2005 BCSECCOM 146

Ronald Stephen Barker and Double Eagle Investments Inc.

Sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken	Vice Chair
	Robin E. Ford	Commissioner
	Marc A. Foreman	Commissioner
	Robert J. Milbourne	Commissioner
Dates of Hearing	September 27 and 28, 2004	
Further Submissions	October 4 and December 13, 2004	
Date of Decision	March 4, 2005	

Appearing

Joyce M. Johner	For the Executive Director

Decision

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I Introduction

¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. On January 14, 2004, the Executive Director issued a notice of hearing alleging that Ronald Stephen Barker and Double Eagle Investments Inc. raised about $2.3 million from 58 investors between November 1996 and August 2002 and in so doing:

- traded, advised on, and distributed securities without being registered or filing a prospectus,
- made misrepresentations, and
- perpetrated a fraud.

¶ 2 The notice also alleges that in engaging in this conduct, Barker and Double Eagle acted contrary to the public interest.

¶ 3 The hearing was originally set for September 20, 2004. We granted Barker an adjournment to September 27 based on his claim that he was in poor health. On that morning, Barker faxed Commission staff to apologize and say that he would not be attending the hearing. He neither attended nor was he represented by counsel.

¶ 4 Commission staff interviewed Barker under oath on March 17, 2003. He was represented by counsel. A transcript of the interview was entered into evidence at the hearing.

¶ 5 At the conclusion of the oral portion of the hearing held September 27 and 28, we asked the Executive Director to file submissions on sanctions and costs. The Executive Director filed those submissions on October 4, and a bill of costs on December 13. The Executive Director sent Barker copies of the submissions and the bill of costs.

II Background

A. The Respondents

¶ 6 Barker was registered under the Act from November 1998 through April 2003. His registration was restricted to trading in mutual fund securities. Barker has not otherwise ever been registered under the Act.

¶ 7 Barker was the president and sole director of Double Eagle. His wife held the title of Secretary, but apparently she had no meaningful involvement in Double Eagle's activities. Double Eagle has never been registered under the Act.

¶ 8 Barker also owned two other businesses, The Barker Agency Inc., a life insurance agency, and Golfland Property Ltd., a retail golf supply store. In June 2004 Barker surrendered his licence to sell insurance products and in April 2002 he sold Golfland.

B. Double Eagle's Investors

¶ 9 Between November 1996 and August 2002 Double Eagle raised approximately $2.3 million from 58 investors, 57 of whom were residents of British Columbia, primarily from the Kamloops area.

¶ 10 The total investment of each Double Eagle shareholder ranged from $2,860 to $150,000. All but 4 single investments were for less than $97,000. The median investment was about $26,500 and the average investment about $42,000.

1. Investors generally

¶ 11 Only 4 of the 23 Double Eagle shareholders who testified, were interviewed by Commission staff, or completed questionnaires characterized themselves as a close personal friend, close relative, or close business associate of Barker. Many knew Barker because they were former or existing mutual fund or insurance clients, or knew him through other business dealings. The remainder knew him only through their investment in Double Eagle.

¶ 12 Shareholders bought shares in Double Eagle for $20 per share, a price set arbitrarily by Barker. Some received share certificates; others had only a copy of their subscription agreement. The investments were for fixed periods of various lengths. Barker told investors that their return would be in the form of dividends, paid annually by the issue of additional shares, also valued at $20, and when the term of their investment was up, their shares would be redeemed for cash. Although this was the typical structure Barker described, some investments were structured so the shareholders received monthly or quarterly cash dividends and, in some cases, a partial return of capital.

¶ 13 Barker told investors little about Double Eagle's business. Barker says he generally did not provide investors with any written materials, which is consistent

with what the shareholders say in their interviews and questionnaires. The shareholders who mention disclosure say that Barker described Double Eagle's business primarily as commercial asset leasing. This evidence is consistent with how Barker described Double Eagle's business to Commission staff when responding to a complaint made to the Commission by a Double Eagle shareholder. In a letter dated June 6, 2001, he said: "Double Eagle is a small business share in which the company invests in finance contracts as well in corporate leases."

¶ 14 The shareholders who mention disclosure say that Barker either said nothing about risk, or represented the risk of the investment as low. Barker represented that Double Eagle paid high returns (most shareholders reported he said Double Eagle paid 12% per annum).

¶ 15 Barker says this about how he described Double Eagle's business to investors: "We didn't really go into specific investments that we did. We just said that it was leasing, financing and investments." By "leasing", Barker says he meant commercial leasing – "leasing as per office equipment, computers, and, I mean, I mentioned that to them. We've done some work with the dental practice, that type of thing." By "financing", Barker says he meant primarily commercial loans, but "the odd time it would be personal". (When referring to Double Eagle, Barker often used the pronoun "we", but acknowledges that this meant him alone.)

¶ 16 Barker says this about how he explained the risk to investors: "I don't think we really got into the risk end of things". He says that if asked, he told investors "that the risk level would probably be comparable with – like a stock." Barker admits that the investment was "quite risky". Barker says he generally did not provide investors with any written documentation that described an investment in Double Eagle as an equity. He says this was "an oversight".

2. George Scalzo and Dorothy Harris

¶ 17 George Scalzo and his wife, Dorothy Harris, who invested $130,000 in Double Eagle over a roughly 8-month period beginning in August 2000, testified that Barker told them Double Eagle's business was corporate equipment leases, mostly dentist chairs and office equipment.

¶ 18 Scalzo and Harris met Barker when shopping at Golfland and found out that Barker's main business was financial advising and selling mutual funds and insurance products. Scalzo and Harris were looking for a financial adviser and started talking to Barker about their financial affairs. In connection with these discussions, they gave Barker their personal financial information.

¶ 19 When it came time to discuss investment options, Barker brought up Double Eagle. He told Scalzo and Harris that he set up Double Eagle for investors looking for a high return and low risk. He told them that Double Eagle was paying its shareholders 12% on average and charged a 2% management fee. Scalzo was skeptical. With rates then in the 5% to 6% range, he wondered how the investment could produce returns that high and still be safe. Barker assured him that Double Eagle's business was low risk. "The investment is as safe as money in the bank," Barker said. "We don't do anything risky."

¶ 20 This is Scalzo's account of Barker's description of Double Eagle's business:

> And we set up this company that we do – we get a bunch of investors, we pool money, and then we do corporate leases of equipment, professional equipment. And mainly his thing was dentist chairs and office equipment.

¶ 21 Barker told Scalzo and Harris that Double Eagle's clients were willing to pay high lease rates because they enjoyed income tax advantages. He also told them that Double Eagle did leases with dentists from all over the province.

¶ 22 Persuaded, Scalzo invested $50,000 in August 2000 for a 3-year term. In connection with this investment, Barker gave Scalzo and Harris this document that purported to describe Double Eagle's business (Barker admits to providing this document to some other Double Eagle shareholders):

> ***DOUBLE EAGLE INVESTMENTS INC.***
>
> Double Eagle Investments Inc. is a finance company that specializes in corporate leases and financing. The company started in 1996 and since then has paid a return to investors of 12% per year. The financing done is to Corporations only Double Eagle investments does not do consumer loans.
>
> The set up of the company is that Ron Barker owns 100% of the voting shares and owns the company itself only. The Barker Agency Inc. is paid a 2% management fee per year of the total funds invested, but cannot share in the profits of the company. Also, Mr. Barker is not permitted to invest in the company. The investors own 100% of all assets of the company and 100% of all profits of the company.
>
> <u>FEATURES</u>

- Safety of capital as funds are guaranteed by the finance contracts, 100% of all assets are owned by the investors;
- Income streams as the value does not go up and down like mutual funds or the stock market;
- The funds are not locked in, although most investors are in for a 5 year period. (Note: as all funds are invested we need as much warning as possible for any major withdrawals. We do keep some cash available for emergency cash needs);
- All though the company would continue in the case of a death of Ron Barker there is a life insurance policy on his life that would make money available to any investor that would like out at that time. All finance contracts would remain intact and the payments would still keep coming in.

