

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

AND

IN THE MATTER OF
STEVEN PETER SOMBACH

D E C I S I O N

Hearing Held February 23, 1994

Before: Marcel de la Gorgendiere, Q.C., Chairman

Appearances: Cheryle Thomson, representing Commission staff
Gordon Kuski, Q.C., representing the Respondent

Decision dated March 10, 1994.

DECISION

This decision arises as a result of a hearing held to determine whether or not a request for transfer to Richardson Greenshields of the registration of Steven Peter Sombach as a salesperson should be granted by the Commission. The Deputy Director of Registration of the Commission had decided that information received by her concerning the termination of the Respondent's employment as a salesperson for the Bank of Montreal Investment Management Limited (BOMIL) raised concerns as to the Respondent's suitability for registration.

Under section 27(3) of *The Securities Act, 1988* (The Act):

"the termination of the employment of a salesperson with a registered dealer operates as a suspension of the registration of the salesperson until:

- a. notice in writing has been received by the Director from another registered dealer of the employment of the salesperson by the other registered dealer; and**
- b. the reinstatement of the registration has been approved by the Director".**

In this case the termination of Mr. Sombach by BOMIL was followed by an application for registration of Mr. Sombach with Richardson Greenshields. Section 28(1) of the Act provides that:

"the Director shall grant registration, renewal of registration, reinstatement of registration or amendment to registration to an applicant where, in his opinion:

- a. the applicant is suitable for registration; and**
- b. the proposed registration or amendment to registration is not objectionable."**

On January 18, 1994 the Deputy Director of registration advised Richardson Greenshields that she had:

concerns as to Mr. Sombach's suitability for registration. As a result of these concerns, I am not prepared to grant Mr. Sombach's registration." The Deputy Director advised as to the provisions of section 28(3) which states:

"the Director shall not refuse to grant, renew, reinstate or amend the registration or impose terms and conditions on a registration without giving the applicant an opportunity to be heard".

As a result a Notice of Hearing and a subsequent Amended Notice of Hearing was issued and the Amended Notice stated in part that:

"The explanations of BOMIL and the Respondent differ as to the reasons for the Respondent's termination, and the true circumstances have not yet been determined. Both the explanation given by BOMIL and the explanation given by the Respondent, as the reason for the Respondent's termination, raise concerns as to his suitability for registration".

Under the Act in accordance with section 29(1):

"after giving a registrant an opportunity to be heard, the Commission may:

- a. suspend, cancel, restrict or impose terms and conditions on his registration or reprimand the registrant where, in its opinion, that action is in the public interest".**

Section 7(1) of the Act provides:

"The Chairman may exercise the powers of and shall perform the duties vested in or imposed on the Commission by this Act and Regulations".

The hearing proceeded pursuant to the above statutory provisions.

During the course of the hearing, the Commission heard evidence relating to the termination by BOMIL of the Respondent's employment and heard direct evidence from the Respondent concerning the facts that were alleged to constitute evidence of unsuitability. In this decision, I propose to deal with the nature of the evidence that was given to the Commission and reflect on whether it provides evidence of unsuitability and to consider the nature of the weight that must be given to such evidence that is tendered in order to make a finding of unsuitability. I will then consider the courses open in a request for reinstatement in light of the evidence and the requirements for its evaluation.

An overview of the evidence is as follows. The Respondent is a 31-year old university graduate who originally commenced work as an investment adviser with an investment dealer in Saskatchewan. In August of 1991, he left that employment in order to take a position with the Bank of Montreal. In the course of his duties, was registered by the Securities Commission in September, 1991 as a salesperson by BOMIL, restricted to trading in shares of mutual funds administered by the Bank of Montreal. The evidence is uncontroverted that during the course of his employ he carried out managerial as well as sales oriented work on behalf of his employer, such as marketing and training.

There were no complaints made about the conduct of the Respondent by his employer until such time as in the ordinary course of investigating a matter not involving the Respondent, the employer became concerned about some items that it considered "unusual". These

matters were investigated by the Bank of Montreal and on October 28, 1993 BOMIL's compliance officer advised the Commission that the Respondent had been **"terminated for cause by the Bank of Montreal"**. As a result of the absence of any facts being stated in the termination notice, the Acting Deputy Director of Registration of the Saskatchewan Securities Commission was not satisfied and wrote for further details. A further termination notice was then sent to the Commission on November 1, 1994, the only addition of which was to the reason for the termination for cause, namely, **"by the Bank of Montreal concerning a personal matter"**. As a result of further inquiries BOMIL advised the Commission on December 24, 1993 as follows:

"Based on the information provided to us by the Bank of Montreal, his employer, Steven Peter Sombach misrepresented his personal finances to the bank when applying for a personal loan".

