

2005 BCSECCOM 197

Paul Larry O'Connor

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

Hearing

Panel	Adrienne Salvail-Lopez Robin E. Ford Neil Alexander	Vice Chair Commissioner Commissioner
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Dates of Hearing September 13 and 14, 2004

Date of Decision March 31, 2005

Appearing

Ralph H. Sahrman For the Executive Director

Decision

Introduction

- ¶ 1 On February 18, 2004, the Executive Director issued a notice of hearing under sections 161(1) and 162 of the Act alleging that from February 18, 1998 to February 2001 Paul Larry O'Connor, while registered under the *Securities Act*, RSBC 1996, c. 418:
1. breached section 50(1)(d) of the Act when he induced clients to redeem mutual fund holdings by making statements to them that he knew, or ought to have known, were misrepresentations;
 2. breached section 57 of the Act when he made misrepresentations to induce the clients to redeem mutual fund holdings for the purpose of funding the issue of cheques to Conservative Investment & Estate Consultants and, further, by converting the proceeds to his own use;
 3. failed to deal fairly, honestly and in good faith with the clients, contrary to section 14(2) of the *Securities Rules*, BC Reg. 194/97; and
 4. in advising the clients to redeem mutual funds, recommended securities' sales that were inappropriate and unsuitable for them, contrary to section 48(1) of the Rules.

2005 BCSECCOM 197

2. In addition, the notice of hearing alleges that O'Connor's conduct, as set out in the notice, was contrary to the public interest.
3. On September 8, 2004, the Commission granted the application of Commission staff to lead evidence and make submissions on sanctions at the hearing. Accordingly, this decision contains both our findings on liability and our decision on sanctions.
4. O'Connor did not appear at the hearing on September 13 and 14. We heard oral testimony from one witness, a Commission investigator. We were also provided with a transcript of the sworn interview of O'Connor by staff on June 4, 2003, during which he was represented by counsel.

Background

5. O'Connor was registered under the Act and employed as a salesperson by a number of different registrants from 1988 until June 2001. He is 56 years old. In 1993, O'Connor was dismissed by Midland Walwyn Capital Inc for "conflict of interest".
6. From 1995 to October 2000, O'Connor was employed by DPM Securities Inc in their branch office in Parksville, British Columbia. Another securities dealer, Assante Capital Management Ltd, acquired DPM and O'Connor then became employed by Assante until he was terminated for cause on June 12, 2001. O'Connor also operated as an insurance broker.
7. O'Connor operated his business as a salesperson in part through a sole proprietorship under the name Conservative Investment & Estate Consultants (Conservative). In addition, he was the sole proprietor of Paul O'Connor Financial Planning (POFP) which also paid some expenses of the business. O'Connor told staff that the two entities were used for tax purposes.
8. The mailing address for both entities was the same as that of the DPM branch office in Parksville.
9. O'Connor told staff that he was responsible for the operation of the DPM branch office in Parksville. The manager of the office was located in DPM's Vancouver office. According to O'Connor, there were other DPM representatives in the office, and three or four assistants who were employed and paid by Conservative or POFP.
10. O'Connor said that the business purpose of Conservative was to pay the expenses of the DPM office in Parksville. In January or February 1998, he said, this

2005 BCSECCOM 197

business purpose was transferred to POFP, and Conservative ceased paying the expenses related to the running of the DPM office.

11. Bank records show that prior to February 1998, a portion of O'Connor's commissions from DPM was deposited into Conservative's bank account, and a portion into POFP's bank account. The majority of commissions from all sources (including his insurance business) was, however, paid into O'Connor's personal bank account. From February 1998, payment of commission income into the Conservative account ceased except for some small amounts of insurance commission.
12. A search of public databases revealed that O'Connor was also a director or officer of Royal Flush Radiators Inc, Jarleo Holdings Ltd, Royal Flush 1 Hour Radiators Ltd, and O'Connor Group Financial & Insurance Services Inc; a director of Select Entertainment Inc; and the principal marketing manager for International Trade Technologies Inc and WorldXpo Online Inc.

