PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF The *Securities Act*, R.S.N.B. 1973, c.S-6, as amended,

- and -

IN THE MATTER OF the Registration of Gordon Arthur Bond

DECISION

Hearing: May 3, June 26, July 24, 25, August 1, 2000

Tribunal: Donne W. Smith, Administrator

Appearances: Suzanne Ball, Deputy Administrator, Policy & Hearings
– Counsel for the Securities Administration Branch

Danys R.X. Delaquis, Barrister & Solicitor
– Counsel for Gordon Arthur Bond

A. INTRODUCTION:

This Decision follows a lengthy hearing conducted over 5 days pursuant to a Notice of Hearing (the "Notice") dated April 11, 2000 and issued to Gordon Bond ("Bond" or the "Respondent"), then a registered salesperson under the *Securities Act*, also called the *Security Frauds Prevention Act* (the "Act"). The Administrator gave notice that at the Hearing he would consider:

a) pursuant to paragraph 12(1)(c)(v) of the Act, whether it is in the public interest to suspend or cancel the registration of Bond; and/or

b) pursuant to paragraph 12(1)(f) of the Act, whether the registration of Bond should be subject to such conditions as the Administrator deems necessary.

A Statement of Allegations prepared by Staff of the Securities Administration Branch was attached to the Notice. The Hearing commenced on May 3, 2000 and continued with adjournments over a 5 day period concluding on August 1.

The evidence upon which I am being asked to base my decision is principally documentary in nature. Only one witness was called, that of the Deputy Administrator, Enforcement and Compliance for Staff of the Branch. The Respondent did not give *viva voce* evidence.

The amount of time taken to introduce and argue this matter was substantial. The position of the parties does not appear to differ from other administrative hearings held under the Act. Staff alleged and introduced considerable evidence to prove that the Respondent's privilege of registration under the Act should be cancelled by reason of significant and continuous unethical conduct and fraud as defined by the Act extending

over a substantial period of time. Counsel for the Respondent, on the other hand, argued that the allegations were incorrect or insufficient to prove fraudulent actions warranting removal of registration from the Respondent.

B. FINDINGS OF FACT:

The totality of evidence consists of the registration file of Bond in the possession of the Securities Administration Branch, as well as 63 separate exhibits introduced entirely through the testimony of the Deputy Administrator, Enforcement and Compliance, Ed LeBlanc ("LeBlanc"). With regard to the registration file it should be noted that, while it was not introduced as an exhibit, I indicated during the Hearing that it was open to me to review and consider its contents. Counsel for the Respondent was provided an opportunity to review the registration file.

The complexity of the evidence in this matter is reflected not only in the length of the Hearing itself but in the number of exhibits and their size and contents. In some instances both Counsel objected to the introduction of these exhibits, for reasons that will be more fully explained below. However, for purposes of this Decision I find the facts in this matter to be as follows:

1) At all times material, Bond was a registrant under the Act, restricted to distributing mutual funds. His registration history as a salesperson under the Act indicates employment and registration as follows:

   - February 16, 1988 to June 20, 1988 – Tillcan Financial Corporation, Broker;
   - September 6, 1988 to January 2, 1990 – Integrated Financial Services (IFS Capital Management), Broker;

- November 30, 1989 to February 14, 1991 – Fortune Financial Mutual Funds Inc., Broker;
- May 27, 1991 to June 23, 2000 – Regal Capital Planners Ltd., Broker.

2) Bond declared bankruptcy on September 13, 1982 and was discharged on May 25, 1983. Bond again declared bankruptcy on January 22, 1990 and was discharged on May 17, 1994.

3) On January 30, 1991 Regal Capital Planners Ltd. ("Regal") requested Bond's registration be reinstated and transferred to Regal as Broker. Bond's application failed to disclose to the Branch certain material facts, particularly his status as a bankrupt. Branch Staff interviewed Bond on April 10, 1991. Bond provided explanations for his 1982 bankruptcy, reasons for not disclosing his 1990 bankruptcy, his sharing of commissions derived from the sale of securities, and reasons for not disclosing his most recent residential address, amongst other matters.

4) By letter dated May 3, 1991 to Regal, the Administrator advised that:

> "should Mr. Bond's application for transfer be approved, certain conditions relating to supervision must be attached to it. In particular we would require your undertaking to closely supervise Mr. Bond's activities, to report immediately any complaints against him made to your office, and to file within 15 days from the end of each month, an activity report...Without your close supervision along with filing of reports we would be unable to determine whether Mr. Bond remains, on a continuing basis, a suitable candidate for registration under the Securities Act."

5) By letter dated May 9, 1991 Regal outlined additional conditions that had to be accepted by Bond before Regal would support Bond's registration, including:

> "1) While operating under the license of Regal Capital Planners Ltd. he must as a condition of sponsorship place all related business through our office including life.
>
> 2) No other name other than Regal Capital Planners Ltd. and/or Regal Capital Insurance Agency may be used in solicitation or the sale of investments and/or insurance....
>
> 4) No other insurance or investment companies can operate out of the Regal Capital Planners Ltd. office in Saint John.
>
> Mr. Bond must undertake to restrict all of his activities to Regal Capital Planners Ltd. and/or Regal Capital Planners Insurance Agency Ltd. (and it's sponsors)."

By letter to Regal dated May 13, 1991 Bond accepted these conditions of employment.

6) By letter to Regal dated May 27, 1991 the Administrator enclosed a salesperson's Certificate of Registration for Gordon A. Bond with Regal as broker, and stated:

> "We view the requirements imposed by Regal Capital Planners Ltd. to apply to the enclosed Certificate also."

7) Schedule A to the Certificate attached two additional conditions:

> "1) the registrant's securities activities are to be supervised by the regional manager, Gary R. Robertson, who is to report immediately any complaints made against Mr. Bond to the Office of the Administrator;
>
> 2) Regal Capital Planners Ltd. shall file within 15 days from the end of each month an activity report to include a list of Mr. Bond's clients, the products he has sold and the amount of each sale, the date of the transaction and, when

recommendations are made to transfer mutual funds, the funds from which the product was transferred."

8) Bond's registration as a salesperson was renewed annually and remained in continuous effect until June 23, 2000 at which time Regal's sponsorship of Bond's registration was terminated.

