

# 2003 BCSECCOM 814

COR#03/173

## Decision

**Brian Stanley Bocking**

**Section 165 of the *Securities Act*, RSBC 1996, c. 418**

<b>Panel</b>	Joyce C. Maykut, Q.C.	Vice Chair
	Neil Alexander	Commissioner
	Joan L. Brockman	Commissioner

**Dates of Hearing** September 24 and November 20, 2003

**Date of Decision** December 3, 2003

### Appearing

Thomas Hara For Brian Stanley Bocking

Lorne Herlin For Commission staff

### Introduction

- ¶ 1 This is our decision following a hearing and review of the January 16, 2003 decision of the Director of Capital Markets Regulation on behalf of the Executive Director, refusing Brian Stanley Bocking's application to renew his registration as an investment adviser with Golden Capital Securities Limited.
- ¶ 2 The Commission stayed the decision until we made our decision on the hearing and review. We agreed with both parties that the review should proceed as a new hearing.
- ¶ 3 In addition to the record, we considered the oral testimony of Bocking, Steven Plummer, Manager of Compliance Capital Markets Regulation, Mark Lotz, chief financial officer of Golden Capital Securities and Douglas Corrigan, securities sales representative at Boulder Securities.

### Background

- ¶ 4 Bocking is 58 years old and has worked in the local securities industry for the last 36 years. He is not trained to work in any other field.

## 2003 BCSECCOM 814

- ¶ 5 Since 1978, Bocking has been convicted of five criminal offences relating to drinking and driving. The last two convictions were in 1999. At the time of the most recent convictions, Bocking's marriage to his first wife was dissolving and she subsequently died. Bocking suffers from a serious chronic illness, which leads to periodic disability and hospitalization. Bocking supports his second wife who is unable to work because of illness and from whom he is currently separated.
- ¶ 6 In 1985 and in 1987, Bocking was disciplined for trading infractions by the then Vancouver Stock Exchange. For the 1985 infraction, Bocking was fined \$5,000 and assessed costs of \$7,500. For the 1987 infraction, Bocking was fined \$15,000, had his approval withdrawn for 60 days, placed under strict supervision for one year and assessed costs of \$1,000. Other than the matter before us, there have been no other disciplinary proceedings against Bocking.
- ¶ 7 In June 2002, Bocking became a registered representative and trader with Golden Capital Securities in Vancouver. At Golden, Bocking acts primarily as an order taker for sophisticated clients who trade almost exclusively on senior exchanges. He does not service a large book of retail clients nor does he have an inventory account.
- ¶ 8 On August 1, 2002, Bocking submitted an application in the standard form to the Investment Dealers Association to renew his registration as an investment adviser and trader.
- ¶ 9 Section 15 of the form, *Offences Under the Law*, states that all criminal offences must be disclosed including "pleas or findings of guilt for impaired driving" ... "even though an absolute or conditional discharge has been granted". Section 15(b) goes on to ask:
- Have you *ever* pleaded guilty or been found guilty under any law of any province, territory, state or country for contraventions or other criminal offences not noted in A) above? [past offences involving securities or commodities]
- ¶ 10 The last page of the form includes a certificate and affidavit in which the applicant certifies and swears to the truthfulness of the answers given in the form.
- ¶ 11 Despite having numerous drinking and driving related criminal convictions, Bocking answered "no" to question 15(b) and deposed in the affidavit that his answers in the form were true.

## 2003 BCSECCOM 814

- ¶ 12 In September 2002, the IDA, after reviewing Bocking's registration file, noted that he had previously filed information about a criminal conviction in 1984 and a criminal charge in 1994. The IDA requested additional information from Bocking.
- ¶ 13 On November 18, 2002, Steve Plummer on behalf of staff telephoned Bocking to pursue the additional information that the IDA had requested. Plummer asked Bocking the full extent of his criminal record. Bocking told Plummer that he had been convicted of impaired driving in 1984 and 1994. Although Bocking stated he was convicted of impaired driving in 1994, he was neither charged nor convicted of any offence in 1994.
- ¶ 14 On November 18, 2002, Bocking submitted a revised application disclosing his October 4, 1978, May 28, 1981, and June 7, 1984 criminal convictions, but not his November 22, 1999 and December 6, 1999 convictions.
- ¶ 15 On November 19, 2002, Plummer phoned Bocking again and asked him if the criminal record information that he had disclosed in his application disclosed the full extent of his criminal record. Bocking replied that it did. Plummer, who had Bocking's complete criminal record in front of him, put to Bocking the two criminal convictions in 1999. Bocking readily admitted them and acknowledged that it was a mistake not to disclose them. Bocking told Plummer that he failed to disclose the 1999 convictions because he was embarrassed about the charges and because he feared that disclosure of the 1999 convictions would compromise his employment. Bocking confirmed this conversation in a letter to Plummer dated November 22, 2002.
- ¶ 16 On November 27, 2002, Bocking attended at a local RCMP detachment to obtain a copy of his criminal record to forward to the Commission to ensure his application would be complete.
- ¶ 17 In summary, Bocking signed and submitted 18 applications for registration between 1982 and 2002. In 16 of them, Bocking failed to disclose any of his convictions. In the remaining two, he failed to disclose some of his convictions.
- ¶ 18 Bocking testified as follows in response to questions about his failure to disclose his criminal convictions in his application:

A: Well, I admit readily to saying no and signing it.