The Clients

13. Gordon Halls, Edith Smithers and Eileen Townsley (the Clients) all maintained a DPM account with O'Connor and so were clients of O'Connor and DPM (later Assante). In February 1998, these individuals were 90, 85 and 80 years old, respectively.
14. By the beginning of the Commission investigation in 2002, two of the Clients had died and one had become mentally incapable due to dementia. This meant that not only were they unable to testify at the hearing, but Commission investigators were also not able to obtain witness statements from them. We have no evidence of their version of events.
15. Even without testimony from the Clients, however, certain facts are clear, and in any event were not disputed by O'Connor in his interview (except where noted).

Halls

16. The DPM New Client Form for Halls is dated September 18, 1996. An initial mutual fund transaction form for Halls was completed in 1997 when he was 89 years old. (He died in June 1999.) His risk tolerance was stated to be medium and his investment objectives were 70% income and 30% growth. He was retired with an annual income of \$14,000 and net worth of \$250,000. His investment knowledge was stated to be fair.
17. Hall's mutual fund redemptions and cheques to Conservative are set out below:

2005 BCSECCOM 197

Client	Redemption Amount	Redemption Date	Amount of Cheque to Conservative	Cheque Deposit Date
Halls	\$9,612.06	February 19, 1998	\$ 5,000.00	February 25, 1998
Halls	\$5,000.00	March 29, 1999		
Halls	\$5,000.00	March 29, 1999		
Halls	\$5,000.00	March 29, 1999	\$10,000.00	April 12, 1999

18. The redemption of mutual funds closely matched in time the payments to Conservative. The total amount paid to Conservative in this period was \$15,000.
19. This is what O'Connor said when questioned by staff (Ex 6, page 79, line 18 to page 81, line 25):

Q Why did Mr Halls write cheques to Conservative Investment?
A He wanted to support Conservative.
Q Did he know what Conservative was?
A I can't recall, no.
Q What did you tell Mr Halls about the company?
A Well, he knew about the branch and he liked that.
Q The DPM branch?
A Mm-hmm.
Q What did he like about it?
A He liked the people there, and liked the ...
Q Did you show Mr Halls any pro formas or financial analysis of any kind?
A No, I did not.
Q Did Mr Hall know the company was not incorporated?
A No, he did not.
Q Did he know the company was not audited?
A No.
Q What were the terms of the loan? ...
...
A Well, we didn't have terms to the loan.
Q And what loan documentation was executed?
A We did not have any.
Q And how was this loan a suitable investment for Mr Halls?
A At the time I thought it was, but in retrospect I see it is not.
Q We have a copy of his NCAF here. We can see he was 70-per-cent income, 30-per-cent growth with a risk tolerance of medium. And

2005 BCSECCOM 197

at the time you thought that a loan to your company was suitable based on this information?

- A Obviously it was wrong.
- Q Why did you think it was suitable at the time?
- A We thought the business would do—would pay him an income.
- Q What sort of an income?
- A We didn't come to that yet. In other words, we didn't know that yet.
- Q When was that to be determined?
- A When we -- our thoughts -- my thoughts are when we were -- became more profitable.
- Q And you would determine how he was to earn the income at that time?
- A That's correct.
- Q Did you ever repay Mr Halls any of the money?
- A No.
- ...
- Q Did you alert his estate to the money you've had owing to him?
- A No.
- Q Why not?
- A I should have done that. I didn't know that.
- Q You didn't know what?
- A I should have done that, I should say. No, I never thought of that.

Smithers

20. An Initial Transaction Form for Smithers was completed on September 26, 1995, and an updated New Client Form was completed on June 5, 2000. Smithers' Know Your Client Information with DPM stated that her investment objectives were 20% liquidity and 80% income.
21. Smithers' mutual fund redemptions and cheques to Conservative are set out below:

Client	Redemption Amount	Redemption Date	Amount of Cheque to Conservative	Cheque Deposit Date
Smithers			\$ 3,000.00	May 14, 1998
Smithers			\$ 5,000.00	October 23, 1998
Smithers			\$ 4,000.00	January 6, 1999

2005 BCSECCOM 197

Smithers			\$ 5,100.00	May 17, 1999
Smithers			\$ 3,000.00	August 25, 1999
Smithers			\$ 4,000.00	December 6, 1999
Smithers			\$ 3,000.00	March 28, 2000
Smithers			\$ 5,000.00	July 28, 2000
Smithers			\$ 5,000.00	November 23, 2000
Smithers			\$ 6,000.00	January 26, 2001
Smithers	\$1,000.00	February 7, 2001		
Smithers	\$2,000.00	February 7, 2001		
Smithers	\$2,000.00	February 7, 2001	\$ 5,000.00	February 20, 2001