The Bank of Montreal, in a letter from Gary Wayne Moerkerk, Senior Manager, Customer Service in Regina, on February 15, 1994 finally provided a more complete factual resume of the situation which will be referred to later.

In the meantime, Richardson Greenshields of Canada Limited applied, on December 7, 1993 for registration of Mr. Sombach as a salesperson. On January 18, 1994, the Deputy Director, Registration, declined to accept the application for registration of Mr. Sombach on the basis of a review of:

"the information about Mr. Sombach's dismissal from the Bank of Montreal. This information was provided to the Saskatchewan Securities Commission from both Mr. Sombach and the Bank of Montreal. Based on this information, I have concerns as to Mr. Sombach's suitability for registration. As a result of these concerns, I am not prepared to grant Mr. Sombach's registration."

It was subsequent to this review that the Commission received the above mentioned letter from Mr. Moerkerk.

The Deputy Director of Registration, at the hearing, referred to a letter from the Respondent and a telephone conversation she had with him. The letter dated November 17, 1993 referred to two "administrative errors" made by him which he believed were the cause of his termination. The Deputy Director felt that as a result of the details given of the administrative errors and the explanation received from the BOMIL in a letter dated December 24, 1993 regarding the misrepresentation of personal finances that she had enough concern about the trustworthiness of the Respondent to deny the registration request. Her evidence at the hearing showed that she had no concerns about the qualifications of the applicant. She advised the Respondent's counsel that she did not feel that she had the whole picture. Under reexamination by Commission counsel, she confirmed that even if she had received the explanation that was received on the February 15, 1994 from the Bank of Montreal, she still would not have been convinced of suitability

and would still have denied the application.

At this point, it might be useful to provide further details of the Bank of Montreal letter of February 15, 1994, referred to earlier. This letter confirmed that Mr. Sombach, as an employee, had his performance documented by the Bank as being a "quality contributor". The bank then described certain administrative entries that had been effected by Mr. Sombach which had come to the attention of the Bank as previously mentioned. The evidence given would indicate that these entries could have come to benefit the grandparents of Mr. Sombach, had they not been corrected. The most important part of this letter so far as it pertains to the administrative errors (which Mr. Sombach himself felt was the reason his employment had been terminated at the time he wrote to the Commission on November 17, 1993 in order to justify his conduct and his application for reinstatement) was the statement that:

"the Bank's Corporate Security Department investigated the above transaction and interviewed Mr. Sombach. It was confirmed that the transfers of August 19 and 20 totalling \$10,400 were done with the consent of his father who had Power of Attorney over his grandfather's account. Mr. Sombach indicated that the other entries were done in error. While these errors were considered to be unusual, there was no loss of funds by the Bank and Mr. Sombach's father has confirmed that Mr. Sombach could retain the funds transferred to his account from the grandparents' account.

During the investigation, it came to light that Mr. Sombach had misrepresented his financial position when applying for a personal loan in December, 1992 (i.e. he neglected to disclose his full list of creditors and inflated his assets such that his financial position was not as secure as he presented it).

While the investigation did not uncover a defalcation or loss of funds to the Bank or its clients, the irregularities in the entries coupled with the undisclosed information of his financial position when applying for a loan, led the Bank to lose confidence in him and a decision was made to terminate Mr. Sombach's employment for just cause."

It should be pointed out that there was evidence of the entries made by Mr. Sombach that was presented in the examination by Commission counsel of Mr. Moerkerk of the Bank of Montreal. Those entries, of course, were the subject of the investigation by the Corporate Security Department of the Bank. Mr. Moerkerk confirmed Mr. Sombach's evidence that one of the account entries made in error had been corrected before the bank's examination and the second was in the process of being corrected and the Bank's head office had been advised of the error prior to notice of the investigation and subsequent termination of Mr. Sombach.

I am not going to consider the evidence given by Mr. Moerkerk about the errors or the questions made of him in regard to photocopies of original evidence that were provided

because in my opinion, the photocopies of the Bank documentation provided no discernable evidence to me of any inappropriate handling of the documents. It could be that the originals may have shown such evidence, but the Bank investigation which would have been carried out with an examination of the originals was unable to come to any conclusion other than that the matters were errors, the completed transactions in question were authorized, even if unusual, and the Bank did not rely on the entries for its dismissal. In these circumstances, given the Bank's determination of the inconclusiveness or the irrelevance of the evidence, its confusing interpretation, and the fact that Commission counsel did not call anyone directly involved in the investigation to give any explanation, including direct evidence of Mr. Sombach's explanations to the investigator, I am not going to give any consideration to that evidence as being a basis for determining lack of suitability.