¶ 23 Barker says that the reference to the funds being "guaranteed by the finance contracts", means they were secured by the contracts, leases and other assets held by Double Eagle.

¶ 24 As described below, Barker knew in August 2000 that Double Eagle was in financial difficulty. He admits that he did not disclose this to Scalzo. He also admits that of the $50,000 that Scalzo invested, $35,000 was paid to The Barker Agency and $6,400 was used to redeem the shares of other shareholders, or make dividend payments to them, and that he told Scalzo none of this.

¶ 25 In November 2000 Barker told Scalzo that Double Eagle had a client that wanted to do a one-year lease and offered Scalzo the opportunity to invest in Double Eagle to fund the lease. Scalzo's recollection is that the client was willing to pay somewhere between 12% and 16% for the lease, which would mean that after the 2% management fee Barker had previously mentioned, Scalzo would earn between 10% and 14% on the investment. Barker gave Scalzo the option of allowing the return to accrue and be paid at the end of the one-year period, or to be paid in four equal cash instalments. Scalzo decided to invest $25,000 and chose the instalment option.

¶ 26 In February of 2001 Harris invested $25,000 in Double Eagle. Barker admits that $15,000 of this amount was advanced to Golfland and another $6,000 to himself, for reasons he says he does not recall. He admits he cannot think of a way that Golfland or he personally would have been able to generate the projected return on Harris' investment.

¶ 27 Double Eagle did not make the first payment on Scalzo's November 2000 investment when due, only issuing a cheque when Scalzo, after waiting a couple

of weeks, called Barker and reminded him that payment was due. This cheque was dated April 30, 2001 and was in the amount of $7,740. At first the bank refused to honour the cheque for want of funds, but after some back and forth, Scalzo eventually cashed the cheque later that day.

¶ 28 On the same day Barker told Scalzo and Harris that another investor had promised to invest $50,000 but had backed out at the last minute. Barker wanted to know if they could help him out and was willing to pay them "any amount of interest" if he could. Scalzo decided to invest another $30,000, stipulating that it be "short term".

¶ 29 In December 2001 Double Eagle issued Scalzo a dividend of 100 shares.

¶ 30 In February 2002 Barker gave Scalzo and Harris a document that Harris describes as an "update". (Barker remembers providing this document to only one shareholder.) The following are excerpts from that document:

> ## *DOUBLE EAGLE INVESTMENTS INC.*
>
> Double Eagle Investments Inc. started in the fall of 1995. The company was formed when some clients were looking for somewhere to invest some money other than in the stock market or mutual funds. They were looking for a place that would give them a steady return but a low risk. This is when the idea of Double Eagle came to be; the company would take in investors' monies and loan them back out by way of leases and finance contracts. The company does a lot of leases for dental and doctor's offices as well as other large computer or business lease.
>
> . . . The Barker Agency Inc. is under contract to supply management of the funds and for this is paid a management fee of 2% per year of total amount of monies invested.
>
> The return to investors is paid only once a year by way of a dividend. Any investor that has monies invested at December 31 would receive a dividend in March for the prior year. The share value is $20.00 per share and this value never changes. When the dividend is paid the investor receives additional shares in the company at $20.00 per share.
>
> As of December 31, 2000 the total of all monies invested to date was $1,860,000.00, with gross revenue of $267,700.00 or 14.4%. After management fees were paid a return of 12% was declared to the investors. The company has paid an average return of 12.15% over five years. . . .

> . . .
> If you have any other questions, please call The Barker Agency Inc., Ron Barker. . . .

¶ 31 As described below, Barker also used Double Eagle's funds to make investments in stock market securities and start-up ventures. Barker has no explanation as to why, in light of that, this document described Double Eagle as a vehicle distinct from investments "in the stock market or mutual funds". He characterizes the statement as "an oversight".

¶ 32 Commission staff asked Barker for examples of Double Eagle's leases with doctors. He says there were none, and explains the reference to them in the document as another "oversight".

¶ 33 Barker also admits that the revenue figure in this document did not reflect actual revenues earned, but was derived simply by multiplying Double Eagle's outstanding capital by Barker's mental estimate of its average lease rate.

¶ 34 Neither Scalzo nor Harris received any more dividends or redemption payments until June 2002. They had by this time decided to cash in their Double Eagle shares and transfer the proceeds to a financial institution. They asked Barker to pay them out. He paid them $10,000 and promised to redeem their remaining shares "next month".

¶ 35 Neither Double Eagle nor Barker made any more payments. Scalzo and Harris had attempted to contact Barker several times before the June meeting and after that it became more difficult. When they finally met Barker in December of 2002, he told them that he was unable to pay, citing a poor economy and the September 11, 2001 terrorist attack on the World Trade Center in New York. Barker also told them that although he hoped to have some funds coming into Double Eagle the following month (January 2003), his intention was to wind down the business over the next 4 years, redeeming shares as Double Eagle's leases expired.

¶ 36 Scalzo and Harris have yet to receive any more funds from Barker or Double Eagle. But for the 100 share dividend to Scalzo and the $7,740 he received in April 2001, they have received no return on their Double Eagle investment. Apart from the $10,000 redemption they received in June 2002, it appears from Barker's evidence that they have lost all of the $130,000 of capital they invested in Double Eagle.

3. Cynthia Smit

¶ 37 Cynthia Smit testified at the hearing that she and her husband John invested about $46,500 in Double Eagle between March and November of 2002.

¶ 38 The Smits, who lived in Merritt, had been looking for a financial adviser. Smit says they found Barker by looking in the telephone book. They met him, felt he gave them sound financial advice, and became Barker's mutual fund clients in 1999.

¶ 39 The Smit's investments were concentrated in their RRSPs, and as those began to grow, Barker identified Double Eagle as a potential alternative, mentioning the possibility of earning 10% to 12% returns on "a very safe investment". The Smits were more interested in monetizing the equity in their home to invest in other properties in the Merritt area. They believed that because real estate prices in the area were low and rents high, real estate investments made sense.

¶ 40 Barker encouraged the Smits to monetize their equity, but to invest instead in Double Eagle. He told them that Double Eagle purchased office equipment for professionals such as dentists. The Smits thought it over. Having no written information from Barker about the investment, they asked a periodontist friend about the concept, and he said that these sorts of lease arrangements were commonly used by dentists coming out of school to finance their practices.

¶ 41 In March 2002 the Smits invested $32,000 with Barker. Later, Barker encouraged the Smits to invest more, as described by Cynthia Smit:

> . . . he was a really good talker and he phoned us and said, 'Your investment is doing really really well. And if you have any extra money, it would be really smart if you put that in here now because we're going to close the – window of time. We – we're only allowing family and friends to do this.' And we didn't consider ourselves either one of those, so we kind of felt like we were pretty fortunate that we were able to invest with this company.

