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Carey Brian Dennis

Section 161 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Robin E. Ford	Commissioner
	Joan L. Brockman	Commissioner
	John K. Graf	Commissioner

Date of Hearing September 15, 2004

Date of Findings January 28, 2005

Appearing

Sean K. Boyle For the Executive Director

Findings

Introduction

- ¶ 1 On May 30, 2001, the executive director issued a notice of hearing alleging that Carey Brian Dennis:
- a) directly engaged in a series of transactions relating to a trade in a security while he knew, or ought reasonably to have known, that the series of transactions perpetrated a fraud on persons in British Columbia, contrary to section 57(b) of the Act; and
 - b) failed to deal fairly, honestly, and in good faith with clients contrary to section 14 of the *Securities Rules*, BC Reg. 194/97.
- ¶ 2 The executive director also issued temporary orders under section 161(2) of the Act as follows:
- a) under section 161(1)(c), that any or all of the exemptions described in sections 44 to 47, 74, 75, 98 or 99 of the Act do not apply to Dennis;
 - b) under section 161(1)(d), that Dennis resign any position he holds as a director or officer of any issuer, and that he be prohibited from becoming or acting as a director or officer of any issuer; and
 - c) under section 161(1)(d), that Dennis be prohibited from engaging in investor relations activities.

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- ¶ 3 After hearing an application from the executive director on June 14, 2001, the commission, considering it to be necessary and in the public interest, extended the temporary orders under section 161(3) of the Act until a hearing was held and a decision rendered.
- ¶ 4 On September 15, 2004, we held a hearing to determine whether it is in the public interest to make the following orders:
- a) under section 161(1)(c) of the Act, that any or all of the exemptions described in sections 44 to 47, 74, 75, 98 or 99, do not apply to Dennis;
 - b) under section 161(1)(d) of the Act, that Dennis resign any position he holds as a director or officer of any issuer, and that he be prohibited from becoming or acting as a director or officer of any issuer;
 - c) under section 161(1)(d) of the Act, that Dennis be prohibited from engaging in investor relations activities; and
 - d) under section 174 of the Act, that Dennis pay prescribed fees or charges for the costs of or related to the hearing.
- ¶ 5 Dennis did not appear at the hearing. We are satisfied that he was properly served with notice of the hearing under section 180 of the Act.

Conduct of the Respondent

- ¶ 6 Staff say that Dennis took money from British Columbia residents purportedly in exchange for Mutual Life investment products when he actually used the investors' money for his own purposes.
- ¶ 7 Staff ask that we consider four pieces of evidence. The first is a section 168 certificate showing when and how Dennis was registered under the Act. The second is an indictment charging Dennis with 10 counts of fraud and theft. The third is the reasons for judgment of Mr. Justice Cole of the BC Supreme Court in *R v Carey Brian Dennis* dated October 10, 2003 (2003 BCSC 1688). The judgment may be found at: <http://www.courts.gov.bc.ca/jdb-txt/sc/03/16/2003bcsc1688.htm>. The fourth is the oral reasons for sentence of Mr. Justice Cole in *R v Carey Brian Dennis* dated December 9, 2003.
- ¶ 8 Relying on *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, [2003] 3 SCR 77, staff say this evidence is sufficient to support the allegations and we agree. Under section 71(2) of the *Evidence Act*, RSBC 1996, c. 124, as long as any appeal period has expired, proof of a relevant criminal conviction is admissible in evidence to prove that the person committed the offence. The convictions in *R v Carey Brian Dennis* relate to the same facts which are at issue here. *Toronto v CUPE* confirms that the conviction is evidence that the person

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convicted committed the crime, and that we may rely on Dennis' convictions as proof of the facts which support the convictions.