22. One cheque in the amount of \$5,000, which was deposited on February 20, 2001 corresponds exactly in amount and closely in time to mutual funds redeemed from Smithers' DPM account on February 7.
23. On May 1, 2000, O'Connor issued a cheque, drawn on the Conservative account and payable to Smithers, in the amount of \$3,000. There is no indication on the cheque as to the purpose of this payment. O'Connor told staff he did not remember why he issued the cheque.
24. Conservative received a total of \$48,100 from Smithers in this period (not taking into account the cheque from Conservative to Smithers mentioned above).
25. When questioned about Smithers, O'Connor said this (Ex 6, page 69, line 16 to page 74, line 9):

Q And why did Ms Smithers make cheques payable to Conservative Investment?

A The -- she wanted to -- she was lending money to Conservative, and she thought that was good.

Q Why did she think that was good?

A She was -- wanted to put money into the company. She thought that was a good idea.

Q A good idea financially?

2005 BCSECCOM 197

- A She wanted to support the company. So that's -- I guess that's what she ...
- Q Why did she want to support the company?
- A She liked the company, and she liked me. So, that's why she wanted to do it.
- ...
- Q ... what did you tell Ms Smithers about the company?
- A ... I can't remember.
- Q Did you show her pro formas?
- A Not -- she saw our offices and she saw the -- well, I would say, no, I didn't show her the pro forma ...
- Q Did you show her any historical financial statements?
- A No.
- Q A cash-flow analysis?
- A No, I did not.
- Q Just a P&L, something to show your revenue and expenses?
- A No, I did not.
- Q Did Ms Smithers know that the company was not incorporated?
- A No she would not have known.
- Q Did she know the company wasn't audited?
- A No, she didn't.
- ...
- Q Okay, why was a loan to your company in line with Ms Smithers' objectives?
- A Well, I think this is where I -- I could see that I -- at the time I thought it was good, but now I see it's -- wasn't that good, so.
- Q Why did you think it was good at the time?
- A I thought that my business was going to do well, and so that's why I thought it was good. But in retrospect it was not the right thing to do.
- Q What made you think your business was going to do well? Had you had some type of pro forma done?
- A We just had reached our goals in the branch and ...
- Q Who sets the goals?
- A Me. I would set the goals along with my manager or whoever would help me to do the goal setting.
- Q The manager of what?
- A Of -- if it was DPM, whoever my manager would be at the time.
- Q So, you mean the branch office of DPM had met its goals?
- A Right.
- Q Not Conservative Investments?
- A No.
- Q Did Conservative Investments have financial goals?

2005 BCSECCOM 197

- A No, they did not.
Q But the investment was made in Conservative Investments?
A That's correct.
Q What were the terms of the loan between Conservative Investments and Ms Smithers?
A We didn't have terms of the loan.
Q What loan documentation was executed?
A I didn't have any.
Q Did you ever repay any of the loaned money to Ms Smithers?
A I can't recall.

26. On May 3, 2001, a lawyer retained by Smithers' Representative, wrote to Assante in Vancouver. He requested an explanation of a series of cheques that had been given to O'Connor between September 1998 and February 2001. All but one of the cheques were made payable to Conservative. He said he had been advised that the signature was that of Smithers, but the handwriting denominating the payee was not. He also said that Smithers' Representative had advised him that Smithers had not been receiving statements from O'Connor. The Representative had attempted to contact O'Connor, but he had not returned her calls. The Representative went to O'Connor's office on May 2, 2001 and was advised by O'Connor's assistant that O'Connor had left on a lengthy holiday. The assistant was unable to find any record of Smithers' transactions.
27. On November 27, 2001, the IDA received a customer complaint form dated November 9, 2001 from the lawyer. According to the complaint form, Smithers "is an elderly woman who is a resident at a long-term care facility. She suffers from significant memory loss from senility. It has been determined that she is not competent to handle business affairs." We do not know when she became incompetent to handle her affairs.