9) On July 27, 1998 Branch Staff attended Regal's Saint John branch office:

   a) to undertake a compliance review of Regal's operations at that office; and

   b) to question Bond on his involvement with the subject matter of a complaint against another individual.

10) During the course of the compliance review various documents were discovered in Bond's possession relating to Brian Reid ("Reid") and corporations controlled by or connected to Reid, namely Registered Investment Financial Services Inc. ("RIFS/IFS"); Global Investment Corporation ("Global"); and Galactic Investment Corporation ("Galactic"). At no material time were either Reid or any of these corporations registered in any capacity under the Act, or entitled to exemption from registration under the Act to trade, advise, or otherwise distribute their own or other securities.

11) RIFS/IFS, Global and Galactic were controlled or directed by Reid whom Bond acknowledged was a friend. However, Bond denied that he was "officially" involved in any way with Reid or these corporations whose business, it was stated by Bond, was "offshore" investing.

12) Bond's files disclosed a document (Exhibit C-14) entitled "Client Letter of Direction", with the fund manager identified as "IFS" and the owner as "Mary C. Ross" ("Ross"). A date of birth, November 28, 1912, was shown along with a residential address. The product was identified as "LIPP" in an amount of $30,000. The document listed beneficiaries and disclosed a return of income at "7.2% for life"; "guaranteed 15 years". Other instructions indicated that share certificates were to be issued. The "representative's signature" was signed by Bond and the client's signature by Ross. The document was dated July 8, 1992.

13) Bond acknowledged that one of his clients, Ross, invested in a "life income annuity", also characterized by him as "basically a guaranteed investment", and that Ross received $180 each month in income paid by Bond.

14) Depending upon the method of calculation, the actual rate of return over 15 years varied from 0.1% to 1.6%.

15) The Respondent stated on July 27, 1998 that the Client Letter of Direction constituted evidence of an "investment" in RFIS/IFS, whose address of 221 Prince William Street, Saint John is the same as the Regal Saint John branch office.

16) Bond acknowledged that he was the ultimate recipient of the $30,000 investment made by Ross in RIFS/IFS and that Ross did not know this fact. He characterized the transaction as "an investment loan" which he would pay back in monthly installments, somewhat like an annuity.

17) Bond explained that the reason for the "loan" was that he was in bankruptcy and "absolutely desperate. But this was able to put me in a position where I could still survive, I guess." (exhibit C-13, p.8)

18) In her affidavit submitted during the Hearing, Ross indicated that she made a personal loan to Bond and not an investment called a "Life Income Payment Plan" sold by RIFS/IFS.

19) Attached to the Ross affidavit as Exhibit B was a copy of a form similar to the Client Letter of Direction discovered at the Respondent's office (Exhibit C-14). However, while some information was the same, including the client name, beneficiaries, the signatures of the representative and client, and the date of execution, Exhibit B contained the notation that "this is a personal loan, as per our arrangement". Additionally the word "loan" was inserted after the name of the product.

20) Banking records show that Bond made regular money order payments of $180 each, marked "IFS", and payable to Ross, between 1992 and 1998.

21) The Respondent admitted that a similar IFS "investment" in the amount of $100,000 was made by Regal client, Gladys C. MacAfee ("MacAfee") in 1991 which was "basically a duplicate of the same thing" into which Ross invested.

22) MacAfee stated in her affidavit submitted at the Hearing that she made a personal loan to Bond.

23) Bond in a "handshake deal" borrowed another unstated amount from MacAfee, in addition to her 1991 IFS "loan" of $100,000. Bond subsequently paid in total approximately $1,450 each month through various money orders to MacAfee for all identified transactions with MacAfee.

24) In 1995, MacAfee redeemed mutual fund investments held for her through a Regal client account. The proceeds of redemption were given to Reid in cheque amounts under $10,000 each. The redemption cheques were deposited into an IFS bank account. Account information and trade confirmations were issued by Global, a company controlled or directed by Reid.

25) Trade confirmations and statements of account issued by Global to MacAfee indicated purchases between August 24, 1995 and December 31, 1996 by Global on MacAfee's behalf of the same mutual funds redeemed by Regal totaling $287,161.97. (Exhibits D-28 and D-26, respectively)

26) Toronto Dominion Bank records for IFS indicated that some of the proceeds of the mutual fund redemptions by Regal for MacAfee, deposited to IFS's credit, were paid out to Bond. Bond received $79,245.71 between August 24, 1996 and December 31, 1996.

27) Bond denied that he received any commission or remuneration for the redemption and reinvestment of MacAfee's assets in Global.

28) In Bond's possession at the Regal branch office were blank redemption and order forms, pre-signed by McAfee and one Terry Ganong, respectively.

29) At Regal's office and in Bond's possession were dealer and investor promotional materials for Galactic.

30) Bond denied knowledge of any Regal clients having invested in Galactic. However, when presented with evidence to the contrary he acknowledged that he was present when his clients, Vernon and Lois Titus ("Titus") made a $100,000 investment in Galactic on April 16, 1997 with Reid.

31) The Hongkong Bank records (Exhibit D-38) for Galactic disclosed that subsequent to a deposit of $100,000 received from Titus, $6,500 was paid to Bond on September 12, 1997 and an additional $13,500 to Reid totaling $20,000. Bond denied receiving any remuneration or commission for any investments in Galactic.

32) Galactic materials found in Bond's possession disclosed that an "administrative fee" of 20% of the actual investment would be charged each client. The fee might decrease by 1% each year in certain circumstances. Monies paid to Bond and Reid from the Titus investments totaled $20,000 or 20% of the $100,000 invested.

33) Two statements of account dated December 31, 1997 issued by Galactic to Titus summarized investments in Templeton Growth Fund ("Templeton") and Trimark Select Growth Fund ("Trimark") as of December 31, 1997.

34) The Templeton statement indicated investments were initiated for Titus commencing May, 1997. The Trimark statement indicated investments commencing August, 1997. The Hongkong Bank records for Galactic indicated that no disbursements had occurred before these dates other than payments to Reid and Bond totaling $20,000. The bulk of the account, $80,000, was withdrawn on September 12, 1997.

C. <u>ANALYSIS AND ARGUMENT</u>:

Before further analyzing the evidence presented at the Hearing it is necessary to consider the many objections and arguments, both preliminary and otherwise, made during its course. This is particularly important since the Respondent did not call any evidence other than introducing two affidavits. Bond's counsel relied totally upon cross examination and argument.

