this proceeding. While the principles of fundamental justice are important in the conduct of statutory investigations, of greater concern to me as it must be to Woodworth

is the exercise of the duty of fairness throughout the adjudicative process.

Fairness is the essential guidepost of all procedural rules. The more serious the adverse consequences of a decision for an individual, the greater is the need for procedural protection. While the Securities Act does not impose any procedural requirements in matters such as this, the common law fairness doctrine demands that I treat the Respondent fairly.

The Respondent is entitled to know the case against him through disclosure and notice. He is entitled to be present during the hearing and to receive reasonable adjournments in order to prepare his case. The Respondent is certainly entitled to counsel at the hearing, to call evidence and to make argument on his own behalf. The Respondent has had the benefit of these rights during this process.

The onus of proving the Respondent's breach of the Act lies with counsel for the staff of the Office of the Administrator. I find that that onus has been discharged. By his own admission the Respondent received fees for his actions. Whether this is only a technical breach of the Act or not as argued by his counsel, it is, nevertheless, a trade under the Act, and because of his lack of registration, I find it a fraudulent activity.

One might think that this finding by itself resolves the issues before me. However, counsel for the Respondent argues that there has been no demonstrable public harm as a consequence and therefore, by implication, Woodworth's improper activities should be excused. This argument raises the fundamental issue of the public interest and the exercise of my discretion.

Counsel for the Respondent rightfully notes that there is a heavy onus on the Administrator in determining what is the public interest and how it is to be served. He also recognizes that a determination of what is the public interest lies with the Administrator alone. By the public interest I mean the interest of the general public, that is, all investors for whose benefit the Securities Act was created and is enforced.

In determining what is the public interest I acknowledge that I must exercise my discretion to promote the policies and objects of the Securities Act. The exercise of that discretion must be based on proven facts and must serve the purposes of the Act. In the matter before me, the scheme of the Act demands that only those securities salespersons who meet the minimum standards imposed pursuant to the Act be allowed to provide financial advice. The general public must have confidence in the adequacy and integrity of the regulatory system. This means that those who do not meet the standards are not permitted the privilege of being registered.

The public interest as described by the general scope of the Act demands that those who carry out activities contrary to the Act suffer penalties. As a consequence the Administrator is given substantial powers, as we have noted, to seek out and take appropriate action against those who contravene the regulatory scheme.

As I stated on an other occasion when I accepted settlement agreements from other registrants employed by Money Concepts, there need not be pecuniary losses to investors before harm to the public interest occurs. The purpose of registration is to safeguard the integrity of the securities industry by ensuring that only those who are qualified to distribute those securities do so. When unqualified individuals, such as the Respondent, participate in the sale of real estate limited partnerships, there is, in my opinion, public harm. To Woodworth's credit there have been no complaints or evidence of financial loss to clients, but this alone cannot excuse his actions in this matter.

Finally, a comment on the glare of publicity in investigative proceedings. In my opinion, the occasional issuance of press releases may serve the public interest by reassuring the investors that the securities industry is regulated and is peopled by individuals of integrity and competence. So long as such press notices are factual in nature and not supposition, or untruths it may be in the public interest to release them. The adverse

economic consequences falling upon a registrant because of such public attention should not overbear the public's right to know. The press releases issued in this matter, I believe, were factual informational and have had no weight in considering the merits of the Respondents' case.

VII CONCLUSION:

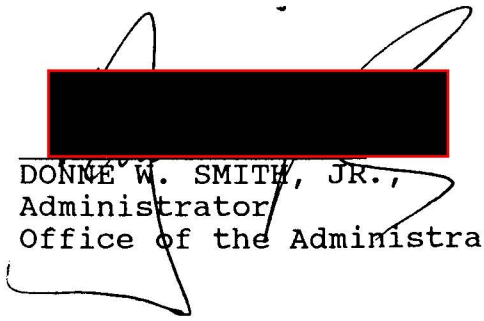
In finding that the Respondent, Woodworth, contravened the trading provisions of the Securities Act, I am cognizant of his counsel's argument that he was but a minor player in an overall larger scheme. Furthermore, I recognize that there has been no evidence of loss to his clients. However, I am not convinced that Woodworth appreciates the significance of his past activities, namely, that he should not have involved himself in this arrangement nor accepted approximately $15,000.00 in fees or commissions as a result. Woodworth was forthright in stating his opinions and I have no reason to believe that he will involve himself in any such sales again without seeking registration.

I am also mindful of my duty to protect the public interest. While I am not bound by precedent, I believe it is helpful to recognize how matters were concluded with regard to other registrants employed by Money Concepts.

Counsel for the Respondent, in summation, made brief reference to penalties that might be imposed upon the Respondent. I believe some penalty is required and therefore, request that the parties make representations to me. In order to assist them I now advise that, pending these further representations, I would propose a suspension of registration for a time to be determined along with an order as to costs. As counsel are aware I am unable to order disgorgement of any earnings gained through improper activity. However, should the parties agree to recommend to me an appropriate settlement involving repayment this might be a factor in determining the nature or degree of suspension.

Therefore, having made certain findings of fact, and having decided that it would be in the public interest to issue certain orders pursuant to the Act, I order that this hearing be reconvened no later than Friday, June 12, 1992 at 10:00 a.m. at the Office of the Administrator, 77 Germain Street, Suite 102, Saint John, New Brunswick or at such other time and place that may be determined, for the purpose of entertaining submissions as to the orders which should be made.

DATED at Saint John, New Brunswick this 3rd day of June, 1992.



DONNIE W. SMITH, JR.,
Administrator
Office of the Administrator of Securities