Townsley

28. DPM's Initial Transaction Form for Townsley is dated October 24, 1995. Townsley's Know Your Client Information, dated June 14, 1999, stated that her net worth was \$300,000 and her annual income was \$16,000. Her risk tolerance was medium.
29. Her investment objectives are typed as income 80% and growth 20%, but someone has written over that 20% and 80%, respectively. There are no initials against the inserted percentages. The same form completed on May 17, 2000 and again signed by Townsley contains investment objectives of 20% income and 80% growth (typed). Her net worth had fallen to \$253,000; her annual income had increased to \$24,000. We have no evidence to explain these changes.

2005 BCSECCOM 197

30. Townsley's mutual fund redemptions and cheques to Conservative are set out below:

Client	Redemption Amount	Redemption Date	Amount of Cheque to Conservative	Cheque Deposit Date
Townsley	\$15,000.00	April 3, 1998	\$15,000.00	April 9, 1998
Townsley	\$12,000.00	May 13, 1998	\$12,000.00	May 22, 1998
Townsley	\$12,000.00	July 2, 1998	\$10,000.00	July 8, 1998
Townsley	\$11,000.00	September 10, 1998	\$10,000.00	September 16, 1998
Townsley	\$10,000.00	January 11, 1999	\$10,000.00	January 20, 1999
Townsley	\$ 6,000.00	April 5, 1999		
Townsley	\$ 8,000.00	August 11, 1999		
Townsley	\$ 5,000.00	August 11, 1999		
Townsley	\$ 5,000.00	August 11, 1999	\$14,000.00	September 10, 1999
Townsley			\$ 6,000.00	January 19, 2000
Townsley	\$ 6,500.00	January 28, 2000	\$ 6,500.00	February 1, 2000
Townsley	\$10,000.00	June 6, 2000	\$10,000.00	June 16, 2000
Townsley	\$ 7,000.00	October 3, 2000	\$ 7,000.00	November 17, 2000

31. The total paid to Conservative in this period was \$100,500.
32. In his interview, O'Connor said this about his dealings with Townsley (Ex 6, page 21, line 24 to page 24, line 4):
- A We talked about investing into the company, and she thought that was what she wanted to do.
- Q Investing into what company?
- A Into Conservative Investment at that time.
- Q As a shareholder?
- A No, it was a loan. So, it was not an investment, it was a loan.
- Q Were there any loan documents written up?

2005 BCSECCOM 197

- A No, there was not.
- Q No promissory notes?
- A No. No.
- Q What were the terms of the loan?
- A I was going to pay her out when the company has sufficient funds with a good return.
- Q What's a good return?
- A In '96 I can't recall what it was, but it was -- it would be a better than average return.
- Q And that's what you told her?
- A Correct, yeah.
- Q Did she get a better than average return?
- A No. I told her she would get a good return.
- Q Did you give her any sort of time frame in terms of when you expected her to be repaid?
- A No, I did not.
- ...
- Q For this loan were there any restrictions on how you could use the funds?
- A No.
- ...
- Q ... Mrs Townsley, over the period of years, has paid to Conservative just over \$205,000. What was that money for?
- A That was to keep the -- running the business and that was -- that was about it, running the business.

33. And later (Ex 6, page 45, line 18 to page 46, line 1):

- Q ... Can you explain to me how an investment or loan to Conservative fits in with her investment objectives?
- A ... Well, the -- for a few years there, the company was doing well, and over the -- I guess the feeling I'd have is, it was probably not the right investment in retrospect now. ...

34. Townsley died on February 22, 2002. O'Connor gave the eulogy at her funeral, having been asked to do so by Townsley's daughter.

35. O'Conner told staff that, after Townsley died, he did not inform the estate of the loan outstanding (Ex 6, page 24, lines 5 to 7).

36. O'Connor went on to say that he thought the "loan" to Conservative would contribute to the 20% growth that Townsley wished to obtain from her investments (Ex 6, page 24, lines 19 to 23). He said that "it was probably not the

2005 BCSECCOM 197

right investment in retrospect now. And looking back it was not” (Ex 6, page 45, line 27 to page 46, line 2).

