IN THE MATTER OF
THE SECURITIES ACT, 1988, S.S. 1988, c. S-42.2

AND

IN THE MATTER OF

KENNETH JAMES BRITTAIN

D E C I S I O N

Hearing Held September 14, 1993

Before:	Marcel de la Gorgendière, Q.C., Chairman Norman Kenneth (Jim) Owen
Appearances:	Cheryle Thomson, representing Commission staff Kenneth James Brittain, representing himself

Decision dated October 26, 1993.

DECISION

This hearing was held to determine Kenneth James Brittain's (the "Respondent") suitability for registration as a registered representative, in accordance with section 28 of The Securities Act, 1988 (the "Act") and:

- whether such registration was objectionable;
- whether such registration should be subject to conditions;
- whether it should be ordered that the Respondent cease trading; and
- whether any or all of the exemptions of the Act not apply to him.

The reason advanced to require such determination was stated as being due to four instances of trading in securities by the respondent while unregistered contrary to section 27(1) of the Act.

The Commission was greatly aided in its task by virtue of an Agreed Statement of Facts and exhibits. This does not make the task easy because implications that can be drawn from the facts can be construed differently in considering how they affect suitability for registration.

The facts are that unregistered trading by the Respondent took place in four companies, none of which could be justified by virtue of an exemption from the prospectus and registration provisions of the Act. The Respondent was under the impression that his trading was exempt from these provisions because he was trading with close friends and/or close business associates. The agreed evidence established quite clearly however that the Respondent, as much as he may have thought his trading was directed at close friends or close business associates in accordance with the provisions of section 81(1)(z), had overlooked two important provisions of that subsection.

The word overlooked is used in its most charitable sense because the Respondent, who had for a number of years been registered in a number of different capacities under the Act, could well have been aware of his non-compliance. In any event, his lack of awareness directly affects his suitability to be registered. Any actual awareness only renders the lack of suitability more evident.

A brief review of the agreed facts might be useful in order to look at the claimed exemption. After that, one can return to the question of how it affects suitability.

The Respondent has been registered for mutual fund sales and for the specific sale of securities of nine individual corporations, commencing in 1982 and continuing at designated irregular intervals relating to the authorized distribution period for each company. He has successfully completed the Canadian Securities Course as well as the Registered Representative Manual exam, and the Investment Funds Institute mutual fund sales course. He was, therefore, well aware of the registration requirements of the Act as shown by his registration in a number of instances.

The four transactions referred to in the Notice of Hearing as being the reasons for considering the lack of suitability did not occur with companies in which there was a registration exemption issued or compliance made with registration requirements.

The Respondent admits that he contacted three people who, in total, paid $50,000 to Noran Tel Inc. ("Noran Tel") and received a commission of 1.50% of the funds raised. Evidence given by one of the investors was of his having given the Respondent a cheque for $20,000 payable to Noran Tel for which he has a receipt marked as being for "an investment loan", and receiving a cheque from Noran Tel for $24,000 post-dated to a time almost four months later. Some question was raised as to whether this would be a securities trading transaction or merely a loan. We have no doubt in holding that this is securities trading by virtue of the provisions of section 21(1)(ss)(v) of the Act in that the receipt and cheque were evidence of an indebtedness.

The Respondent also admits having been contacted by the President of International Brew Pub Inc. to raise $30,000. He agreed to do so for a 10% commission. Evidence was given from one person who invested $10,000 and received a promissory note for $10,000 without interest and a share certificate for 10,000 class B shares after he had executed a share subscription agreement in which he agreed to a shareholder's loan and subscribed to 10,000 shares at a stated price of .004 cents per share. The respondent admits to receiving a $1,000 fee. The witness stated that he had a combination business and social relationship with the Respondent although they were not in business together.

Further admissions involved a sale of shares in Emerald Park Golf and Country Club. The Respondent was registered to sell securities in the Emerald Park Venture Capital Corporation but more than a year after expiration of his registration, he attempted a sale to a person who invested some time later in shares of the Emerald Park Golf Club, but the evidence given by that purchaser clearly indicates he did so much later and only because of the intervention of others connected to the company.

The Commission, however, in determining if trading took place considers whether, in accordance with the definition of "trade" in section 2(1)(vv) of the Act, there was "any act" in furtherance of anything mentioned in sub-clauses (i) to (iv). The attempt by the Respondent would be such an act. In any event, there was an additional admission of a successful share sale in the same company to another person for $10,000 for which the Respondent received a 7% commission.

The final incident admitted involves the sale to eight persons of $58,800 in shares of New Vision Goematics Inc. for a commission received of $5,880 by the Respondent between the period of August 1992 and January 1993. A Form 19 Report of a Trade in Reliance on clause 81(1)(z) indicated that the Respondent was a promoter of "New Vision", relying on the close friends or close business associates exemptions. The Form 19 was filed with the Commission on March 12, 1993, almost a month after an investigation order involving the Respondent and "New Vision" among others had been issued by the Commission.

Looking at these events from the point of view of assessing whether the registration or prospectus provisions of the Act are exempted by virtue of section 81(1)(z), there was no suggestion of the Respondent coming within any of the relationships with any issuer described in 81(1)(z)(i),(ii),(iii), or (iv), that is the trades were not with a senior officer or director of the issuer or affiliate of the issuer, a spouse or relative as designated of one of the aforementioned or a company all of whose shares were owned by them. Subclause (v) deals with the situation referred to in regard to New Vision Geomatics Inc. and the Form 19 that was filed with the Commission. There are a number of elements required to comply with this exemption. It is not

our intention to deal with all of the elements but, as mentioned before, the Commission finds that at least two of the elements were missing. Firstly, the trades must be with close friends or close business associates of a promoter of the issuer. The Commission notes that a promoter is defined in section 2(1)(mm)(i) as "a person who….acting alone or in conjunction with one or more other persons.…directly or indirectly takes the initiative in founding, organizing or substantially reorganizing the business of the issuer". (Subsection (ii) also includes as a promoter a person who obtains 10% of a class of securities in consideration of property or services in connection with the founding, organizing or substantial reorganization of the business of the issuer, but the Respondent admits that this provision was not applicable to him).