¶ 42 The Smits invested another $14,500 in Double Eagle – $8,000 in May 2002, $5,000 in August, and $1,500 in November.

¶ 43 Soon after their November 2002 investment they were contacted by a Commission staff investigator about Barker's activities and became concerned. When Cynthia confronted Barker, he told her that the dentists were defaulting on their leases. On July 10, 2003 he sent Cynthia an e-mail addressed to her, John, and John's mother Ada, also a Double Eagle investor. The e-mail said:

> I would like to clear up a couple of facts:

> 1. Please do not put any of this on Gail [Barker's wife] as she had nothing to do with ANY business of Double Eagle. . . .
>
> 2. The money that you invested with Double Eagle went to pay out other investors and monthly payments, NOT to me personally.
>
> Yes, I'm dearly sorry that any of this happened to anyone and YES I do think about the people that have lost money every day. All I wanted to do is to help people. I really had no intentions of hurting anyone.
>
> I am very very sorry that I lost your money.

¶ 44 Cynthia and John Smit received no return on their Double Eagle investments and it appears from Barker's evidence that they lost their whole investment of $46,500.

4. Ada Smit

¶ 45 Ada Smit, John Smit's mother, was also a Double Eagle investor. Barker told her that Double Eagle was in the business of leasing business equipment. Her first investment, $85,000 in June 1997, yielded regular cash payments through April of 2002. These cash payments, which Barker says included both dividends and the redemption of all of her $85,000 investment, totalled $115,173, a compounded annual rate of return of about 6.6%.

¶ 46 In June 2002, Smit re-invested $80,000 in Double Eagle. This is Barker's description of the circumstances surrounding that investment from the transcript of his interview:

> Q Now, with – with Ada Smit's $80,000 deposit, was she told how that money would be invested?
> A No.
> Q How did you invest that money or what did you do with that money?
> A I'd have to go back. I don't recall exactly. There were some people paid out.
> . . .
> Q So in a sense the money did not go, or at least the vast majority . . . did not go towards the investments, but went to repay other Double Eagle shareholders?
> A Correct.
> Q And she wasn't aware of that?
> A No.
> Q How old is Ada Smit?

A Late sixties.
Q Was she one of your mutual fund clients?
A Yes.
. . .
Q Okay. Was she one of your insurance clients?
A Yes.
Q Okay. Was this – was this kind of investment suitable for Ada Smit in June 2002?
A I felt so at the time.
Q You did, eh?
A Yeah.
Q I mean, it was a pretty risky investment, wasn't it?
A Yes, it is.
Q In fact, by this time, 2002, Double Eagle is going down the toilet, right?
A Yes.
Q So has Ada Smit lost her $80,000?
A Yes.
Q So less than a year has gone by, she's lost her entire $80,000. In June of 2002 Double Eagle was already going down the toilet. Yet you thought in June of 2002 this was a suitable investment for Ada Smit?
A Yes.
. . .
Q Tell me, Mr. Barker, perhaps you could define to me what is a suitable investment for someone in their late sixties, so that I can better understand where you're coming from? Could you do that please?
A Late sixties, they should be into something that's – depending on their mix of what other investments they have, they should have a fairly good blend of safe to conservative investments.
Q I see. And so was this a safe investment?
A No.
Q Was it a conservative investment?
A No.
Q So then how could it be suitable?
A It wasn't.

C. Double Eagle's Activities

1. Record-keeping and business practices

¶ 47 The records of Double Eagle's business that Barker provided were skimpy. As a result, Commission staff supplemented this information with records obtained from banks, investment dealers and other financial institutions that held accounts

for Double Eagle and Barker. This information was entered into evidence at the hearing.

¶ 48 Commission staff summaries of some of this information was entered into evidence and appeared in their submissions. In our deliberations, we found discrepancies between these summaries and the underlying evidence, so our findings are based on the underlying evidence.

¶ 49 Barker provided documentation to support only 9 transactions – 6 lease agreements and 3 loan agreements. When asked why there were no more records, Barker first said he "was not sure why", then said "they've obviously been lost". When asked if there was any particular explanation as to why so many documents had been lost, he said "no". Commission staff asked if there had been a fire or a flood. Barker answered "no". When staff asked him if he had moved and suggested that as a possible reason, Barker agreed. When asked why he did not mention his moves as the reason for the loss of documents until suggested by Commission staff, he said, "It didn't really come to mind."

¶ 50 Commission staff asked Barker to provide lists of Double Eagle's leases and other lending transactions, broken down by year. He did so. When interviewed about the lists he provided, he admitted that of the 77 transactions listed, only 23 in fact existed. The remaining 54 (70%) were fabrications. The following are excerpts from Barker's interview:

> Q Is there any particular reason, Mr. Barker, why all of these loans that – or leases are on these lists, and yet from your evidence this morning they do not exist?
> A No.
> Q Well, Mr. Barker, with all due respect it's not really a question that you can simply answer "no" to, okay? What is your explanation as to why there's so many loans and leases on this list that you provided to [a Commission staff investigator] that in fact appear to be fabrications? Why is that? What's the explanation for it?
> A There really is none.
> Q Were you trying to mislead [the Commission staff investigator]?
> A No.
> Q Then what were you doing?
> A I don't know.

¶ 51 In addition to including transactions that did not exist, the lists Barker provided did not include Double Eagle's largest transactions: advances to Golfland, and loans to a nightclub business in Kamloops in which Barker held a one-third

interest (both transactions are described in more detail below). Barker says their omission from the lists was an oversight and has no other explanation:

> Q Tell me, Mr. Barker, how is it that the two largest loans could be omitted from this list?
> A I don't know.
> Q Were you purposely trying to hide those two loans from the Securities Commission?
> A No.
> Q Then what explanation do you have for it?
> A I don't have one.

¶ 52 As described below, Barker used Double Eagle's funds to make loans to individuals, most of whom were Barker's friends or relatives. Barker says these loans were not evidenced by promissory notes, loan agreements or any other documentation.

¶ 53 Barker says he kept accounting records for Double Eagle, but that all the information was lost when the computer on which it was stored (without backup) crashed "in the late '90's".

¶ 54 Commission staff also asked Barker to provide Double Eagle's financial statements. He did so. However he admits that the numbers in the financial statements he provided are not accurate. This exchange in his interview says it all:

> Q So is it fair to say that – that if any of these numbers in these financial statements are in fact accurate, it's just by fluke?
> A Yes.

¶ 55 Barker admits that Double Eagle never filed tax returns, saying that there was "no particular reason" that he did not do so and that it was "an oversight".

¶ 56 Barker was casual about keeping Double Eagle's funds separate from his own, or those of his other companies. As described below, he invested some of Double Eagle's funds in shares of an unlisted venture company and a number of other listed companies. All of these shares were purchased in his personal name. Barker took cash payouts from the brokerage accounts. Barker did not produce any documentation showing that he was holding the funds and securities on behalf of Double Eagle. Barker says there is "no particular reason" why this documentation does not exist and that it was "an oversight".

¶ 57 As more fully described below, Barker caused Double Eagle to advance funds to Golfland, with no documentation to support the advances.

2. Double Eagle's transactions

¶ 58 This summarizes Double Eagle's advances:

Commercial loans and leases	$ 760,000
Loans to individuals	184,500
Stock market and investments	375,000
Golfland, Barker and The Barker Agency	824,000
Total	**$ 2,143,500**

¶ 59 Barker says that these transactions represent all but "a handful" of Double Eagle's transactions.