Q: And sir, you don't feel that given all these warnings that you've read in this document, given the fact that you had to complete this document in front of a commissioner for oaths, that it did not occur

## 2003 BCSECCOM 814

to you that by falsely filing a document there would be severe consequences to you?

A: It wasn't a conscious effort to hide anything. I didn't pay attention to it. Something I regret and apologize for. I didn't read these forms word for word like you have. They were filled out by somebody in the office who signed them. I'm sorry I didn't pay as much attention as I did. I didn't think at the time these convictions had anything to do with the brokerage business.

...

Q: Well, sir, if Mr. Plummer testified that when he spoke to you on November 19th, you said it was your lawyer's responsibility to provide you with adequate information regarding your previous criminal convictions?

A: I was mistaken. I thought I could get a copy of all my criminal convictions from my lawyer. He didn't have them all. I didn't realize that he didn't have them all. When he sent them to me, there was another one that should have been there but wasn't. It wasn't my lawyer's fault. It was mine and my responsibility.

Q: And of course you did say as you testified today its your opinion it was other people's responsibilities to fill in this form?

A: It always had been. I regret that as well. I was wrong. Yes, I admit that and I was wrong.

- ¶ 19 Mark Lotz, chief financial officer of Golden Capital Securities, testified that he is aware of Bocking's criminal and regulatory record and Bocking's failure to disclose his criminal convictions on his application and subsequently to staff. Nonetheless Lotz testified that his firm would still hire Bocking today. Lotz, a chartered accountant, is one of four individuals who reviews the trades of the firm's registered representatives, including Bocking. Lotz testified that there have been no problems or complaints from investors or others within the firm concerning Bocking's work. Other than the times he's been ill, Lotz testified that Bocking has been punctual, never appeared at the office under the influence of alcohol and is otherwise a model employee.
- ¶ 20 Douglas Corrigan testified that he has known Bocking professionally for about 35 years and has worked with him for about 11 years. He was aware of Bocking's disciplinary history and personal problems, including his impaired driving convictions. Corrigan described Bocking as honest and very good at his job.

## 2003 BCSECCOM 814

### **Issue**

- ¶ 21 Is Bocking suitable to be registered as an investment adviser under section 35 of the Act or is his proposed registration objectionable?

### **Staff's argument**

- ¶ 22 Staff argue that Bocking is not "honest and of good repute" and therefore it is not in the public interest to renew his registration.
- ¶ 23 Staff concede that not renewing Bocking's registration will severely impact his livelihood. However they argue that this should not be our primary consideration. It is but one of several factors to be weighed in considering the Commission's primary obligation to protect the investing public.
- ¶ 24 Staff say Bocking's disciplinary history, failure to properly disclose his criminal convictions in 18 registration applications and subsequent lies to commission staff demonstrates that he is not suitable for registration. His deceptive conduct leads to no other conclusion than his proposed renewal for registration is objectionable.
- ¶ 25 To support their argument, staff referred us to a decision of the Ontario Securities Commission *In the Matter of Jay Peter Thompson* (1986), 9 OSCB 6219.
- ¶ 26 Thompson applied for registration as a mutual fund salesperson and indicated that he had no past convictions. During the processing of Thompson's application OSC staff became aware that Thompson had a series of drinking and driving convictions and two convictions for possession of narcotics. Thompson then provided OSC staff with a statement in which he swore that he was not same Thompson with the criminal record. The OSC staff subsequently confirmed that indeed he was. In a subsequent interview with OSC staff, Thompson again denied that he was the Thompson with the criminal record. The OSC held a hearing to consider Thompson's suitability for registration. At the hearing, Thompson admitted the driving offences, but refused to admit the narcotic convictions.
- ¶ 27 The OSC determined that through his failure to reveal his criminal convictions Thompson had demonstrated that he was not fit to be registered. The OSC stated:

Had Thompson been forthright in Thompson's application or at the other levels of questioning outlined above, it is possible that registration may well have issued. However, the issue here is not the nature or quality of the Criminal Code convictions, but disclosure, especially given the number of opportunities Thompson was given to set the record straight.

## 2003 BCSECCOM 814

In the Matter of Stanley Elwood Barjarow, H. S. Bray, Director, citing previous decisions on the importance of candor, wrote: “As I have said several times previously the real barrier in these cases is the false affidavit which forms part of the application. Through his action Stanley Elwood Barjarow has demonstrated that he is not a fit person to hold registration and accordingly it will be refused.” (November 1965) OSCB 26.

In The Matter of Frederick Arthur Fleishman, on an appeal to the Commission from a decision of the Director, wherein registration of the application as a salesman was refused, the Commission upholding the Director’s decision wrote: “Honesty and integrity are essential qualifications to obtain registration as a securities salesman, and when the appellant not only swore falsely as to the answers given in his application but failed to take the opportunity of correcting such false statements when he subsequently filed his sworn declaration of February 14, 1966, the only conclusion which may be reached is that he is not a fit and proper person to be licensed as a securities salesman.” (May 1966) OSCB 22.