Use of the funds

37. O’Connor maintained 4 bank accounts – one each for Conservative and POFP, a personal C\$ account, and a personal \$US account. The Clients’ funds were deposited in the Conservative account.
38. To give a flavour of how much commission income was coming into the business and to O’Connor personally, staff estimated that from January 1996 to February 2001, DPM and Assante paid about \$1,507,250 in commission. About \$101,600 was deposited into Conservative’s account, about \$838,650 into O’Connor’s personal account and about \$567,000 into the POFP account. This does not include insurance commission. It appears that O’Connor used about \$1.12 million of his commission income to pay himself and to pay personal expenses and about \$389,000 to pay the expenses of the DPM branch business.
39. The bank records show that from February 18, 1998 to February 2001 payments from Conservative’s account were supported almost entirely by the funds from the Clients. The account was often near zero (and on occasion in deficit) and would be replenished with Client funds. \$163,600 was paid to Conservative by the Clients. Staff were able to trace payments out of \$166,715 (but more was paid out in small amounts). The extra money (in addition to that from the Clients) to cover the higher amount paid out can be attributed in part to small amounts of insurance commission income paid into the Conservative account and in part to funds already in the account. (There was about \$4,694 in the account on February 18, 1998.)
40. In addition to some business expenses, from February 1998, about \$79,000 in total was paid from the Conservative account to O’Connor’s personal account, and to pay personal expenses (as described below). About \$169,000 was paid from the POFP account to O’Connor’s personal account, about \$14,300 in cash was paid to O’Connor personally, and some of O’Connor’s personal expenses (at least \$25,000) were also paid from that account. Staff were unable to trace more than \$440,000 in payments out from the POFP account.
41. In his interview with staff, O’Connor frequently referred to the Clients’ funds deposited into Conservative’s bank account as investments. On other occasions he stated that the Clients’ funds were loans. O’Connor told staff that he told the Clients, and they understood, that their money was to be used for the purposes of his business. He did not offer specifics to staff as to how he intended the funds to be used in the business except to say they would be “for marketing” and “for making the [DPM] branch work better”.

2005 BCSECCOM 197

42. O'Connor said in interview (Ex 6, page 40, lines 11 to 23):

Q ... And some of these cheques in the memo space on the left-hand bottom corner states, for example, Mrs Smithers, her cheque, tab 40 states "For Investment".

A Yeah.

Q Is the money from all these people to Conservative, an investment in the company?

A Correct.

...

Q ... What were they investing in, like what was it?

A So, the money was in the company, and that we would use to make more money to -- and that's what they would put their money in for.

43. As described above, bank records reveal that O'Connor did not use all the money deposited in Conservative's bank account for business purposes. He used the money largely to pay refunds to a client (about \$9,900 in total), to pay \$3,000 to Smithers in May 2000, to make transfers to POFP's bank account (about \$70,000 in total), and to cover personal expenses (including payments to VISA, to O'Connor's personal line of credit at Canada Trust and to his personal C\$ chequing account) (about \$79,000 in total). The bank records show that a significant amount was paid for or to O'Connor personally, flatly contradicting O'Connor's statements in interview that the funds from the Clients were for the "running of the business".

44. O'Connor's personal account and the POFP account were also frequently close to zero. Although most of O'Connor's commission income was being deposited into the POFP account and his personal account, it was not enough to cover payments out.

45. Since virtually all the funds deposited in Conservative's account were funds from the Clients, it is fair to say that most of the funds transferred to POFP were also obtained from the Clients. These funds were commingled with commission and other deposits into the POFP account (which was used in part for business expenses, including the DPM branch office expenses, and in part for personal expenses).

46. When asked whether he considered it to be an acceptable practice to receive loans from clients, O'Connor responded: "At the time I did, but now I know it was -- in hindsight, it was definitely ..." (Ex 6, page 102, lines 18 to 21).

2005 BCSECCOM 197

47. O'Connor also admitted that he did not tell the compliance officer at Assante that the Clients were lending him money.

Findings

48. Staff allege that from February 18, 1998 to February 2001, O'Connor, while registered under the Act:
1. breached section 50(1)(d) of the Act when he induced the Clients to redeem mutual fund holdings by making statements to them that he knew, or ought to have known, were misrepresentations;
 2. breached section 57 of the Act when he made misrepresentations to induce the Clients to redeem mutual fund holdings for the purpose of funding the issue of cheques to Conservative and, further, by converting the proceeds to his own use;
 3. failed to deal fairly, honestly and in good faith with the Clients, contrary to section 14(2) of the Rules; and
 4. in advising the Clients to redeem mutual funds, recommended securities' sales that were inappropriate and unsuitable for them, contrary to section 48(1) of the Rules.
49. In addition, staff allege that O'Connor's conduct, as set out in the notice of hearing, was contrary to the public interest.