Commercial leases and loans

¶ 60 Double Eagle advanced just under $760,000 in financings evidenced, with the exception of item 5 below, by 6 leases and 3 promissory notes:

1. In December 1996 Double Eagle entered into a 5-year lease with Johnny's Hi-Tek Golf Centre Ltd. The lease was for two golf simulators valued together at US$91,600 (about C$110,000, assuming an exchange rate of US$1.00 = C$1.20) . After making its first three lease payments, Johnny's made no payments for 5 months then made another 4 payments before defaulting entirely in early 1998. Johnny's payments totalled only about $24,800. Barker took possession of the golf simulators and put them into storage. Barker says he is not "100% sure" whether he told the Double Eagle investors of the outcome of the Johnny's lease, apart from a few shareholders whom he described as "close friends".

2. Double Eagle entered into 5 leases in 1997 and 1998 providing equipment valued in total at about $25,000 to 3 separate lessees, only one of whom was a dentist. There is no evidence of default on these leases and they were apparently paid out.

3. In 1997 Double Eagle made two unsecured loans, one to Kamloops Golf & Country Club for $110,000 to fund improvements and one to a restaurant in Barriere, B.C. for $75,000. There is no evidence of default on these loans and they were apparently repaid.

4. In April 1998 Double Eagle loaned $65,000 to Eagle Point Golf & Country Club to fund renovations. The loan was unsecured and was evidenced by a promissory note showing a term of 5 years and an interest rate of 14.5%. According to Barker, the owners of Eagle Point intended to repay the loan in full in 4 to 6 months after the funds were advanced. However, Eagle Point defaulted almost immediately and Double Eagle never recovered its investment. Barker admits he did not tell any Double Eagle shareholders about the Eagle Point default and says that was an "oversight".

5. Between June 1998 and March 1999 Double Eagle advanced $375,000 to 2 companies that operated nightclubs in Kamloops. According to Barker, these funds were a loan to purchase another club. Barker says the loans were not documented. He cannot recall the repayment terms or the interest rate, but says the loans were repaid in full over a period of 1 or 2 years. The borrower also says the loan was repaid. He says Barker was a one-third partner in the night club business at the time.

   Barker admits that he did not tell Double Eagle shareholders about its loans to these borrowers.

Loans to individuals

¶ 61 Barker caused Double Eagle to loan money to several individuals. There are numerous contradictions and ambiguities in the evidence about these loans, attributable in large measure to the absence of documentation supporting these loans. This is what Barker said about one of these loans (which Barker characterizes as a consumer loan):

> Q . . . so there's a loan there to Derrick O'Brien?
> A Yes.
> . . .
> Q Okay. Now, on the same day that Mr. O'Brien borrowed $15,000 he also invested $15,000 in Double Eagle?
> A That's correct.
> . . .
> Q . . . Why would somebody invest $15,000 just to turn around and borrow it?
> A I don't know.
> Q What was the rate, what were the terms of that loan?
> A There really is no terms to it.
> Q There's no terms?
> A No.
> Q Is there a rate of interest being charged?
> A No.

Q Is there a particular due date?
A No.
Q Has Mr. O'Brien made any payments with respect to the loan?
A No.
Q Have you ever asked him for payment.
A No.
. . .
Q It strikes me as a funny way of operating a company, Mr. Barker. Is there any particular reason why this transaction took place?
A No.
Q What were you trying to accomplish on behalf of Double Eagle and Double Eagle's shareholders by doing this transaction?
A I'm not sure.
. . .
Q Well, whose idea was it to structure this transaction in this way? Was it your idea or was it Mr. O'Brien's?
A I don't know if it was anybody's individual idea, it just happened.

¶ 62 It appears that Double Eagle made loans to at least 11 individuals totalling about $184,500. All but one of these were made between 1997 and 1999; the exception was made in 2001. The purpose of the loans is not clear, but they had no apparent business benefit to Double Eagle. According to Barker, in 4 cases Double Eagle lent the individual money to invest in Double Eagle, and in 2 cases it was to fund the borrower's purchase of shares in a publicly-traded mining company. In 2 other cases, the loans were for personal purposes. Barker says one of these was to help the borrower to "pay his bills". He says he cannot recall the purpose of the other loan but says his memory is that it was "something to do with his mother that was ill at the time".

¶ 63 All of these loans were undocumented; none paid interest or had terms of repayment. Most of the borrowers were friends or relatives of Barker. All but one remain outstanding. Only 2 of the borrowers under the loans still outstanding have made payments.

¶ 64 Barker admits that the loans did not benefit Double Eagle and that he did not disclose these loans to any Double Eagle shareholders. As to why, in the first disclosure document he provided to Scalzo and Harris, he stated that Double Eagle did not do consumer loans, he says it was an "oversight".

Stock market and venture investments

¶ 65 Barker estimates that Double Eagle invested about $200,000 in stock market securities. The evidence shows funds moving from Double Eagle to Barker's investment accounts in 1997 and 1998.

¶ 66 Barker also says that Double Eagle invested $125,000 in an unlisted start-up gold mining venture and $50,000 in another junior resource company. It appears these investments were made in 1997 and 1998.

¶ 67 Barker says the total value of these investments is now nominal.

¶ 68 Double Eagle deposited the funds to make these investments into Barker's personal investment dealer accounts. As noted above, there was no documentation created to show that any of these amounts were being held in trust for Double Eagle. In fact, the account opening forms for the accounts entered into evidence all indicate that no person other than Barker has a financial interest in the account.

¶ 69 The dealers paid withdrawals from the accounts to Barker's personal bank account. Barker says he would then write a cheque to Double Eagle.

¶ 70 Commission staff says that they were unable to confirm that Barker made these payments. For example, $15,000 was paid to Barker from his TD Waterhouse account in October 2000. However, Double Eagle's bank account statements for the following few months show no deposits for this amount, although they do show a number of small deposits, source unknown, which in total exceed $15,000.

¶ 71 Commission staff asked Barker about Double Eagle's equity investments in light of the statement in the information that he provided Scalzo in 2002 (reproduced above):

> Q Also in this document it states that clients were looking for somewhere to invest some money in – other than the stock market or mutual funds. . . . And earlier in this interview you stated that there were investments in the stock market, correct?
> A Yes.
> Q Okay. But here you're stating that investors were looking for something different than investments in stock markets or mutual funds. Why would you state that?
> A I'm not sure why.
> Q Was that just another one of your oversights?
> A Yes.
> Q Did you ever tell any of the shareholders, Mr. Barker, that you were actually using some of the Double Eagle money to invest in stock market investment?
> A I don't recall if I discussed it with any one particular person.
> Q I see. Is it possible that you didn't tell any of the shareholders?

A Yes.

Golfland

¶ 72 After taking possession of the golf simulators as a result of the default of the Johnny's Hi-Tek lease as described above, Barker tried unsuccessfully to sell them. He then decided to start up Golfland "to make them pay for themselves". Golfland was incorporated in December 1998. Golfland did not pay for the simulators nor did it enter into a new lease or financing arrangement with Double Eagle. Barker has no explanation for his failure to create documentation to protect Double Eagle's ownership of the simulators.

¶ 73 Between 1998 and 2001, Double Eagle advanced more than $104,000 to Golfland. Double Eagle also advanced about $375,000 to Barker and just under $345,000 to The Barker Agency. In all, Double Eagle advanced about $824,000 to Golfland, Barker and The Barker Agency. Barker characterizes most of this as advances to Golfland, and says that "six or seven hundred thousand" is still outstanding, which is consistent with Commission staff estimates of at least $629,000.