- ¶ 9 We find as follows.
- ¶ 10 The certificate under section 168 of the Act shows that from September 27, 1993 until July 11, 1997 (the relevant times), Dennis was registered under the Act as a mutual fund salesperson. His registration was restricted to the offering and sale of securities in which his employer was permitted to trade under its registration.
- ¶ 11 On October 10, 2003, in the Supreme Court of British Columbia, Dennis was found guilty of four counts of fraud and four of theft for events that took place between June 1993 and April 1997.¹ On December 9, 2003, Dennis was sentenced to two years and three months in prison on each count, to run concurrently, and ordered to make restitution in the amount of \$106,185.10.
- ¶ 12 We adopt the findings of fact and law of the court which relate to the eight counts of fraud and theft for which Dennis was found guilty. The following is a summary of the judge's findings of fact.
- ¶ 13 During the relevant times, Dennis was employed by Mutual Investco Inc, a subsidiary of Mutual Life, later known as Clarica Life Assurance Company.
- ¶ 14 Dennis was a financial adviser and of some standing and good reputation in the community of Salmon Arm in British Columbia. Dennis deprived seven clients in British Columbia of \$247,576. He intentionally misled the clients to believe that their money was invested in a mortgage or other mutual fund with Mutual Life. However, he actually intended to (and did) place their money with a sole proprietorship called Dennis Financial Services, and used their money to invest in mortgages or a mortgage pool in his own name or for other business or personal purposes. Dennis, through Dennis Financial, used trust funds to pay his own bills. He also knowingly put the clients' money at risk by placing their money with Dennis Financial Services and by investing the money, in his name and at his discretion, in securities or investments that were less than secure.
- ¶ 15 Dennis admitted that his conduct was dishonest and that he realized the serious criminal nature of his conduct. He concealed his activities by mechanisms such as generic receipts (which did not indicate where they had come from) or by telling the clients, or allowing them to believe, that Dennis Financial was part of Mutual Life. They had no reason to make further inquiries of him because they trusted

¹ Dennis was found not guilty on one count of fraud and one of theft.

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him. He hid the existence of his involvement in Dennis Financial from Mutual Life.

Breaches of the Act and Rules

¶ 16 Section 57 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 or a trade in an exchange contract 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 ...

...

¶ 17 Section 14 of the Rules provides:

(1) A registrant must deal fairly, honestly and in good faith with the clients of the registrant.

(2) 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.

¶ 18 “Security” is defined in section 1(1) of the Act to include “(d) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, ... or subscription ...”.

¶ 19 Relying on *Toronto v CUPE* (cited above), staff say the convictions for fraud in *R v Carey Brian Dennis* (cited above) are conclusive proof that Dennis committed fraud. We agree. As we noted above, the findings of Mr. Justice Cole cover the same facts which are at issue here. In convicting Dennis of fraud, the judge applied the same legal definition for fraud that we must apply under section 57(b) of the Act, namely the one set out in *R v Theroux*.²

¶ 20 Staff also say, and we agree, that the reasons for judgment of Mr. Justice Cole provide sufficient evidence to prove the other elements of section 57(b).

² See *Anderson v BCSC*, 2004 BCCA 7 (BCCA).

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- ¶ 21 First, was Dennis directly engaged in a series of transactions relating to a trade in or acquisition of a security? The reasons for judgment show that some of the clients' money may have gone into a mortgage pool. More important, Dennis led the clients to believe that they were investing in a mortgage or other mutual fund with Mutual Life. Units in a mutual fund are securities. It does not matter that some or all of the clients' money was not actually invested in such a fund. In leading his clients to believe that their money would be and was invested in a fund with Mutual Life, Dennis was engaged in each case in a series of transactions relating to a trade in or acquisition of a security.
- ¶ 22 Second, the judgment provides sufficient evidence to show that the frauds took place in and around Salmon Arm in British Columbia.

Limitation period

- ¶ 23 For all counts on which Dennis was convicted, the last event of the series of events found in each case to constitute fraud and theft falls within the six year period prior to the issue of the notice of hearing on May 30, 2001 (beginning on May 31, 1995). There is a question however as to whether the whole of each series of events should be treated as falling within the six year limitation period in section 159 of the Act and (accordingly) whether we may take into account the events which form part of the series but which pre-date May 31, 1995.