The only other evidence of unsuitability presented for consideration is that of a loan application made by the Respondent and his wife. The application of December 3, 1992 was made prior to any investigation by the Bank of the Respondent prior to termination. The evidence of the Respondent is that he was completely unaware of the application being a factor in his termination at the time he was given his letter of termination after an interview with Mr. Moerkerk and another Bank official. The application was a renewal in regard to a loan made to reduce the Respondent's payments and was completed by a Bank loan officer. The loan was not in arrears and, of course, the principal had been reduced between the original granting of the loan and the renewal. The loan application clearly shows an investment in a Government of Canada coupon of \$10,000. There was considerable questioning of Mr. Sombach by his counsel, the Commission's counsel and the Commission itself as to the details of the completion of this application. It is clear that at the time that it was completed, Mr. Sombach did not have an asset stated on the application nor were two other loans shown. He did not add the new loans as he thought he was only required to hand the loan officer his old loan application, a statement of the current balance and arrange for co-signors approval. It was the loan officer who completed the new application.

Having observed the Respondent during the questioning, and having considered the nature of his responses, I have concluded that they could be characterized as highly confused at best and evasive at worst. In the last analysis, however, the Respondent does acknowledge that it was possible that he indicated to the loan officer that he did have such an asset, in a weak moment thinking that it was a good idea so that the application would not look bad. As his counsel stated, this is neither the subject of commendation nor conduct of **“the finest fashion”** but also was not **“enough to deprive him from being registered as a salesperson”**.

After considering the evidence, I have concluded that the only evidence that could establish unsuitability is that of the inclusion of the asset on the application and the applicant's evidence given in defense of his conduct. The question is whether that evidence is sufficient to show such lack of suitability as to be capable at law of justifying the denial of reinstatement.

Counsel for the Respondent recommended the consideration of the decision of the Ontario Securities Commission in the Matter of Frederick Elliot Rosen, 1991, 14 OSCB 1091. I consider reference to this decision to be quite useful as a review of the authorities dealing with the question of the application of the burden of proof when determining a matter of the standard of conduct demanded of an investment adviser with the status of registrant under the Act when such determination has the effect of terminating employment. The decision refers to the Judgment of Reid, J. in the Divisional Court decision in Re Coates, et al. 1988, 65 O.R.(2d) 526, page 536:

"This message is clear and has been consistently been adopted by this court, nothing short of clear and convincing proof based upon cogent evidence will justify an administrative tribunal in revoking a license to practice medicine or to gain a livelihood in business" (emphasis added). The Commission went on to note that Reid J. said:

"The concept that the standard of proof rises with the gravity of the allegation and the seriousness of the consequences"

was affirmed by the Supreme Court of Canada in its decision R. v. Oakes, 1986 1 S.C.R. 103. The decision refers then to the case of Re Bernstein and College of Physicians and Surgeons of Ontario (1977), 15 O.R. (2d) 447, at pane 470-1, where O'Leary J. said:

"In my view discipline committees whose powers are such that their decisions can destroy a man's or woman's professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities"..... The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish fact.

In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or the facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.

The grave charge against Dr. Bernstein could not be established to the reasonable satisfaction of the Committee by fragile or suspect testimony."

To my mind, the most practical help in assessing evidence was referred to in the decision of the late lamented Vice-Chairman of the Ontario Securities Commission, Charles Salter in Gregory McGroarty, et al. (1220), 13 OSCB 3887, who at pages 3935-6 stated:

"While the point was not discussed by counsel, we think it appropriate to note that the standard of proof in Commission proceedings will vary with their subject matter. In some cases a simple preponderance of probability will suffice. In disciplinary

proceedings against registrants the governing standard of proof is that proclaimed by the Divisional Court in *Re Bernstein*.... and further discussed in *Re Coates et al.*..... In the latter decision the court after reviewing and confirming *Bernstein*, referred with approval to the decision of the Supreme Court of Canada in *R. v. Oakes*.....for the principle that the standard of proof rises with the gravity of the allegation and the seriousness of the consequences to the Respondent.

Our present proceeding, of course, is not a disciplinary proceeding: Taylor is not a registrant. Without attempting to fix any particular standard of proof as appropriate to proceedings for the protection of the public under section 124 of the Act, it may be considered that if they carry some element of punishment of the Respondent, to that extent the staff may have to make out their case on something more than a simple preponderance of probability. Whatever that "something more" may be, we can say that in this present case staff have fully satisfied the standard laid down in *Bernstein and Coates*."

In the Rosen matter, the panel of the Ontario Securities Commission had concluded: **"Unfortunately we cannot say the same thing with respect to the staff's case in this matter."** I have come to the same conclusion in this matter.