¶ 74 In April 2002, Barker sold Golfland's business through a sale of assets. The evidence included an unsigned sale agreement and a document appearing to be a lawyer's trust account reconciliation – an accounting of the disposition of the sale proceeds. A schedule to the sale agreement that lists the assets purchased includes a reference to 2 "golf game simulators". The agreement states that the vendor is not assuming "any indebtedness of the Vendor for the operation of the Vendor's business or against any assets or inventories to be purchased", the only exception being the assumption of the lease of the premises in which the business was located.

¶ 75 The trust account reconciliation shows gross proceeds received of about $293,000 and lists several disbursements to various parties. Double Eagle is not on the list. The final item on the list of disbursements is $151,522 "Paid to Golfland Properties Ltd./Ron Barker". Barker says that "quite a large chunk" of the sale proceeds went to Double Eagle, but Double Eagle's bank statements after the date of the sale show no single deposits over $10,000 not otherwise identified, and the unidentified deposits total only about $50,000.

¶ 76 Although many Double Eagle shareholders were aware that Barker owned Golfland, there is no evidence that they knew its business was in any way connected to Double Eagle. To the contrary, Scalzo testified, when asked whether he was aware that Double Eagle had invested in Golfland:

> No. Never. He never – he never – all the – the money . . . was going for leases in, like again like I said, dentist chairs and office equipment.

¶ 77 Cynthia Smit's testimony was similar. Asked if she or her husband were aware that Double Eagle was investing in Golfland, she said:

> Absolutely not. We would never have invested if – especially for Golfland. We knew at the time that that particular company wasn't doing very well. And he admittedly said that, Golfland wasn't a very good investment for him and that he was going to divest and – and separate himself from that investment. And John actually and Ada asked him outright numerous occasions if Golfland was at all connected to Double Eagle and he vehemently, vehemently denied that.

3. Double Eagle's failure

¶ 78 Double Eagle's activities changed significantly after 1999. After that, it did not enter into any commercial leases or loans. Its investment activity in the stock market appears to have tapered off. In fact, it appears that once Barker formed Golfland, virtually all of the funds raised by Double Eagle were used for advances to Golfland, Barker and The Barker Agency or to make payments to existing Double Eagle shareholders.

¶ 79 Barker admits that by August 2000 he knew that Double Eagle was in financial difficulty. He says "virtually all" of the investors' funds were lost as a result of Double Eagle's bad loans and investments and that "quite a few hundred thousand dollars" raised from new shareholders was used to make payments to existing shareholders.

¶ 80 Barker admits that he never told investors that many of Double Eagle's loans and leases were in default, and that its business operations were in jeopardy. He offered no explanation:

> Q Is there any particular reason why you wouldn't have told the shareholders of Double Eagle that Double Eagle was actually, from a business perspective, on rocky ground?
> A No.
> Q Just an oversight?
> A Yeah.
> . . .
> Q Did you tell any prospective investors that much of the loan portfolio or lease portfolio that Double Eagle had was on rocky ground?
> A No.
> Q Why didn't you do that?
> A I don't know.

Q If you would have told them that, is there a chance that it may have affected their investments with Double Eagle?
A Yes.
. . .
Q And nevertheless you continued to sell shares in Double Eagle?
A Yes.
Q To new investors?
A Yes.
Q At $20 a share?
A Yes.
Q Even though obviously the value of the shares at that time if the company was liquidated or whatever, assuming even recovery of what they could, okay, was going to be less than $20 a share?
A Yes.
Q Right? So why would you do that?
A I don't know.

4. Impact of Double Eagle's activities on its investors

¶ 81 Working from Double Eagle's incomplete records, Commission staff estimate that Double Eagle paid dividends totalling about $230,500 to 4 shareholders and made redemptions totalling about $561,000. This latter figure is roughly consistent with Barker's estimate that about 25% of the $2.3 million Double Eagle raised was redeemed. The rest, Barker admits, is gone. Included in the missing funds are:

- $120,000 invested by Scalzo and Harris in 2000 and 2001,
- $46,500 invested by John and Cynthia Smit in 2002, and
- $80,000 invested by Ada Smit in 2002.

III Analysis and Findings

A. Limitation Period

¶ 82 Section 159 of the Act says "Proceedings under this Act . . . must not be commenced more than 6 years after the date of the events that give rise to the proceedings."

¶ 83 The notice of hearing was issued on January 14, 2004. Some of the allegations in the notice of hearing are based, at least in part, on conduct by Barker and Double Eagle in 1996 and 1997. About $1.4 million of the $2.3 million that Double Eagle raised was raised between January 27, 1998 and August 1, 2002. The remainder, about $875,000, was raised in 1996 and 1997. Of the 57 British Columbia investors, 12 acquired shares only in 1996 or 1997.

¶ 84 We must therefore consider section 159 before we take into account any conduct of Barker and Double Eagle prior to January 15, 1998 (the date 6 years prior to the notice of hearing).

¶ 85 *Re Dennis*, 2005 BCSECCOM 65, involved, like this case, a continuous course of conduct that spanned a period longer than the 6-year limitation period in section 159. In applying section 159, the Commission considered *Re Heidary* (2000), 23 OSCB 959, which interpreted the corresponding provision of the *Securities Act (Ontario)*. (In contrast to section 159, that provision ties the limitation period to "the last event on which the proceeding is based".) After an analysis of section 159, the Commission in *Dennis* concluded as follows:

> 37 Section 159 ties the limitation period to the "date of the events". The ordinary meaning of "the events" encompasses all events (or one event) constituting a course of conduct that may be one or more breaches of the legislation or conduct contrary to the public interest. In this case staff have alleged fraud against seven victims which they say is both a breach of the Act and the Rules. When a series of events or transactions in a continuing course of conduct spans a period of time, the "date of the events", in the ordinary sense of that phrase, can only mean the date of the last event in the series that allows staff to allege a breach of the legislation or conduct contrary to the public interest.
>
> 38 Therefore, we find that "date of the events" in section 159 means the date of the last event and so has the same meaning as "the date of the occurrence of the last event" in the Ontario legislation.
>
> 39 As in *Heidary*:
>
> > in determining what constitutes 'the occurrence of the last event on which the proceeding is based', it will normally be necessary to look at the course of conduct of the respondent, as alleged by Staff and proved in evidence, and to determine just what is the last event in the course of conduct alleged and proved. . . .
> >
> > . . .
>
> 41 In our view, this construction and interpretation is the one which best ensures the attainment of the objects of the securities legislation. The purpose of the limitation period is to provide some certainty and finality to respondents while nevertheless allowing the regulator to pursue a course of conduct which may extend over a considerable period of time. That purpose is not achieved (and certainty and finality is not prejudiced) by cutting a continuing course of conduct in two so that events falling before the six year period are not caught.

¶ 86 In this case, the events in issue constitute one course of conduct involving distributions of Double Eagle shares, Barker's representations made in connection with those distributions, and the purposes to which Barker put the funds raised from those distributions. These events form a continuous pattern of conduct that began in 1996 and continued until August 2002. Under the reasoning in *Dennis*, we may therefore take into account all of this conduct in determining whether Barker and Double Eagle contravened the legislation and acted contrary to the public interest and whether it is in the public interest to make orders under the Act.