The facts

- ¶ 24 The Thiessens entrusted their money to Dennis in July 30, 1994 and July 1995 (in the second instance, after May 31, 1995). (The judgment refers to a second payment to Dennis Financial Services in July 1985, but we think that must mean July 1995.) It was not until August or September 1996 when they first became concerned about their investments. We find that Dennis' deceit continued until August or September 1996. In particular, Mr. Justice Cole found:

[40] Sometime in August or September 1996 they went back to Salmon Arm and visited the accused at his home. According to Mrs. Thiessen, they were still good friends. At that meeting, Mrs. Thiessen testified that she said to the accused words to the effect that, "You have stolen our home and you didn't put our money into Mutual Life". She said that the accused replied that that was a serious allegation. When he was told that he had caused a great deal of strain and anxiety in their home and that it was like taking their children's inheritance, the accused told her to stop worrying that she would get her money when a hotel was sold.

- ¶ 25 The Gentles first entrusted money to Dennis in 1993. There is some evidence of later payments, but we do not know the dates. It was not until July 1997 (after

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May 31, 1995) that they became concerned about their investments. We find that Dennis' deceit continued until July 1997. In particular, Mr. Justice Cole found:

[80] In July 1997, the Gentles became concerned about what was happening with their trust funds. On July 25, 1997, Mr. Gentles phones the accused on the pretext of needing \$31,000 for a vehicle purchase. The accused indicated that he would probably have the money for them by the end of the month.

- ¶ 26 The Fudgers entrusted their money to Dennis in 1993 (before May 31, 1995) and Dennis paid them 'interest' on the capital once a month until 1997 (after May 31, 1995). In the summer of 1997 they became concerned about their investments. We find that Dennis' deceit continued until summer of 1997. In particular, Mr. Justice Cole found:

[23] In the latter part of 1993, the Fudgers requested money from the accused. He suggested they leave the money intact for a year so he could pay them \$1,000 per month and it wouldn't affect the principal amount. They agreed to this suggestion, and for three years, they received interest payments totaling \$36,000. Since the summer of 1997, they have received nothing.

- ¶ 27 Mr. Allan entrusted his money to Dennis between March 15, 1997 and April 15, 1997 (in both cases after May 31, 1995).
- ¶ 28 In each case, the deceit by Dennis started or continued after May 31, 1995. The judgment tells us that the deceit was buttressed by transactions like the payment of interest, the issue of tax receipts and portfolio reviews.

The law

- ¶ 29 Section 159 of the Act says:

Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.³

- ¶ 30 In our opinion, in this case, "proceedings" should be taken to refer to the notice of hearing which informs the respondent that a hearing is to be held, and sets out the

³ Section 140 contains the limitation period for statutory civil actions under the Act and is not relevant here.

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allegations against him. Section 159 provides in effect that allegations in the notice may not be issued “more than 6 years after the date of the events that give rise to [them]”. Does this mean that, in assessing Dennis’ liability, we cannot consider any of Dennis’ acts of deceit prior to May 31, 1995?

¶ 31 Section 8 of the *Interpretation Act*, RSBC 1996, c. 238 provides:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

¶ 32 In *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559, the Supreme Court of Canada outlined the Court’s preferred approach to statutory interpretation (at paras 26 to 29):

In Elmer Driedger’s definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings . . . I note as well that, in the federal legislative context, this Court’s preferred approach is buttressed by s. 12 of the *Interpretation Act*, RSC 1985, c. I-21, which provides that every enactment ‘is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects’.

. . .

Other principles of interpretation – such as the strict construction of penal statutes and the ‘Charter values’ presumption – only receive application where there is ambiguity as to the meaning of a provision. . . .

What, then, in law is an ambiguity? To answer, an ambiguity must be ‘real’ The words of the provision must be ‘reasonably capable of more than one meaning’ By necessity, however, one must consider the ‘entire context’ of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.’s statement in *CanadianOxy Chemicals Ltd. v Canada (Attorney General)*,

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[1999] 1 SCR 743, at para. 14, is apposite: ‘It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids’ . . . to . . . which I would add, ‘including other principles of interpretation’.

- ¶ 33 We have been provided with only one authority on the interpretation of a limitation provision such as this one. In *Re Heidary* (2000), 23 OSCB 959, the Ontario Securities Commission considered the equivalent section 129.1 of the *Securities Act*, RSO 1990, c. S 5 which differs somewhat from section 159:

Except where otherwise provided in this Act, no proceeding under this Act shall be commenced later than five years from the date of the occurrence of the last event on which the proceeding is based.