1) Protecting the Public Interest and the Issue of Bias: The Role of the Securities Regulator:

a) **Public Interest** - The purpose of regulatory legislation, such as the *Securities Act*, is often simply stated, namely, to protect the public interest. However, the public interest itself is not often defined. Courts have had difficulty defining the "public interest" other than recognizing that it must be determined in light of each case's facts and circumstances. They have recognized that administrative agencies, in contrast to

courts, are charged with determining what best serves the public interest rather than adjudicating between parties. Macaulay in *"Practice and Procedure Before Administrative Tribunals"* (Carswell, 1997) states that "It is what is 'good', 'beneficial' and in the 'best' interest of the society for which the particular legislation was designed" (1-22).

The *Securities Act* is silent on its purpose. However, recent amendments to the Ontario *Securities Act* have for the first time in any Canadian securities legislation stated its objective which might be considered as a guide:

> s.1.1 The purposes of this Act are,
>
> 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.

In order to achieve its mandate to protect the public interest, however one defines it, the Act requires that firms and individuals who wish to trade securities with New Brunswick investors or provide securities advice be registered. The purpose of registration is to ensure that those engaged in the securities industry are honest and of good repute; that they demonstrate they have met minimum standards of education; and that they exercise financial responsibility in an ethical way. In other words, the registration process seeks to ensure that both firms and individuals are and remain candidates fit and suitable for the privilege of dealing with investing public.

Today's complex capital market environment requires increasingly higher and more expansive standards to help foster within our regulatory system the twin goals

enunciated in the Ontario *Securities Act* of investor protection and efficient capital markets. Consequently, suitability means more than just being honest and of good repute. It includes a high degree of financial well-being, competence and good character necessary to guide investors in the complexity of today's financial marketplaces.

Grant of registration under the Act is entirely discretionary on the part of the Administrator or his delegate, the Registrar. Sub-section 8(1) and provisions of section 12 reflect this broad discretion. For example, paragraph 12(1)(f) states that the Administrator "may order" a registration be made subject to such conditions as the Administrator deems necessary. Paragraph 12(1)(c) grants the Administrator the broad discretion to suspend or cancel a registration when the Administrator is satisfied that such action is in the "public interest".

Counsel for the Respondent argued that public interest tests are met when, as in the case before me, there is no complainant, independent of Branch Staff. Counsel for Staff, on the other hand, argue and I agree that the public interest must be considered more broadly. It must encompass, if the *Securities Act* is to have any meaning, all investors resident in New Brunswick and the regulatory system itself which the legislature has put in place to protect them. The integrity of this system can be jeopardized even if there is no evidence of immediate, substantial or individual harm.

Administrative law underpins the protection of the public interest by incorporating into it concepts of procedural fairness and natural justice. A tribunal's overall duty is to be fair and this duty is not dependent upon its classification as an administrative, legislative or

quasi-judicial agency. Rather, it is necessary to examine all circumstances to determine what duty of fairness is owed by the administrative body to the persons it regulates.

b) **Bias** – Counsel for the Respondent raised a preliminary objection which he maintained throughout the Hearing that the Administrator, acting as the tribunal, was possibly biased and accordingly should withdraw from the proceedings. He alleged institutional rather than apprehended or personal bias on the part of the Administrator. Counsel for Staff responded that the scheme of the *Securities Act* is such that the ordinary rule against bias is excluded.

An institutional bias is a reasonable apprehension of bias generated by the structure of an institution rather than the words or deeds of an individual. If the structure of the tribunal creates a reasonable apprehension, then impartiality is not met and the necessary public confidence in the regulatory system is not achieved. (Jones and DeVillars, Principles of Administrative Law, 3rd ed., 1999 at p.372) The "test" is stated by Mr. Justice Sopinka in Régie des permits d'alcools [1996] 3 S.C.R. 919 at 951:

> "The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension of bias in a substantial number of cases."

The difficulty, however, is not in stating the test but in applying it. This is particularly true when there are tribunal members with overlapping functions, such as the Administrator under the Act.

In determining whether prejudice results from institutional bias, the courts have first turned to the statute establishing the tribunal. In Brosseau v. Alberta (Securities Commission), [1989] 1 S.C.R. 301, a commission panel chair received investigation information prior to sitting on a panel. The Supreme Court of Canada held that no bias existed because these functions were impliedly authorized by statute. The Court noted the functions of the tribunal mattered and in this case stressed the protective role given to securities commissions.

In W.D. Latimore Co. v. Bray (1974) 52 D.L.R. (3d) 161, the Ontario Court of Appeal had the opportunity to rule on the structure of the Ontario *Securities Act* which permitted the commission to investigate as well as adjudicate on the same fact situation. The Court held that the Act did not divide or separate the commission members responsibilities into administrative and adjudicatory functions. Dubin, J. A. noted that the commission was, by statute both "the prosecutor and judge":

> "Where a statute by its terms or by clear implication precludes the introduction of a common law rule and where the imposition of such a rule would frustrate the will of the Legislature or of Parliament as expressed in the statute, the Court is not free to insist that the common law rules prevail, however inviting it may be for a Court to do so."

Dubin, J.A. continued:

> "It is to be observed that in the division of responsibility under the Securities Act, it is the Commission which is charged with directing the investigation undertaken in this case, and it is the Commission which is charged with a conduct of a...hearing. Mr. Bray [the Vice Chair] was always acting pursuant to the responsibilities imposed upon him by the statute. There is no suggestion here of his having obtained information or being associated with the subject matter or the parties in any way other than when he was acting pursuant to the statute. The very language of [the statute] contemplates that information

> has come to the attention of the Commission which, if unanswered satisfactorily, may lead to a suspension or cancellation of a registration."

Finally, Dubin, J.A. held that the Commission was simply conducting itself as required by statute:

> "By statute, every member of the Commission is entitled to have the report submitted to him, and the statute does not divide responsibilities of the members of the Commission into administrative and adjudicatory functions with respect to the type of proceedings being considered here. To give effect to that submission, in my respectful opinion, would frustrate the scheme of the statute."