B. Trading, advising on, and distributing securities without registration or prospectus

¶ 87 The shares of Double Eagle, and the subscription agreements investors signed to acquire those shares, are clearly *securities* as defined in section 1(1) of the Act. That section also defines *trade* to include "a disposition of a security for valuable consideration," and *distribution* as "a trade in a security of an issuer that has not been previously issued". Double Eagle sold shares not previously issued and therefore traded and distributed securities under the Act. We find that Barker was Double Eagle's sole directing mind and will, and caused Double Eagle to trade and distribute its shares. Barker therefore also traded in securities because the Act defines *trade* to include "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of" a disposition of a security for valuable consideration.

¶ 88 Section 34(1) says "a person must not . . . trade in a security . . . unless the person is registered in accordance with the regulations . . .". Section 61(1) says " . . . a person must not distribute a security unless . . . a preliminary prospectus and a prospectus respecting the security have been filed with the executive director" and the Executive Director has issued receipts for them.

¶ 89 Barker was registered under the Act from November 1998 through April 2003 but his registration was restricted to trading in mutual fund securities, which the shares of Double Eagle were not. Therefore, neither Barker nor Double Eagle was registered under the Act as required. Nor did either of them file a prospectus. In the absence of an applicable exemption, Barker and Double Eagle contravened sections 34(1) and 61(1) when selling shares to the 57 British Columbia investors.

¶ 90 The legislation provides exemptions from section 34 (1) and 61(1). The onus of showing that any of those exemptions applies rests on the person who seeks to rely on the exemption (see *Re Bilinsky* 2002 BCSECCOM 102). The respondents did not appear or present a defence, but the evidence shows that none of the exemptions applies. Barker and Double Eagle did not comply with any of the

conditions attached to the exemptions that require a minimum investment or an offering memorandum (see former sections 45(2)(5) and 74(2)(4) of the Act and former sections 89(b), 128(b) and 128(c) of the *Securities Rules*, B.C. Reg 194/97; these provisions have been superseded by National Instrument 45-103 *Capital Raising Exemptions*). The "private issuer" exemption (formerly sections 46(j) and 75(a) of the Act, now in NI 45-103) did not apply because, apart from a few exceptions, the investors were, *vis-à-vis* Double Eagle, "members of the public".

¶ 91 We therefore find that Barker and Double Eagle contravened sections 34(1) and 61(1) when they traded and distributed shares of Double Eagle.

¶ 92 Section 34(1) also prohibits persons from acting as an adviser without being registered. Section 1(1) defines *adviser* as "a person engaging in, or holding himself . . . out as engaging in, the business of advising another with respect to investment or the purchase or sale of securities". As noted above, Barker was registered for most of the relevant period, but his registration was restricted to trading in and advising on mutual funds. He was not otherwise registered as an adviser.

¶ 93 However, Barker did act as an adviser. Scalzo, Harris, John and Cynthia Smit, Ada Smit and many others who invested in Double Eagle knew Barker through his mutual fund and insurance business. He held himself out as a financial adviser, and these people hired him for that purpose and trusted him to give them competent and ethical advice. Instead, he advised these clients that an investment in Double Eagle was safe and suitable, which it clearly was not. This advice led directly to the losses that these investors have suffered.

¶ 94 We find that Barker contravened section 34(1) by acting as an adviser without being registered as required.

C. Misrepresentation and fraud

¶ 95 The Executive Director alleges in the notice of hearing that Barker committed misrepresentation and fraud. In addition, as noted below, the Executive Director is seeking significant sanctions against Barker, assuming we make those findings.

¶ 96 When the Executive Director alleges misrepresentation and fraud, the evidence of investors is important. Usually it is this evidence that shows a pattern of misrepresentation, and it is often through this evidence that the Executive Director can establish the element of intent necessary to make a finding of fraud.

¶ 97 In this case, the evidence included the following primary sources of information about the Double Eagle shareholders and what they were told:

- testimony at the hearing from 3 shareholders (Scalzo, Harris and Smit),
- the transcript of Barker's interview,
- notes of a Commission staff investigator's informal, unsworn interviews (mostly by telephone) with 16 shareholders, and
- questionnaires completed at the request of Commission staff by another 4 shareholders who were not interviewed.

¶ 98 The best evidence from these sources is that of Scalzo, Harris and Smit. This was testimony in the hearing, which provided us with the opportunity to hear their stories directly, observe their demeanour, and to ask them questions ourselves.

¶ 99 The next best evidence is the transcript of Barker's interview. Although unable to observe his demeanour or ask questions, we were able to assess his evidence with the confidence that comes from sworn testimony with counsel for the witness present.

¶ 100 Third best is evidence consisting of a Commission staff investigator's notes of telephone interviews with other shareholders. The statements of the shareholders are not sworn, nor is there a transcript of their conversation with staff, so we do not have the context of the questions that Commission staff put to them, or their *verbatim* answers. Nor is the evidence, for the most part, corroborated by other, more reliable evidence. We therefore gave this evidence no weight when considering the allegations of misrepresentation and fraud.

¶ 101 Finally, the evidence includes questionnaires completed by investors who were not interviewed by Commission staff. Investor questionnaires are undoubtedly a useful tool to help staff determine which investors may have relevant evidence in an investigation. However, on their own these questionnaires have little probative value and we gave them no weight when considering the allegations of misrepresentation and fraud.

1. Misrepresentation

¶ 102 Section 50(1)(d) of the Act says that a "person . . . with the intention of effecting a trade in a security, must not . . . make a statement that the person knows, or ought reasonably to know, is a misrepresentation."

¶ 103 Section 1(1) defines *misrepresentation* as "(a) an untrue statement of a material fact, or (b) an omission to state a material fact that is . . . necessary to prevent a statement that is being made from being false or misleading."

¶ 104 Section 1(1) also defines *material fact* as "a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value" of the relevant securities.

Statements and omissions about the nature of Double Eagle's business

¶ 105 Barker told Scalzo, Harris and Smit that Double Eagle's business was primarily commercial asset leasing. The document he gave some Double Eagle investors, including Scalzo and Harris in August 2000, says that Double Eagle "is a finance company that specializes in corporate leases and financing" and "does not do consumer loans". In the document Barker gave Harris in February 2002, Barker described Double Eagle's business this way:

> "The company was formed when some clients were looking for somewhere to invest some money other than in the stock market or mutual funds. . . . This is when the idea of Double Eagle came to be; the company would take in investors' monies and loan them back out by way of leases and finance contracts. *The company does a lot of leases for dental and doctor's offices as well as other large computer or business lease*. [our emphasis]

¶ 106 This is in stark contrast to Double Eagle's actual activities. Even under the most generous interpretation of the phrases "corporate leases and financing" and "leases and finance contracts", the only transactions entered into by Double Eagle that fit in this category are the $760,000 of commercial leases and loans described above. This represents only 33% of the $2.3 million Barker raised from investors, and it appears that Double Eagle entered into no transactions of this type after 1999.

¶ 107 Moreover, we find that Barker's representation of Double Eagle's business emphasized asset-based financings as its principal business. Yet the only asset-based financings found in the evidence are the US$91,600 lease with Johnny Hi-Tek, which went into early default, and the $25,000 of leases Double Eagle entered into in 1997 and 1998. These transactions account for only about 6% of the total funds Double Eagle raised from investors. For example, financing dental practices was a key example in Barker's description of Double Eagle's business, yet only one of these transactions was for a dental practice. Barker admits that Double Eagle had no leases with any doctors.