- ¶ 34 In *Heidary*, the OSC interpreted and applied this provision as follows:

The decision which the Commission must arrive at in determining whether a subsection 127(1) order should be made is not whether a provision of Ontario securities law has been breached, but, rather, whether, on the basis of the evidence, it is in the public interest to impose the sanction.

Against this background, it is a respondent's course of conduct, and not specific breaches of Ontario securities law, which is determinative, although, of course, specific breaches will no doubt be a consideration, in appropriate cases, to be taken into account by the Commission. It will normally be the course of conduct on which the proceeding will be based. A course of conduct for this purpose could be a single act, and one which was not necessarily a breach of Ontario securities law.

So, 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.

When the first breach occurred in a series of breaches of Ontario securities law is not, as argued by the Applicants, the touchstone. Nor, if some breaches in a series of breaches occurred before, and some during, the limitation period, is it appropriate to proceed only with respect to those breaches which occurred during the limitation period. . . .

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Rather, ‘the last event on which the proceeding is based’ referred to in section 129.1 of the Act is the last event in the series of events which form the course of conduct on the basis of which . . . sanctions are requested by Staff.

- ¶ 35 The Ontario provision makes clear that the limitation period is tied to “the last event on which the proceeding is based”. Section 159 of the BC Act uses the plural “events” and ties the limitation period to “the date of the events that gave rise to the proceedings”.
- ¶ 36 In our opinion, there is no ambiguity in the wording of section 159 that requires us to look beyond the Driedger approach described by the Supreme Court of Canada in paragraph 26 of *Bell* (cited above) and, for example, interpret the section restrictively.
- ¶ 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. ...
- ¶ 40 Although the OSC was concerned in *Heidary* with allegations of conduct contrary to the public interest (and not allegations of breaches of the legislation as here), we think it right to extend the reasoning in *Heidary* to allegations of breach. We adopt the reasoning in *Heidary* that if some breaches in a series of breaches or some part of the conduct occurred before the limitation period, it is appropriate to

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proceed with respect to those breaches or that conduct which occurred both before and during the limitation period.

- ¶ 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.
- ¶ 42 Dennis' course of conduct with Allen was entirely within the limitation period. We find that, in the case of each of the other victims whom Dennis was convicted of defrauding, some breaches in a continuing series of breaches or some part of the continuing conduct occurred before, and some during, the limitation period. We may therefore take into account the entire continuing series of breaches or course of conduct which for each victim made up the fraud and theft, whether occurring before or after May 31, 1995, in assessing whether Dennis breached section 57(b) of the Act and section 14 of the Rules.

Findings

- ¶ 43 Accordingly, we find that, in conducting himself as described in the parts of the reasons for judgment of Mr. Justice Cole which relate to the counts on which he was convicted, Dennis directly engaged in a series of transactions relating to a trade in or acquisition of a security when he knew that the transactions perpetrated a fraud on seven persons in British Columbia, contrary to section 57(b) of the Act.
- ¶ 44 We also find that, in conducting himself as described in the parts of the reasons for judgment of Mr. Justice Cole which relate to the counts on which he was convicted, Dennis failed to deal fairly, honestly, and in good faith with the seven clients, contrary to section 14 of the Rules.

Sanctions

- ¶ 45 As we indicated in the hearing, having issued our findings, we expect to receive written submissions from staff on the orders to be made under sections 161 and 174 of the Act within four weeks of the date of these findings. The submissions must also be served on Dennis. Dennis may make submissions in reply which must reach us and staff within four weeks of the date of receipt of staff's submissions. If Dennis makes submissions, then staff must provide to us any submissions in reply to those of Dennis within seven days of receipt of Dennis' submissions.

Temporary orders

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¶ 46 As the temporary orders were extended for a period ending when a decision is rendered, the orders continue until we have issued our decision on sanctions.

¶ 47 January 28, 2005

¶ 48 **For the Commission**

Robin E. Ford
Commissioner

Joan L. Brockman
Commissioner

John K. Graf
Commissioner