Like the Ontario *Securities Act* and the Alberta *Securities Act* cited in Latimore and Brosseau above, the New Brunswick *Securities Act* does not expressly incorporate the ordinary rule against bias by separating the Administrator's functions. To the contrary, Part II of the Act permits and directs the Administrator to conduct investigations and undertake administrative action. This authority is in addition to the discretion granted the Administrator pursuant to sections 8 and 12 in dealing with applications for registration and suspension or cancellation of registrations. In my view, absent express or implied rules against bias in the Act, it is the common law doctrine of procedural fairness that safeguards the rights of those regulated, and accordingly, Counsel's allegations of institutional bias cannot be sustained.

2) Investigative Procedures:

Counsel for the Respondent raised a number of objections with regard to the procedures followed by Branch Staff in bringing this matter to a hearing, including a failure to afford the Respondent an opportunity to retain counsel during the examinations of July, 1998; the search and seizure of documents from Regal's branch office; an unreasonable delay

following Bond's examination before issuing the notice of hearing; and finally, breaches of the Respondent's Charter rights. These failures, he argued, prejudiced the Respondent and constituted a denial of natural justice and procedural fairness.

a) **Right to Counsel** - Counsel argued that Bond was not afforded the opportunity to seek counsel when Branch Staff visited his office on July 26, 1998 and interviewed him on the record over 2 days. Counsel suggested that a registrant has a right to legal advice in such circumstances and pointed to ss. 144(4) of the British Columbia *Securities Act* in support:

> ss. 144(4) A witness giving evidence at an investigation conducted under section 142 or 147 may be represented by counsel.

Under that Act the right to retain counsel is in the discretion of the witness but, this right is given in the context of a formal investigation order issued by the Commission pursuant to section 142. Such an order grants extensive powers to the investigator (s. 144) to compel attendance and testimony. Failure may constitute contempt of court, a very significant consequence.

The *Securities Act* is silent on its investigation procedures and protections. While I agree that in some circumstances, better practice might be to afford the Respondent an opportunity to seek counsel, the failure to do so does not amount, in my opinion, to a denial of procedural fairness. There is no provision similar to that of British Columbia's upon which the Respondent could rely.

The grant of registration is a privilege, not a right and it is the duty of a registrant, as well as a condition of registration, to cooperate fully with the regulator in any matter involving the *Securities Act*. This duty is particularly important when one considers that the reason for the visit by Branch Staff was not to conduct an investigation of the Respondent in the first instance but rather to seek an explanation of information relating to another investigation.

b) Search and Seizure - Respondent's Counsel also implied that in conducting the interview of the Respondent, at some point Branch Staff's approach changed from one of simple inquiry to that of investigation of the Respondent. At that point, he argued, the matter became at a minimum, a quasi-criminal investigation warranting the protections of the Charter, in particular, the right to counsel and to protection from search and seizure.

While the current case law is not definitive the Courts have generally held that the Charter does not apply to administrative proceedings in contrast to the investigation of offenses established by statute. Whether the examination of Bond constituted an administrative process or a quasi-criminal investigation is not relevant, I believe, at least for our purposes here. Fundamental justice as represented by the Charter includes natural justice and procedural fairness. Consequently, the more appropriate question is whether the Respondent was treated fairly at the time of the examination. In my view there is no evidence that he was not, even though the interview lasted over several hours without a break. The Respondent did not seek an adjournment or express his opposition to the examination. On the contrary, he was co-operative, and indeed volunteered information.

c) **Charter Issues** - With regard to Charter issues, it is clear that when an agency is administrative in nature and not adjudicative, the Legislature did not intend it to have powers to consider questions of law such as the applicability of Charter provisions. It can only interpret and apply its enabling statute. Consequently, it is not appropriate for me to respond to Counsel's objections of Charter violations. Remedies must be sought elsewhere.

d) **Unreasonable Delay** - Finally, Counsel suggested that the Respondent was prejudiced, and an abuse of process resulted, because of unreasonable delay in commencing this Hearing. A year and a half expired between July, 1998 and April, 2000 when the Notice of Hearing was issued. Branch Staff's explanation for this delay included lack of human resources necessary to review the documents and consider the evidence. It is to be noted, however, that Bond continued to trade, his registration being renewed in November, 1998 and 1999. It was only when his employment terminated with Regal that his registration was suspended. Furthermore, no evidence was presented at the Hearing that the Respondent was harmed or was any specific evidence presented of detriment to his case through death or the incapacity of any potential witness which might suggest prejudice to the Respondent.

3) Tribunal Procedures:

Much of the Respondent's defense rested upon arguments made throughout the Hearing about a lack of jurisdiction; Staff's failure to disclose appropriate and necessary evidence; and the appropriateness of hearing procedures, the admissibility of evidence and the required standard of proof.

a) **Jurisdiction** – Respondent's Counsel argued that I lost jurisdiction to consider the matter before me because the Respondent's registration was suspended effective June 23, 2000 when his employment with Regal was terminated. Counsel also suggested that I had no jurisdiction because the transactions which are the subject matter of the hearing, were personal loans, not securities and therefore outside the purview of the Act. Consequently, I lacked jurisdiction over both the individual and the matter.

Pursuant to sub-section 10(1) of the General Regulation, registration of a salesperson is automatically suspended upon termination of employment with a registered broker. Consequently, Counsel argued that I had no jurisdiction to consider whether to suspend the Respondent's registration when he was already suspended. Counsel for Staff argued, to the contrary, that even though Bond's registration was suspended by reason of termination of employment he could seek reinstatement at some future time and it was necessary to place on his record the final conclusion of this administrative process.

I cannot accept the Respondent's arguments. For purposes of the matter before me, and certainly during the time of the Hearing itself, I did have jurisdiction over Bond until such time as his registration was no longer in effect. The Act contemplates degrees of registration when it speaks of both "suspension" and "cancellation". I agree that the Act retains no jurisdiction over the individual, and from an administrative law perspective, over matters involving the individual as a registrant, once a registration is cancelled or expires. Bond's registration expired on October 31, 2000 when an application for renewal of registration was not received.

As Staff Counsel pointed out the Act's public interest mandate necessitates both specific and general deterrence be consequences of administrative processes involving registrants. Specific deterrence applies to the registrant who is the subject of the administrative process and results in imposing a penalty in order to deter that individual from again undertaking improper activity. General deterrence is important in order to maintain an effective regulatory system for the protection of the investing public. Consequently it is appropriate that the Administrator's decisions and actions deter others from a course of conduct which contravenes the Act.