Misrepresentation

50. Section 50(1)(d) of the Act provides:

A person, ... with the intention of effecting a trade in a security, must not do any of the following:

...

(d) make a statement that the person knows, or ought reasonably to know, is a misrepresentation.

51. "Misrepresentation" is defined in section 1 of the Act to mean:
- (a) an untrue statement of a material fact, or
 - (b) an omission to state a material fact that is
 - (i) required to be stated, or
 - (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.

2005 BCSECCOM 197

52. “Material fact” is defined in section 1 of the Act to mean:

where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities.

53. We had concerns about the adequacy of the disclosure of this allegation in the notice of hearing and of staff’s argument in support, which also left some gaps. We decided that, since such concerns did not arise for us on the allegation of fraud, and fraud is the most serious allegation in this case, the public interest did not require us to deal with this issue.

54. Accordingly, we make no findings on the allegation of breach of section 50(1)(d).

Fraud

55. Section 57(b) of the Act provides:

A person in or outside British Columbia 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, or ought reasonably to know, that the transaction or series of transactions

...

(b) perpetrates a fraud on any person in British Columbia,

...

56. We find that O’Connor was engaging in or participating in a transaction or series of transactions relating to a trade in a security, namely the redemption of mutual funds for the Clients.
57. In the course of this conduct, O’Connor made at least two statements. As he said in interview, he told the Clients the funds would be used to support the business conducted through Conservative. (He told staff that the business was the DPM branch business.) He also admitted that he had promised a good return to one of the Clients (Townsley), but said he could not recall what he had said to the others. We think it likely that he made similar representations to the other Clients. It is otherwise hard to believe that they would have provided the funds to O’Connor for loan to or investment in Conservative, or for any other purpose.
58. These statements were false. The business was not doing well - certainly not well enough to make good returns to the Clients likely in the short to medium term. Quite the opposite. The bank records show that little commission income was being deposited into the Conservative account, and sufficient income was not

2005 BCSECCOM 197

coming into the POFP account and O'Connor's personal C\$ account to support the outgoings from those accounts, let alone the Conservative account. As O'Connor admitted, he had not established what return he would pay to the Clients. He was waiting to take that decision when the business "became more profitable". He must have known that good returns were very unlikely in the short to medium term.

59. There is no evidence, for example of increased marketing, to support an argument that the business would improve in the longer term. When asked by staff what sort of an income the business would return to the Clients, O'Connor replied - "We didn't come to that yet. In other words, we didn't know that yet." We find that O'Connor either knew that the business was not likely to improve to the point where good returns could be paid to the Clients in the longer term, or was wilfully blind to the substantial evidence that it would not improve.
60. Bank records reveal that commission income was being directed largely to the POFP account and O'Connor's personal account and that he was using the funds advanced to Conservative by the Clients to pay both business and personal expenses. O'Connor's statement to the Clients that the funds would be used for the business was false to the extent the funds were used to cover his personal expenses. O'Connor must have known that a significant amount of the Clients' money would have to be used (and was used) to cover his personal expenses.
61. O'Connor also failed to provide information to the Clients about Conservative's financial position. He must have known that the omission was important negative information about the loan to or investment in Conservative and the business and that the omission would deceive them.
62. In addition, he used the funds advanced to Conservative by the Clients to pay both business and personal expenses. He converted funds the Clients intended for the business to his own personal use.
63. As set out in the BC Court of Appeal judgment in *Anderson v. BCSC*, 2004 BCJ 8, the elements of fraud under section 57(b) of the Act were summarized in *R v. Théroux*, [1993] 2 SCR 5 at 20, 100 DLR (4th) 624, 79 CCC (3d) 449 by Madam Justice McLachlin (as she then was) as follows:

... 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

2005 BCSECCOM 197

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).