¶ 108 In fact, the evidence establishes that nearly 87% of the money Double Eagle raised from investors was used for other purposes: unsecured business loans ($625,000 – 27%), loans to individuals ($184,500 – 8%), venture capital and stock market investments ($375,000 – 16%), and advances to Barker, The Barker Agency and Golfland ($824,000 – 36%). About $156,000 (7%) is not accounted for.

¶ 109 It is clear from the evidence of Scalzo, Harris and Smit that Barker did not disclose these transactions to them. To the contrary, the document that Barker gave some Double Eagle investors, including Scalzo and Harris when they invested in August 2000, represented clearly that Double Eagle's primary business was asset-based financing, that an investment in Double Eagle was an alternative to an investment in the stock market, and that Double Eagle did not do consumer loans. It also represented an annual revenue number for Double Eagle that Barker admits was false.

¶ 110 Barker described Double Eagle's business to the John and Cynthia Smit the same way he did to Scalzo and Harris – leasing equipment to dental offices.

¶ 111 Both Scalzo and Smit are adamant that they had no idea that any of their funds would be advanced to Golfland.

¶ 112 Barker admits that he did not tell Scalzo and Harris that $56,000 of the funds they invested would be advanced to him, The Barker Agency and Golfland. Barker also admits that he did not tell Double Eagle investors about the nightclub loans and the personal loans.

¶ 113 More significantly, Barker admits that he knew from August 2000 onwards that Double Eagle was in financial difficulty and that he did not disclose this to Scalzo and Harris when they invested in August and November of 2000 and in February and April of 2001. Neither did he disclose this to the Smits when they invested in 2002. In fact, after their initial investment he encouraged them to invest more, telling them that their investment was "doing really really well".

¶ 114 Barker admits that he did not tell any prospective investors about Double Eagle's financial difficulties, even though he knew it would have affected their investment decision. He continued to sell Double Eagle shares at $20 per share.

¶ 115 Barker also admits that "quite a few hundred thousand dollars" of the money Double Eagle raised was used to repay other shareholders, including $6,400 of the funds invested by Scalzo, an unspecified amount of the funds invested by John and Cynthia Smit, and "the vast majority" of the $80,000 invested by Ada Smit in June 2002.

Statements about risk and return

¶ 116 Barker admits that in discussing Double Eagle's business with investors, he did not "really get into the risk end of things". He admits the investment was "quite risky" and yet he told Scalzo and Harris that the business was "as safe as money in the bank" and that Double Eagle didn't "do anything risky". Among the features

listed on the document he provided some Double Eagle shareholders, including Scalzo and Harris in August 2000, was "safety of capital".

¶ 117 Similarly, Barker characterized an investment in Double Eagle for the Smits as "a very safe investment".

¶ 118 Barker held out to Scalzo, Harris and John and Cynthia Smit the potential for returns ranging from 10% to 14%, yet he knew when they invested that Double Eagle was in financial difficulty. He admits that he was using new shareholders' funds to make payments to existing shareholders and in fact used some of the funds invested by Scalzo, Harris, and John, Cynthia and Ada Smit for that purpose. He also admits that he cannot think of a way that the $21,000 of Harris' funds that he advanced to himself and Golfland could have generated the projected return on her investment. The same has to be true of the $35,000 of Scalzo's funds that Barker advanced to The Barker Agency.

Findings

¶ 119 To find that Barker contravened section 50(1)(d), we must conclude that

1. the statements and omissions described above related to material facts, and therefore were misrepresentations,
2. Barker knew or ought reasonably to have known that they were misrepresentations, and
3. Barker made the misrepresentations with the intention of effecting a trade in a security.

¶ 120 It is clear that the statements Barker made were untrue, and the things he omitted to state were necessary to prevent the other statements he made from being false or misleading. These misstatements and omissions were also related to material facts because they all, both individually and collectively, could reasonably be expected to significantly affect the value of the Double Eagle shares:

- Double Eagle's business was completely different from the way Barker described it;
- Double Eagle had many non-performing loans and was in financial difficulty; and
- The manner in which Double Eagle handled Scalzo's, Harris' and the Smits' funds made it impossible for it to generate the return on their investment that Barker had held out.

¶ 121 Barker admits that as a result of Double Eagle's financial difficulty, its shares were worth less than the $20 at which he sold them.

¶ 122 We find that all of these facts could reasonably be expected to significantly affect the value of the Double Eagle shares.

¶ 123 We also find that Barker knew that these misstatements and omissions were misrepresentations. He admits to making most of them, but his explanations as to why he did so are, to say the least, feeble. The evidence he gave generally to explain his conduct is not credible. Whenever he was confronted with difficult facts, his responses were evasive, offering either no explanation or characterizing the event as "an oversight". In assessing his credibility, we took into account his fabrication of over half of the Double Eagle transactions on the lists he gave Commission staff, and his omission from the lists of Double Eagle's largest loans (to the nightclubs and Golfland).

¶ 124 The facts are that Barker knew that Double Eagle was not generating its target returns. He knew he was relying on new shareholders to pay out existing shareholders. He knew that many of Double Eagle's loans and leases were in default. He knew that most of Double Eagle's business activities were inconsistent with how he was describing Double Eagle's business to investors. He simply must have known that he was making misrepresentations.

¶ 125 Barker made these misrepresentations when soliciting investment in Double Eagle from Scalzo, Harris, and the Smits, so we find that he made them with the intention of effecting a trade in a security.

¶ 126 We therefore find that Barker contravened section 50(1)(d).

2. Fraud

¶ 127 Section 57(b) of the Act says:

> A person . . . must not, directly or indirectly, engage in or participate in a transaction or series of transactions relating to a trade in or acquisition of a security . . . if the person knows . . . that the transaction or series of transactions . . . perpetrates a fraud on any person in British Columbia.

¶ 128 We have already found that Barker traded in the shares of Double Eagle. Clearly in doing so he participated in a series of transactions relating to a trade in securities. Did he know that those transactions, or some of them, perpetrated a fraud on persons in British Columbia?

¶ 129 Section 57(b) was considered by the British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7. The Court said:

> 29 Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

¶ 130 The Court cited the elements of fraud from *R. v Théroux*, [1993] 2 SCR 5 (at p. 20):

> . . . the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

¶ 131 In our opinion, the evidence provides clear and convincing proof that Barker committed what *Théroux* describes as a "prohibited act" and that it caused deprivation. Barker's many misrepresentations constitute deceitful conduct. In addition, Barker appropriated the golf simulators that Double Eagle had bought and leased to Johnny's Hi-Tek and gave them to Golfland, without protecting Double Eagle's interest in them. When they were sold along with the rest of Golfland's assets, Double Eagle received none of the sale proceeds. This was another act of deceit.

¶ 132 Because of Barker's deceit, Scalzo, Harris and the Smits have been deprived of $246,500 in capital, as well as virtually all the return on that capital. These shareholders would not have invested had they known that Double Eagle was advancing funds to Golfland, or using the funds they invested to redeem existing Double Eagle shareholders. Barker admits that had other Double Eagle shareholders investors known about Double Eagle's frail financial condition, they may not have invested. All of Double Eagle's shareholders have been deprived by Barker's appropriation of the golf simulators.

¶ 133 It is also our opinion that the evidence provides clear and convincing proof that Barker had subjective knowledge of the deceit, and that it would result in the deprivation of others. Barker was the one selling Double Eagle shares. He alone solicited investors to buy Double Eagle shares, in some cases while acting as their financial adviser. He alone made representations about Double Eagle's business and its potential returns. He alone decided when and how Double Eagle invested its funds and otherwise managed its assets and business.