Counsel argued that I lacked jurisdiction over the matter because of the nature of the alleged transactions. Certainly, a determination of this issue is important. However, the issues raised before me were broader, namely, the Respondent's duties as a registrant. Whether some or all of the transactions were loans and not securities should not be the sole determinant.

b) **Disclosure** - On several occasions Respondent's Counsel complained that full disclosure had not been provided to him in order to meet the allegations expressed in the Notice. It must be said that the scope of documentary evidence submitted at this Hearing was daunting. I accept Staff's statement that every attempt was made prior to the commencement of the Hearing to disclose materials upon which Staff's case was based. However, as Counsel pointed out, there is no absolute duty of full disclosure in an administrative process. Rather procedural fairness requires a level of disclosure necessary for the Respondent to prepare and present his case. Counsel for the Respondent sought and obtained during the course of the Hearing access to the Respondent's registration file as well as Staffs' 1998 investigative notes regarding Bond.

I declined to order disclosure of similar records or materials relating to an investigation separate and apart from Bond.

c) **Tribunal Procedures and Admissibility of Evidence** - By far the most contentious aspect of this Hearing was the on-going objection by Counsel for the Respondent that much, if not all, the evidence submitted by Staff Counsel was hearsay, not reliable, irrelevant and consequently inadmissible. All the documentary evidence was submitted through the testimony of LeBlanc, the sole witness for Branch Staff. Consequently, it is incumbent on me to discuss the admissibility of this evidence.

Generally speaking, hearsay evidence is written or oral statements or conduct made by persons otherwise than in testimony at the proceeding in which it is offered. It is a fundamental principle in law that such evidence is inadmissible if it is tendered as proof of the truth of the facts alleged or proof of assertions implicit in the conduct. The law assumes such oral or written evidence to be unreliable because it cannot be tested. Hearsay evidence is evidence weaker than best evidence which is direct evidence. The principal justification for the rule against hearsay is the abhorrence of common law to proof that is unsworn and untested by cross examination.

The danger in admitting hearsay evidence increases as the seriousness of legal consequence increases. Criminal offenses, for example, have much more deleterious consequences and hearsay evidence may be more damaging in criminal proceedings than in civil. However, if a document is submitted in evidence as proof that it existed but not as proof of its contents, the law holds it not to be hearsay and, therefore, is admissible.

There are exceptions to the hearsay rule. One is that of admissions of a party to a proceeding. While they may be hearsay they are admissible. That party can hardly object that he had no opportunity to cross examine himself or that he lacks credence. The party is able to take the witness box to deny the admission or to qualify it.

The hearsay rule may also be amended by statute. For example s. 41 of the *Evidence Act* permits copies of entries or records maintained by financial institutions to be received as *prima facie* proof of the transactions recorded. However, this exception is limited by ss. 46(2) which states that evidence must be made in the ordinary course of business and proved orally or by affidavit. Counsel for the Respondent argued that much of the bank records submitted in evidence and the conclusions resulting therefrom did not meet the statutory tests under the *Evidence Act* and should not be admitted.

Regardless of the hearsay rule for criminal and civil proceedings, the courts have always maintained that the rule does not apply to administrative proceedings. Sopinka in "The Law of Evidence in Canada" (Butterworths, 2nd ed.) at page 308 states:

> "In proceedings before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless its receipt would amount to a clear denial of natural justice. So long as such hearsay evidence is relevant, it can serve as a basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law."

The rationale for the non-applicability of the hearsay rule is that administrative proceedings are not normally as adversarial as criminal or civil cases. Administrative tribunals are by their nature fact finding bodies with policy and social objectives. Evidence with respect to these issues contains a hearsay component which is difficult and perhaps improper to exclude.

Evidence is a matter of procedure. Courts have long held that administrative agencies are masters of their own procedure. Thus they are not bound by formal rules of evidence except to the extent that rules of natural justice are applied and subject to the applicability of statute law. This freedom results from the administrative agency's mandate. It does not do the same thing as a court. It is investigative and fact finding in nature, not adversarial and penal.

There are limitations to this freedom, however. A concept of evidence must be followed. Natural justice and procedural fairness require an opportunity to know the case and to respond and that the decision be made by an unbiased adjudicator. The decision must reflect the intent of the statute and its underlying purpose.

When an agency is faced with an evidentiary objection, its obligation is not necessarily to determine whether hearsay or other rules exclude evidence, but...

> "to determine what practical weakness is really being asserted as a basis for the rejection of the evidence and whether that weakness is sufficient to make the evidence sufficiently unreliable or unusable for the task it is intended to be put by the agency." (Macaulay, 17-2.2)

A sound factual basis for any decision depends upon two elements: relevance and weight. Hearsay evidence is an issue of weight. Because the documents or conduct cannot be tested, are they so unreliable and do they carry so little weight that in reaching a decision they should not be considered? However, an agency must also determine that even if evidence is not completely reliable, is it sufficiently reliable to meet the agency's mandate? A higher degree of certainty may be required, for example, when someone's career is at risk.

Counsel for the Respondent argued that all hearsay evidence submitted at the Hearing should have been excluded. This evidence included: correspondence between Regal and the Securities Administration Branch contained in Bond's registration file, because Regal was not a party to the Hearing; the transcripts of Bond's examinations conducted in July, 1998, because of the varied references to people other than Bond; and all the documentary evidence relating to the financial institutions including bank records, bank statements, cheques and money orders, because these did not meet the strict test of section 46 of the *Evidence Act* which establishes an exception to the hearsay rule.

Counsel for the Respondent also argued that some of the evidence was inadmissible because of a lack of procedural fairness. Bond was not given the right to counsel during his examination. Additionally, he argued that the transcripts of the examination also submitted as evidence at the Hearing were not reliable because Bond was forced to continue with the examination despite a diabetic condition.

Apart from the issue of procedural fairness, to which I responded above, Counsel's objections regarding admissibility of Staff evidence were essentially founded on the rule against hearsay. At the Hearing I permitted all evidence to be submitted including the hearsay evidence of Ross and MacAfee contained in their affidavits. This proceeding acted administratively, not judicially, with the purpose of assessing facts in order to determine whether regulatory standards had been breached by the Respondent. Accordingly, I hold that it was appropriate that Staff be allowed to submit evidence to explain what it believed the facts were and why those facts were relevant. The Respondent equally had an opportunity to lead evidence. At no time did Counsel for the Respondent argue that the evidence was irrelevant, only that it was hearsay.