64. McLachlin J also cited with approval (at 23) the words of Taggart JA who stated in *R v. Long* (1990), 51 BCLR (2d) 42, 61 CCC (3d) 156 at 174:

... the mental element of the offence of fraud must not be based on what the accused thought about the honesty or otherwise of his conduct and its consequences. Rather, it must be based on what the accused knew were the facts of the transaction, the circumstances in which it was undertaken and what the consequences might be of carrying it to a conclusion.
[underlining added]

65. The *actus reus* of fraud is clear. O'Connor made the false statement that Conservative would provide a good return. He also made the false statement that the funds would be used to support the business, when he was using the funds advanced to Conservative for business and personal purposes. He deceived the Clients by failing to inform them that the business was not doing well. (*R v. Cuerrier*, [1998] 2 SCR 371, 162 DLR (4th) 513, 127 CCC (3d) 1 confirms that dishonest concealment of material facts can amount to fraud.) He failed to provide the Clients with any information or documentation about Conservative's financial position and the real risks associated with the transactions. He converted funds to his own use. In the result, the Clients lost all or most of their money.

66. The BC Court of Appeal in *Anderson* (cited above) went on to say:

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 law 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.

67. We must base our finding of the mental element of fraud on our findings as to what O'Connor actually knew. The evidence must be clear and convincing. We

2005 BCSECCOM 197

have found that O'Connor must have known that the statements to the Clients were false and the omissions were deceitful. We also found that he knowingly deceived the Clients by converting the funds to his own use. Accordingly, we find that O'Connor had subjective knowledge of the falsehood and deception of the Clients.

68. By 1998, the business was not doing well and bank records show that both repayment of capital and returns on the loans or investments would have been difficult, if not impossible. Payments out of the Conservative account relied almost entirely on the Clients' money. The accounts also show significant sums being drawn from the Conservative and POFP accounts to pay O'Connor's personal expenses and O'Connor personally. It follows that O'Connor must have known that the prohibited acts described in the previous paragraph would put the Clients' pecuniary interests at risk. In our view, the evidence provides clear and convincing proof that both aspects of the mental element were present.
69. **Accordingly, we find that O'Connor breached section 57(b)** when he knowingly made false statements and failed to provide important information to induce the Clients to redeem mutual fund holdings for the purpose of funding the issue of cheques to Conservative and, further, by converting the proceeds to his own use.

Section 14(2) of the Rules

70. Section 14(2) provides that:

A registered

(a) salesperson,

...

of a dealer or adviser must deal fairly, honestly and in good faith with the clients of the dealer or adviser.

71. **We find that O'Connor, a registered salesperson, breached section 14(2)** in that the behaviour which we have found was to breach section 57(b) of the Act was also not to deal fairly, honestly and in good faith with the Clients.

Section 48(1) of the Rules

72. Section 48(1) provides:

A registrant ... must make enquiries concerning each client

(a) to learn the essential facts relative to every client, including the identity ... of the client ..., and

2005 BCSECCOM 197

(b) to determine the general investment needs and objectives of the client, the appropriateness of a recommendation made to that client and the suitability of a proposed purchase or sale for that client.

73. In advising the Clients to redeem mutual funds and invest in or lend to Conservative, O'Connor made inappropriate recommendations and advised the Clients to make a purchase or sale that was unsuitable. There is evidence that O'Connor made some enquiries to learn the essential facts relative to the Clients and to determine their general investment needs and objectives. However, the recommendations that he made to redeem mutual funds and issue cheques to Conservative were so clearly inappropriate and the proposed purchases or sales so obviously unsuitable that we have concluded he could not have made the enquiries required by section 48(1)(b).

74. Accordingly, we find that O'Connor breached section 48(1) of the Rules.

Conduct contrary to the public interest

75. **We find that O'Connor's conduct** which we have found breached section 57(b) of the Act and sections 14(2) and 48(1) of the Rules **was contrary to the public interest.**

Orders

76. Staff ask that orders be made against O'Connor as follows:

1. under section 161(1)(b) of the Act, that O'Connor cease trading in any securities or exchange contracts and be prohibited from purchasing any securities or exchange contracts;
2. under section 161(1)(c) of the Act, that all of the exemptions described in sections 44 to 47, 74, 75, 98 and 99 of the Act do not apply to O'Connor;
3. under section 161(1)(d) of the Act, that O'Connor resign any position he may hold, and be prohibited from becoming or acting, as a director or officer of an issuer;
4. under section 161(1)(d) of the Act, that O'Connor be prohibited from engaging in investor relations activities;
5. under section 162 of the Act, that O'Connor pay an administrative penalty;
and
6. under section 174 of the Act, that O'Connor pay the prescribed fees or charges of or related to the hearing.