Clearly Thompson did not meet these tests and is not suitable as a registrant.

### **Bocking’s argument**

- ¶ 28 Bocking argues that the purpose of the Commission’s public interest jurisdiction is neither remedial nor punitive but protective and preventive, intended to be exercised to prevent likely future harm to British Columbia’s capital markets.
- ¶ 29 Bocking says that refusing to renew his registration is punitive, excessive and simply not necessary to protect the public interest. It would be tantamount to permanently barring him from the securities industry - an industry in which he has earned his livelihood for the last 36 years. Before such a step is taken under section 35 of the Act, there must be “clear and convincing” proof that he is “not suitable” or that his renewal would be “objectionable”.
- ¶ 30 Bocking argued that although he initially failed to disclose his complete criminal record, this does not constitute clear and convincing evidence demonstrating that he poses a threat to the investing public or the efficiency of capital markets. Bocking’s drinking and driving convictions and his disciplinary record from 16 years ago are not relevant to a determination of whether his registration should be renewed. What is relevant is that Bocking readily admits his mistake, has no other vocational skills and both his employer and a past co-worker, who know his history, support him and testified to his honesty, competence and reliability.

## 2003 BCSECCOM 814

- ¶ 31 In summary, Bocking argues that refusing to renew his registration bears no relation to his impugned conduct and is not commensurate with regulatory action taken in similar cases.

### Analysis

- ¶ 32 Applications to grant, renew, reinstate and amend registration are considered under section 35 (1) of the Act, which states, in part, as follows:

35 (1) ... the executive director must grant an applicant ... renewal ... of registration ..., unless

(a) the executive director considers that the applicant is not suitable for registration in the capacity applied for, or that the proposed registration is objectionable, or

...

- ¶ 33 These provisions, and any applications made under them, must be considered in the context of the Commission's primary obligation to protect the investing public. As Iacobucci, J stated in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at page 592:

As already mentioned, the primary goal of securities legislation is the protection of the investing public. The importance of that goal in assessing the decisions of securities commissions has been recognized by this Court in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 (*Brosseau*), where L'Heureux-Dubé J., writing for the Court, stated the following at page 314:

Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this court in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, where Fauteux J. observed at page 588:

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such business.

## 2003 BCSECCOM 814

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.

- ¶ 34 Under section 168.1(1) of the Act a person must not provide information in any record required to be filed, or give information to the commission, under the Act or regulations that is false or misleading. Applicants for registration are required to file a standard form disclosing all of their criminal convictions, including those related to drinking and driving.
- ¶ 35 Bocking filed 16 applications for registration that were false and misleading when he failed to disclose his complete criminal record. Furthermore, he gave false and misleading information to the commission on two occasions when he was questioned about his criminal convictions.
- ¶ 36 We find that Bocking's dishonesty undermines public confidence in the regulatory system and is contrary to the public interest.
- ¶ 37 However, is Bocking's misconduct sufficient to demonstrate under section 35(1)(a) of the Act that he is not suitable for registration or that his proposed renewal of registration is objectionable?
- ¶ 38 The Director concluded that the Bocking's registration would be objectionable. He found that Bocking is "profoundly unreliable" and "chronically careless and negligent, both personally and professionally." These conclusions were based on Bocking's regulatory and criminal record, his failure to disclose all his criminal convictions and his failure to come clean with Commission staff.
- ¶ 39 Unlike the Director, we had the benefit of hearing from Bocking, his employer and a fellow registrant who has known him for over 35 years. We found Bocking to be straightforward and contrite about his failure to completely disclose his criminal convictions in the application and with staff. We also accept his employer's and colleague's testimony to his honesty, competence and reliability.
- ¶ 40 Finally, Bocking has been an investment advisor in the securities industry for 36 years. While he has had two other disciplinary infractions in 1985 and 1987, there have been no complaints made about his trading activities in the past 16 years.
- ¶ 41 While we find that Bocking's dishonesty undermines public confidence in the regulatory system and is conduct that is prejudicial to the public interest, we also find that refusing to renew Bocking's registration is not the appropriate regulatory response to his misconduct. However, the matter before us is not an enforcement



## 2003 BCSECCOM 814

hearing under section 161 but a hearing to review a decision made under section 35 of the Act. Consequently, under section 165(4) of the Act we are limited to confirming, varying or making another decision we consider to be proper. Practically this means we are limited to renewing or not renewing Bocking's registration.

### **Decision**

¶ 42 Considering all the circumstances and the public interest, we find that Bocking is suitable to be registered as an investment adviser and that his proposed renewal of registration is not objectionable. Accordingly under section 165(4) of the Act we direct the Executive Director to renew Bocking's registration as an investment adviser.

¶ 43 December 3, 2003

¶ 44 **For the Commission**

Joyce C. Maykut, Q.C.  
Vice Chair

Neil Alexander  
Commissioner

Joan L. Brockman  
Commissioner