If one follows Macaulay's test cited above, the practical weakness in Staff's evidence, as asserted by the Respondent, is the Respondent's inability to rebut or contradict, especially through cross-examination, the documentary evidence. However, it is clear that the Respondent also relied on hearsay evidence in claiming it had submitted the "better" documentary evidence, that is, the affidavits. As it is recognized that consideration of hearsay evidence is more a matter of the weight of evidence, rather than its relevance, when all is taken into consideration, I cannot find that the danger of admissibility, particularly unreliability, has been demonstrated.

D. **ANALYSIS:**

The issues in this matter are not complicated though the volume of evidence would appear to make it so. Evidence was introduced which, on its face and in the described circumstances, would suggest improper activity on the part of the Respondent. At its best this activity may be viewed as breaches of ethical standards or codes of conduct either established by or customary to the industry, or characterized in another way, minor regulatory infractions. At the other end of the spectrum, at its worst, the activity may be considered as fraudulent acts constituting quasi-criminal offenses under the Act. The question, then, is whether there is sufficient evidence to warrant an administrative order affecting the Respondent's registration.

I have carefully reviewed the evidence and considered the arguments submitted by both counsel during the 5 day hearing. I recognize the importance to the Respondent's position of Counsel's argument that the evidence submitted was substantially hearsay, and I have taken particular regard of its relevance and weight for the reasons I discussed above. Apart from Counsel's vigorous arguments and the 2 affidavits

fundamental to his position, the Respondent did not present any other evidence to contradict the testimony of Branch Staff. The transcript of Bond's July, 1998 examinations were not rebutted. These are revealing particular with regard to the Respondent's dealings with his client, Mary Ross, and deserve comment.

It is Bond's position that the very substantial amounts of money - amounts which Bond did not dispute - were not misappropriated or converted by him, unbeknownst to Ross and MacAfee, but were in fact loans, given in full knowledge that they were loans and not investments. Furthermore, Ross's and MacAfee's affidavits purport to absolve Bond of any responsibility for the dealings that Ross and MacAfee had with others, particularly IFS/RIFS, Global and Reid. By themselves these affidavits might be persuasive of Bond's explanation. While I have no doubt that the elderly clients who swore them did so with the best of intentions, I cannot accept them solely as evidence of the truth of the matter they purport to express.

Of particular concern is the significant discrepancy without explanation between the Client Letter of Direction, submitted as Exhibit C-14 by Staff, and the Client Letter of Direction attached as Exhibit B to the Ross affidavit. The latter purports to be a copy of the Client Letter of Direction executed by Ross in 1992, and was submitted as proof that Ross intended the amount received by Bond to be a loan. Equally disturbing are the significant details on the Client Letter of Direction submitted with the Ross affidavit especially the notation that the transaction was a loan, which was absent from the other version. In July, 1998 Bond himself characterized the transaction as an investment in IFS, not a loan. No corroborating evidence was discovered by Staff during the Regal

branch office examination nor was evidence submitted other than the affidavit to characterize this transaction as a personal loan.

Equally telling, I believe, is the admitted circumstance in which the 1992 IFS investment was made by Ross. Bond freely and candidly acknowledged that the reason he sought $30,000 from Ross was that he was bankrupt and consequently "absolutely desperate". Significantly, he acknowledged that he did not advise Ross of the true nature of the investment in IFS nor that he would be the ultimate recipient. In his interview with Staff in July, 1998 his confusion, if not his unease, about the receipt of this money is evident for he characterized it variously as "an investment, I guess", and "investment annuity" or "like an annuity". The evidence is persuasive that the $30,000 transaction was intended by Bond to be an investment in IFS for why otherwise would the Client Letter of Direction be structured and documented like an investment with IFS and, with share certificates to be issued.

I do not find that these discrepancies have been satisfactorily explained by the Respondent. While Counsel explicitly argued that, regardless, I must place greater weight on the sworn affidavits in contrast to other hearsay evidence, - that the evidence "doesn't get any better than this" - I find the discrepancies to be so significant that the affidavits alone cannot adequately justify the Respondent's actions.

Bond's candid acknowledgement that he needed the $30,000 because of his second bankruptcy, underscores the fundamental objective of the registration process, namely, to determine the suitability or fitness for registration of applicants. Suitability means more than just being honest and of good repute. It includes a high and demonstrated

degree of financial well-being, competence and good character. Declarations of bankruptcy are an important determinant as are convictions, violations of other regulatory statutes, civil proceedings and other employment or business relationships which might lead to potential conflicts of interest. Question 17 of the Salesperson Application for Registration Form specifically requires disclosure of bankruptcy as well as the reasons for it. It is expected that an applicant – and registrant - be as forthright with the regulator – and his employer, in disclosing material information as securities law expects and requires a salesperson be with investors.

Once a Certificate of Registration has been granted, each registrant is required to continue to meet the suitability obligations on an on-going basis. Personal circumstances change subsequent to registration, as they did with Bond's two bankruptcies, and what was not a consideration of suitability before, may become one later. The Standard Conditions of Registration, attached as Schedule "A" to each registration certificate, reflects this on-going requirement. Condition 2, for example, states:

> "The Registrant shall comply with provisions of the *Securities Act* (R.S.N.B. 1973, c.S-6) and regulations thereto;"

Condition 4 states:

> "The Registrant, whether or not a member of or employed by an SRO, is required to conform to standard business conduct guidelines common to the industry. Such guidelines include but are not limited to the "know your client rule", the duty to report breaches or apparent breaches of securities law requirements by others which come to the attention of the Registrant, and the duty to report to the Office of the Administrator customer complaints regarding the Registrant;"

Finally, Condition 8 should be noted:

> "Failure by the Registrant to comply with the *Securities Act*, its regulations and the policies of the Administrator, along with these conditions of registration, shall constitute grounds upon which the Administrator may consider the fitness of the Registrant for continued registration as being contrary to the public interest;"

The Respondent, therefore, had a continuing responsibility to remain a fit and suitable candidate for registration subsequent to his initial registration. However, these were not the only conditions of registration that applied to him. In 1992 two additional conditions were imposed when he was transferred to Regal. The reasons for these are instructive.