2005 BCSECCOM 197

77. *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 contains a non-exhaustive list of factors we may take into account in assessing sanctions.
78. Staff presented evidence to us concerning O'Connor's conduct prior to February 1998. Staff say, and we agree, that conduct prior to the period relevant to the allegations raised in the notice of hearing may be taken into account in making orders and setting penalties (see *Diianni* 2001 BCSECCOM 918). We have taken into account the fact that, in 1993, Walywn terminated O'Connor with cause for conflict of interest.
79. Staff say that the orders should be even more stringent than those imposed in *Rast* 2003 BCSECCOM 609 in which the Commission ordered that paragraphs (a) to (d) above should apply to Rast for 30 years, a penalty of \$200,000, and the payment of prescribed fees or charges.
80. *Rast* is in many respects on all fours with O'Connor. Making the case particularly egregious, he was a registrant who breached his obligations to deal with clients fairly, honestly and in good faith. He knowingly diverted funds and enriched himself by fraudulent conduct over a period of time at the expense of more than one client. Rast took more money (net amount approximately \$476,000) from more people and also pleaded guilty to securities related criminal conduct.
81. On the other hand, unlike Rast, O'Connor has not cooperated with the Commission. He has shown no remorse, he concealed his conduct, and there is no evidence that he has voluntarily repaid or intends to repay any money or in any other way accept the consequences of his misconduct.
82. In addition, the Clients were particularly vulnerable (due to their age and lack of knowledge and experience); they trusted him (so much that he was able to avoid documenting the transactions); they relied substantially on his judgment and advice. O'Connor violated the trust placed in him by targeting and exploiting the Clients as he did and concealing his behaviour. He did not tell the compliance officer at Assante that the Clients were funding Conservative.
83. Both the courts and the Commission have recognized on many occasions that the Act is aimed at regulating the market and protecting the public. A cornerstone of the regulatory structure established by the Act is the requirement that people advising on and involved in trading in securities be registered and comply with the legislative requirements. This is intended to ensure that the investing public receives expert advice from competent and ethical people, whose activities are governed by appropriate standards and subject to regulatory scrutiny. See for example: *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301.

2005 BCSECCOM 197

84. O'Connor wilfully ignored securities requirements, put his own interests in front of those of his Clients, showed complete disregard for his regulatory duties, and lied to the Clients. His conduct damaged the integrity of the securities markets in British Columbia.
85. It seems to us unlikely that O'Connor will change his character or learn from his mistakes. We think O'Connor's continued participation in the capital markets would pose a significant threat to investors. He is clearly unfit to hold a position of trust such as a registrant or a corporate director and officer.
86. We have concluded that it is in the public interest to impose substantial sanctions on O'Connor to keep him out of the market and deter future misconduct. In addition, following *Re Cartaway Resources Corp*, [2004] 1 SCR 672, we think it right to take into account general market deterrence. Therefore, considering it to be in the public interest, we order:
 1. under section 161(1)(b) of the Act, that O'Connor cease trading in and be prohibited from purchasing any securities or exchange contracts permanently;
 2. under section 161(1)(c) of the Act, that all of the exemptions described in the Act do not apply to O'Connor permanently;
 3. under section 161(1)(d)(i) of the Act, that O'Connor resign any position he holds as a director or officer of any issuer;
 4. under section 161(1)(d)(ii) of the Act, that O'Connor be prohibited from becoming or acting as a director or officer of any issuer permanently;
 5. under section 161(1)(d)(iii) of the Act, that O'Connor be prohibited from engaging in investor relations activities permanently; and
 6. under section 162 of the Act, that O'Connor pay an administrative penalty of \$200,000.
87. It is the Commission's usual practice to award costs against an unsuccessful respondent under section 174 of the Act and *Securities Regulation*, BC Reg. 196/97, section 22, item 28. O'Connor was given notice that staff would seek costs of the hearing. The allegations outlined in the notice of hearing have in our view been substantially proved.
88. We therefore order that O'Connor pay the prescribed fees or charges of or related to the hearing in the amount of \$48,368.25.

2005 BCSECCOM 197

89. March 31, 2005

90. For the Commission

Adrienne Salvail-Lopez
Vice Chair

Robin E. Ford
Commissioner

Neil Alexander
Commissioner