In three of the four instances, the Respondent admitted to not being an officer, director or promoter of the issuer. A promoter is not defined in the sense that it might be understood commonly that it is someone who assists or helps by advocating or by raising funds for someone. One has to have taken the initiative in founding, organizing or substantially reorganizing the business of the issuer. Mr. Brittain was not around at the commencement of any of the companies. He came in at a later date, well after incorporation as a consultant in fund raising and in his evidence he did not suggest that he was in any way involved in the initiatives that led to the founding or organizing of the issuer. The Commission considers that the exemption is granted to close friends of the promoter because of the fact that the promoter in the defined sense has all the knowledge of the structure and purpose of the company. Someone who knows that promoter "closely" may be willing to rely on that knowledge to invest. Someone who comes along later as a director may not be in that position, nor will someone who is employed to raise funds. It is important then that the trade made by an issuer is with a close friend of a promoter of the issuer as defined.

The second element missing is compliance with 81(1)(z)(v)(D), "no selling or promotional expenses have been paid or incurred in connection with the offer and sale". In this case, commissions were paid to the Respondent based on the amount invested. He clearly cannot qualify his actions under the exemption. It is not, therefore, necessary to decide if any of the purchasers constituted close friends or close business associates but there may be some value in the Commission commenting on that aspect of the exemption.

These categories seem to be capable of a great deal of elasticity in the minds of those attempting to use the exemption. In considering "close friend" for the purpose of this exemption we have to look at the ordinary meaning of the words as applied to the facts in evidence and see if they are in concert. The Oxford dictionary in the context in question says "close: near; in near relation or connection (close friend, relative); in intimate friendship or association". Let us look at some of the examples offered in this case as close friends. One individual was not known to the Respondent until contacted at a fitness club. All meetings that took place up to the trade dealt with the proposed transaction. That is not evidence of friendship, let alone close friendship. In another case, the witness showed hesitancy when questioned as to whether he considered the Respondent a close friend. His reply was "yes, in some terms" "not in the way of his family and mine involved socially, but socially, yes". This was a less than enthusiastic confirmation of close friendship. The seeming reluctance in the answer seems to indicate consideration of an answer that should be obvious if a person was a close friend. It is a situation in which if you have to think twice about it, the person is not a close friend. An acquaintance, perhaps, is a better description for someone you meet socially. It may be that some friendship exists. A close friend is more. It would be someone joined by a common bond developed through either a long

or intense period of relationship. One should look for facts demonstrating the development of such a bond showing a likeness, fondness, admiration, and above all, trust. It is that type of friendship that must have been contemplated in order to justify the granting of an exemption.

The other question would then be, is the person, if not a close friend, one who should qualify for the exemption as a close business associate? One has to look at the combined effect of all of the words. Associate is defined as "joined in companionship or function; allied". Another definition is "join, make oneself a partner in a matter". We do not consider it necessary to say that the individuals concerned must be connected formally in the same business. What we do think as being necessary is factual evidence of being not only connected together in business activity, but that such connection is a close one. A close connection in business exists if you have knowledge of what each person does in the business, of what is going on in the business and are aware of each other's part in it.

When two people in separate businesses meet to discuss a transaction which will involve part of each business, it does not mean that they are in a close business association, they are merely each other's customers. In this case, evidence of having some similar investments or having been on the board of the same company is not necessarily evidence of a close association. What one has to establish is a detailed knowledge of the other's conduct in a business. The level of knowledge would be such as to give confidence in the ability and trustworthiness of the individual confirmed by a reasonable number of common transactions or events.

There is an analogy to these two relationships in the cases that deal with the "private company" exemption described in section 39(2)(k) and 82(1)(a) of the Act. They looked at the question of whether the shares of a private company had been offered to the public. In deciding whether the relationship could be said to be private as contrasted with public, it has been held that one must look for a fact situation that demonstrates a commonality in expenditure of time, attention and labour. There has to exist a unification in the sense of working together or being engaged in a joint undertaking. The relationship is one that can be reasonably expected to have developed the capacity to assess the integrity and character of the seller as regards the speculative venture of the issuer. This type of situation results in a common bond that should result in access to information about the issuer that would otherwise have to be disclosed by prospectus.

The Commission will order that the Respondent cease trading and that the exemptions of the Act not apply to him because the Commission believes he clearly does not understand those exemptions. Rather than believing that he has willfully ignored them, it concludes that he displayed a negligent attitude to compliance with the Act's provisions.

The Commission's order will provide that the Respondent may apply to the Director six months after the hearing, which was held September 14, 1993, to answer questions establishing that he is aware of restrictions that apply to the sale of securities and is aware of what a security is. If the Director is satisfied with the level of competence displayed and the Commission is so advised, it will rescind its order. If the Respondent is not satisfied, he is then free to apply to the Commission to review the decision of the Director.

DATED at the City of Regina, in the Province of Saskatchewan, this *26th* day of October, 1993.

"Marcel de la Gorgendière"
Marcel de la Gorgendière, Q.C.
Chairman