Correspondence submitted in evidence and in the registration file disclosed that there was concern on the part of Branch Staff in 1991 about Bond's suitability for registration, initiated by his failure to disclose his second bankruptcy within 6 years. His ability to manage his own affairs raised questions regarding his competence to provide securities advice to potential investors. Evidence was lead at the Hearing which showed that Bond exhibited the same pattern of behavior in 1991 that is apparent in the matter before me now, namely, an evasiveness and obfuscation, either intentional or otherwise, in disclosing material facts to the regulator unless confronted with significant evidence to the contrary.

The *Securities Act* and regulations are silent with regard to the standards of conduct expected of registrants. However, the industry itself has established ethical codes of conduct and practice, compliance with which is required as a condition of registration. For example, at the Hearing, the Respondent's Counsel cited the by-laws of the Investment Dealers Association of Canada ("IDA") when he argued that the industry

trade association and self-regulatory organization ("SRO") did not prohibit members absolutely from borrowing from clients. The IDA represents Canadian securities dealers and as an SRO has the ability to discipline its members.

The mutual funds industry, of which Regal is and the Respondent was a member, is another but separate facet of the Canadian securities industry. While not yet governed by a self-regulatory organization the mutual funds industry is represented by the Investment Funds Institute of Canada ("IFIC"), a trade association of fund managers and distributors.

For purposes of this decision, it is to be recognized that, while the IDA and IFIC represent different segments of the securities industry, and have varying authorities over their members, both organizations have established codes of conduct and issued statements of ethical practice which reflect similar philosophies: that only in complying strictly with high ethical standards of practice are the interests and well-being of the investing public, and consequently, the industry, served and protected. The IDA sponsored Conduct and Practices Handbook (Canadian Securities Institute, 1999 at p. 5) emphasizes that the securities industry is a business of trust and confidence: "Ethics involve not only complying with the letter of the law but with its spirit... It is possible to take an action that is unethical, even though one is complying strictly with the rules."

IFIC's Ethical Conduct and Behaviour guidelines would be especially applicable to the Respondent as a mutual funds salesperson. IFIC's Code of Practice, Member Statement of Principles, and Guidelines for Managers and Retail Distribution Codes of Ethics are extensive and complete. These include a duty:

1) To fulfill obligations with integrity and good faith.

2) To make reasonable effort and to be faithful to the interests of share/unit holders.

3) To know and understand the financial circumstances of clients and serve them by meeting their needs.

4) To protect the confidential nature of information provided by investors.

5) To present all investment proposals fairly without false or misleading statements.

6) To make suggestions for change in a personal financial program only in the best overall interests of the investor.

7) To indicate sources of fact or comment in any written or oral representation.

8) To keep informed and to inform so that the investor may always have the benefit of sound information and guidance.

9) To ensure that everyone who consults with investors has a knowledge and understanding of these principles and the spirit of this Code.

10) To exercise equitable judgement and to carry out all responsibilities in the spirit of this Code.

("Ethical Conduct and Behaviour", IFIC course manual, 1999, Appendix II, p. 12)

Of particular application to the matter before me is IFIC's conflicts of interest standard expressed in its Codes of Ethics:

> "conflicts of interest: you must disclose potential conflicts of interest to your clients and when faced with a potential conflict, put your clients' interests first." (ibid, page 11)

However these standards of practice are expressed, it is clear that the industry itself expects its members to conduct themselves in a manner warranting the respect and

trust of the investing public. It is for this reason that securities regulators place great emphasis on compliance with these standards when considering whether an individual is suitable or fit for registration. Breach of industry codes of ethics therefore are equated by regulators as being contrary to the public interest.

Just as it is not in the public interest for a registrant to violate industry ethical standards, it obviously follows that it is contrary to the public interest to violate the Act and regulations. Section 1 of the Act defines what is a "fraud" or "fraudulent act":

> "(a) any intentional misrepresentation by word or conduct or in any other manner of a material fact, either past or present, and an intentional omission to disclose any such fact,
>
> (b) a promise or representation as to the future that is beyond reasonable expectation and not made in good faith,
>
> (c) a fictitious or pretended trade in any security,
>
> (d) the gaining or attempt to gain, directly or indirectly, through a trade in any security, a commission, fee or gross profit so large and exorbitant as to be unconscionable and unreasonable,
>
> (e) a course of conduct or business that is calculated or put forward with intent to deceive the public or the purchaser or the vendor of a security, as to the nature of a transaction or as to the value of a security, and
>
> (h) generally any artifice, agreement, device or scheme, course of conduct or business to obtain money, profit or property by any of the means hereinbefore set forth, or otherwise contrary to law, and anything specifically designated in the regulations as coming within the meaning of this definition;"

Evidence of a defined fraudulent action warrants either or both administrative action by the Administrator or prosecution of a quasi-criminal offense under Part II of the Act.

E. CONCLUSION:

These, then, are the standards against which I am being asked to measure the Respondent's actions. In making my decision in this matter I am cognizant that the burden of proving the allegations rest with Staff. I also acknowledge Counsel's argument that the standard of proof, while not a criminal standard of beyond a reasonable doubt is not simply the civil standard of balance of probability. Counsel suggests that the test is "perilously close to the criminal standard because this case amounts to quasi-criminal misconduct." While case law generally permits administrative tribunals some latitude in determining this standard it is acknowledged that when the livelihood of an individual is at stake the standard might appropriately be a "probability of a high degree" considering both the gravity of the allegations and the consequences.

Considering all the evidence I conclude that there are more than adequate grounds upon which to base a finding that the Respondent, prior to the expiry and cancellation of his registration on October 31, 2000, was an individual unfit for registration. It is inconsequential whether the evidence also supports a quasi-criminal prosecution under the Act, so long as I am convinced the evidence, on a probability of a high degree, proves that the Respondent participated in a course of conduct which requires me, given the public interest mandate of the Act, to take appropriate action. It is clear that only the courts have jurisdiction to impose penalties more severe than I am empowered administratively.