¶ 134 Barker knew, when he was describing Double Eagle's business to investors after 1999, that in fact Double Eagle was no longer doing commercial asset-based financing. He knew it was not financing any dental practices. He knew that he was causing Double Eagle to advance large sums to Golfland, himself and The Barker Agency. He knew that he appropriated the golf simulators for Golfland without protecting Double Eagle's ownership interest in them. He knew that when he took $130,000 from Scalzo and Harris, $46,500 from John and Cynthia Smit, and $80,000 from Ada Smit, the money would be used in part to make payments to existing investors. He knew by August 2000, before any of these people invested, that Double Eagle was in financial difficulty.

¶ 135 For these reasons, he must have known that it would be impossible for Double Eagle to generate returns for its shareholders' investments and that their capital was at risk. Barker therefore knew that his deceit could have as a consequence the deprivation of others.

We therefore find that Barker contravened section 57(b).

E. Summary of findings

¶ 136 We find that:

1. Barker and Double Eagle traded in securities without being registered to do so, contrary to section 34(1);
2. Barker and Double Eagle distributed securities without filing a prospectus, contrary to section 61(1);
3. Barker acted as an adviser without being registered to do so, contrary to section 34(1);
4. Barker made statements with the intention of effecting trades in securities, which he knew or ought to have known were misrepresentations, contrary to section 50(1)(d); and
5. Barker engaged in transactions that he knew perpetrated a fraud on persons in British Columbia, contrary to section 57(b).

¶ 137 We also find that in engaging in this conduct, Barker and Double Eagle acted contrary to the public interest.

IV. Decision

¶ 138 In *Re Eron Mortgage Corp.*, [2000] 7 BCSC Weekly Summary 22, the Commission cited a non-exhaustive list of factors that are usually relevant to making orders against a person under sections 161(1) and 162. They are:

- the seriousness of person's conduct,
- the harm suffered by investors as a result of the person's conduct,
- the damage done to the integrity of the capital markets in British Columbia by the person's conduct,
- the extent to which the person was enriched,
- factors that mitigate the person's conduct,
- the person's past conduct,
- the risk to investors and the capital markets posed by the person's continued participation in the capital markets of British Columbia,
- the person's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

¶ 139 The conduct of Barker and Double Eagle was serious. They contravened sections 34(1) and 61(1), the foundation investor protection provisions of the Act. These provisions are designed to prevent situations just like the one that resulted from their conduct.

¶ 140 Section 34(1) requires that those who trade in securities be registered. It is the means by which the Act intends to ensure that purchasers of securities are offered only securities that are suitable. Section 61(1) of the Act requires that those who wish to distribute securities file a prospectus with the Commission. Its intent is that investors and their advisers get the information they need to make an informed investment decision.

¶ 141 Barker abused his status as a registrant under the Act by using it to find investors. Barker betrayed the trust of those who came to him for financial advice, who were entitled to expect him to recommend only investments that were suitable for them. Instead, he advised them to invest in Double Eagle. He provided them with no written information about their investment.

¶ 142 Barker's advice to Ada Smit was particularly egregious. She was in her late sixties when he advised her in June 2002 to invest $80,000, at a time when he admits he knew that Double Eagle was "going down the toilet". He admits now that the investment was unsuitable.

¶ 143 Barker misrepresented to investors Double Eagle's actual business and the use to which their funds would be put. He failed to disclose to them his conflict of interest in causing Double Eagle to make undocumented loans totalling $375,000 to a nightclub business in which he had a one-third interest, and $184,500 to his friends and relatives. By causing Double Eagle to advance $824,000 to himself, The Barker Agency and Golfland, he enriched himself. Even after it was clear that the returns he was holding out could not be paid, he continued to raise funds from investors.

¶ 144 Barker and Double Eagle failed to document loans and keep proper business records. Barker's explanation that the documents were lost while moving is no excuse – we expect companies that raise money from the public to properly maintain and manage their records, which includes ensuring the security of those records in an office move. We are similarly not persuaded by his explanation that the accounting records were lost in a computer crash "in the late '90's". Proper records management practices would include appropriate backup procedures to minimize the impact of a computer crash. The computer crash in any event fails to explain the absence of documents and records from 2000 forward.

¶ 145 Barker also failed to keep separate Double Eagle's assets from his own, whether held personally or through Golfland or The Barker Agency. Barker treated Double Eagle's funds and other assets as if they were his own. This is shown by his appropriation of the golf simulators for Golfland, the use of his personal brokerage accounts to invest Double Eagle funds in the stock market, and his making undocumented and interest-free loans totalling at least $184,500 to his friends and relatives.

¶ 146 We found that Barker's conduct constituted fraud, in contravention of section 57(b).

¶ 147 The result of this has been significant harm to investors. Barker and Double Eagle raised over $2.3 million from 57 British Columbia investors. About 75% of that money, over $1.7 million, is gone.

¶ 148 In his July 2003 e-mail to the Smits, Barker expresses some remorse, but we give that little weight, given that Barker and Double Eagle contravened the most important requirements of the Act over a period of 6 years, and that Barker does not appear to have made any real effort to face the consequences of his conduct.

In fact, when Commission staff investigated his conduct, Barker was evasive and provided them with false documents.

¶ 149 Through their serious misconduct, Barker and Double Eagle significantly harmed investors and damaged the integrity of British Columbia's capital markets. Their conduct shows they are not fit to participate in our capital markets. We must also make orders that will demonstrate the consequences of the conduct they exhibited, and that will have an appropriate deterrent effect.

¶ 150 Therefore, considering it to be in the public interest, we order:

Barker

1. under section 161(1)(c) of the Act, that the exemptions in the Act do not apply to Barker's purchase or sale of securities permanently, except that Barker may rely on the exemption in section 45(2)(7) of the Act to buy or sell securities for his own account through a registrant, if he gives the registrant a copy of this decision;

2. under section 161(1)(d)(i), that Barker resign any position he holds as a director or officer of any issuer, except an issuer all the securities of which are owned beneficially by him, his wife or his children;

3. under section 161(1)(d)(ii), that Barker be prohibited permanently from becoming or acting as a director or officer of any issuer except an issuer all the securities of which are owned beneficially by him, his wife or his children;

4. under section 161(1)(d)(iii), that Barker be prohibited permanently from engaging in investor relations activities;

5. under section 162, that Barker pay an administrative penalty of $250,000;

6. under section 174, that Barker pay, jointly and severally with Double Eagle, costs of or related to the hearing in the amount of $58,845.89;

Double Eagle

7. under section 161(1)(b), that all persons cease trading in, and be prohibited from purchasing, the securities of Double Eagle permanently;

8. under section 161(1)(c), that the exemptions in the Act do not apply to Double Eagle permanently;

9. under section 174, that Double Eagle pay, jointly and severally with Barker, costs of or related to the hearing in the amount of $58,845.89.

¶ 151 We would have imposed a significant administrative penalty on Double Eagle as a result of its serious misconduct, but we did not wish to impair whatever prospect the investors may have of recovery from the company.

¶ 152 March 4, 2005

¶ 153 **For the Commission**

Brent W. Aitken
Vice Chair

Robin E. Ford
Commissioner

Marc A. Foreman
Commissioner

Robert J. Milbourne
Commissioner