In summary, I conclude that:

1) When Bond entered into the transaction with Ross for a $30,000 investment in IFS/RIFS he failed in his fundamental duty to provide full, true and plain disclosure of material facts so that the client could determine the suitability of the investment for her needs. He also failed similar fundamental obligations to ensure his client's interests were paramount, and that he not put himself in a position of conflict with his client. Whether he borrowed or converted these monies he did so unbeknownst to Ross and, I find, with an intent to deceive her;

2) When Bond participated in and promoted the investment activities of non-registrants, IFS/RIFS, Global, Galactic and Reid, by assisting Reid carry-out investment activities with Regal clients; and by retaining at Regal offices significant dealer and investor promotional materials of non-registered entities when Bond knew or ought to have known that registration is required to trade securities in New Brunswick, Bond breached an important condition of his registration by failing in his obligation to report securities violations;

3) When Bond actively permitted, over an extended number of years, the use of Regal's Saint John branch office as a contact mailing, telephone, facsimile address for non-registered entities conducting registerable activities, he violated his special conditions of registration imposed in 1991;

4) When Bond assisted Reid or acquiesced in the preparation of account statements which he knew or ought to have known were fictitiously created to document

investments which had not in fact been made; and when Bond received portions of 3 clients' assets, denying them to be remuneration or commissions without any other reasonable explanation, I find he committed fraudulent acts; and

5) When Bond prevaricated in his questioning by Branch Staff in July, 1998 he continued a pattern of behaviour first exhibited in 1991, of denial, evasiveness and obfuscation until confronted, thereby breaching his obligation to be open and truthful not only to his clients but also to securities regulators.

F. SANCTIONS:

In considering whether administrative sanctions are necessary or appropriate in this matter, I am guided by the leading decision of the Ontario Securities Commission In The Matter of Mithras Management Ltd. et.al., (1990) 13 O.S.C.B. 1600 in which the Commission said at page 1610:

> "the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; this is the role of the courts...We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In doing so we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be."

I am also mindful of the words of caution expressed by the New Brunswick Court of Appeal in R.v. Smith, [1998] NBJ N°. 239 that the Administrator must apply fairness when assessing penalties and be able to compare and justify a penalty in similar fact situations. Otherwise he has erred in law and exceeded his jurisdiction.

A review of case law, including administrative penalties ordered by other securities regulators, provides little guidance given the fact situation before me. The IDA, an SRO but not a statutorily empowered tribunal, permanently banned a registrant who was found to engage in personal financial dealings without the knowledge or approval of the firm in which over nearly $2 million was misappropriated from nine clients (Re: Holloday, December 3, 1999 – Bulletin # 2670). Similarly a permanent ban was placed against an IDA and Ontario registrant who, through a fictitious scheme involving 76,000 pretended trades, obtained loans under false pretenses and misappropriated assets of five clients (see LeFleur, March 15, 2000 – Bulletin # 2702). A registrant who borrowed from and loaned to clients was barred from being a member in the IDA for ten years and assessed $50,000 in administrative penalty. Thirty separate incidents were highlighted. (see Georgiou, May 18, 2000 – Bulletin # 2727).

The Manitoba Securities Commission, In The Matter of Dennis Wayne Gamble, April 20, 2000, accepted a settlement agreement with a registrant, found to have borrowed, unbeknownst to the registrant's firm, $90,000 from an elderly client who subsequently died. The registrant was required to be closely supervised for six months, retake industry courses and make payments to the Crown. This case can be distinguished from the matter before me by the clarity of evidence and by the candidness of the registrant in that the monies taken were clearly evidenced as loans and the mutual fund salesperson acknowledged that he failed to avoid personal financial dealings by borrowing money from his client for his own personal use.

The Ontario Securities Commission, In The Matter of Linden Dornford, (1998) 21 O.S.C.B. 7345 banned a registrant from being a mutual fund salesperson for five years

by reason of his co-mingling of trust funds over an eighteen month period in order to salvage the mutual fund dealer firm of which he was president. Of particular import to the matter before me is the conclusion of the Commission that a continuing and on-going course of conduct which demonstrates "so callous a disregard for the duties owed by a registrant to his clients and to the capital markets" warrants a substantial penalty. This case is also important for its recognition of the ability of a regulator to consider general deterrence in determining the appropriate penalty to be applied, following the standards established earlier by Mithras Management Ltd., referred to above.

Regardless, because the Respondent is not at this time a registrant under the Act, nor is there an application for registration pending, it is neither necessary nor appropriate for me to make a determination on sanction. While these cases provide some guidance none are entirely on point given the extensive and lengthy course of conduct by the Respondent that was pervasive, deliberate and contrary to all standards of practice expected of registrants.

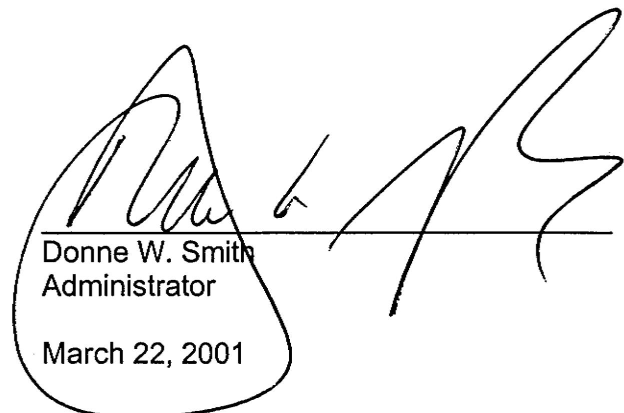
Staff Counsel argued that the Respondent's actions warranted a permanent ban. Given the totality of the Respondent's registration history, in particular, questions in 1991 about Bond's suitability for registration, which subsequent events have obviously confirmed, I am sympathetic to this argument. However, I do not believe that it is within my jurisdiction to make such an order even if Bond was a registrant at this point in time. Section 12(4) of the Act permits an applicant, and by implication a former registrant, to re-apply for registration following any decision to refuse, suspend or cancel an application, where it is clear that material circumstances have changed. In my opinion it

still remains for the Registrar to determine at some future time whether the applicant is a suitable candidate for registration.

This Decision will be placed in the Respondent's registration file and on the public record. If an application for registration is ever again received from the Respondent, I would expect the Registrar to give serious consideration to this Decision before determining whether to recommend registration be granted.

In summation, I conclude that there is very clear evidence that the Respondent is not now, nor has he been for many years, a suitable candidate for registration under the *Securities Act*. The Respondent's actions and attitude can be characterized at best, as stupidity and incompetence, and at their worst, deliberate fraud. It would take very significant evidence to persuade me that he will ever be a suitable candidate given the extended history of the matter before me.

While s. 25 permits me to order the payment of costs and expenses of an investigation, I decline to do so in this instance.



Donne W. Smith
Administrator

March 22, 2001