On the authorities then, where the finding, if adverse, would interfere with the right to earn a living for which one is qualified, we must only take action on the basis of **"clear and convincing proof"**. Such proof varying with the gravity of the matter is **"something more"** than the preponderance of probability. While the concept may be easy to state, it will not be that easy to apply. Here we are dealing with the finding as to suitability. If Mr. Sombach is not found suitable for reinstatement or if, pursuant to clause 28(1) of The Securities Act, 1988, the registration is objectionable then Mr. Sombach will not be able to carry on employment with his proposed employer. For reasons explained earlier, I did not accept the evidence of the "unusual" entries and the papers that accompanied them as evidence of unsuitability. Given the efforts to correct the mistakes prior to Mr. Sombach even being aware of being under suspicion and given that his former employer after detailed analysis could not conclude that it was a reason for dismissal, I would conclude that the evidence does not meet even the balance of probabilities test.

The remaining evidence of unsuitability involves the misrepresentation of an asset and outstanding loans in the loan renewal application of Mr. Sombach. I can certainly accept that this evidence would justify the loss of confidence in Mr. Sombach as described in the letter of his employer. Does such loss of confidence constitute clear and convincing evidence of unsuitability. A different professional manager, for Richardson Greenshields, having been present at the hearing and no doubt having inquired into the matters prior to the hearing, has assessed that information differently and concluded that the Respondent is suitable. There is nothing unusual about such a situation as the assessment of human character is not an exact science and to a great deal remains a matter of subjective choice. I am required, as much as humanly possible, to attempt to evaluate evidence in an objective

manner.

In viewing the evidence presented and hearing the witnesses, in particular the Respondent himself, my own determination would be that on the balance of probabilities he attempted to make himself look better in the eyes of his employer than he actually was insofar as his financial assets were concerned and when giving evidence before the Commission, tried to explain away the mistake. Had he forthrightly admitted an error in judgment, one might have more easily determined that such a matter was not evidence of unsuitability. I do not think, however, there is any onus when a Respondent gives evidence to be any more clear and convincing than the evidence that is presented against him. In addition, I am mindful that the Respondent had offered, during the course of the investigation by his former employer, to give evidence by taking a lie detector test.

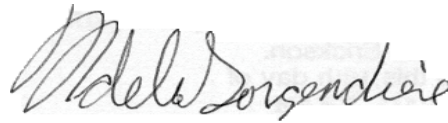
While I would be much more happy to see a more straightforward and frank person registered, I have not been clearly convinced that he will not carry out his duties in the "quality" fashion that he had done up to the date his former employer lost confidence in him. While his misrepresentation may certainly cause apprehensions it did not relate to his securities duties and lessens to some extent "the seriousness of an allegation". The clear and convincing "something more" is not present.

However, while I feel constrained as a result of the nature of the evidence presented to find that the applicant is suitable for reinstatement, provisions exist in section 29(1) of the Act to impose terms and conditions upon the registration. In this particular case it will be necessary for the branch manager of the applicant to ensure that not only the retraining as required be taken, as pointed out by the Respondent's counsel, but that he also closely supervises the financial affairs of the Respondent who must make quarterly returns as long as the Respondent is still personally indebted and that Mr. Sombach advise the manager of any increase in debt, direct or contingent. In addition, Mr. Sombach shall not be authorized to effect any trade on behalf of accounts held for any relative other than his wife. In addition, the branch manager will discuss with the Director of the Commission, his plan to closely supervise the applicant for the next year. In the event of any disagreement between the manager and the Director, the matter will be referred to me for determination. In addition, after the quarterly verification of financial status to the manager the manager will, in writing, confirm to the Director that he has received the report and that in his opinion there are no adverse changes in status and further that he is satisfied with the degree of compliance of the Respondent to the Act and the SRO bylaws pertaining to sales staff and the operating procedures of his firm. Depending on the nature of the quarterly reports, on the anniversary of the reinstatement, the provisions as to close supervision and credit status may be terminated.

I am aware of occasions in the past where people have been registered or reinstated after a period of time after having engaged in conduct that questioned their standard of professional ethics only to find them later to be found guilty of a similar lapse. There is considerable discussion now going on as to what standards should apply to dealers who wish

to employ as salespersons individuals who have breached professional ethical requirements. One proposal before the United States Congress is for a "three-strikes-and-you're-out bill" in order to control the problem of "rogue brokers". In my opinion I think that three strikes is at least one too many and that in a situation where the evidence is clear and convincing, one is probably enough.

DATED at the City of Regina, in the Province of Saskatchewan, this 10th day of March, 1994.

A handwritten signature in cursive script, reading "Marcel de la Gorgendiere". The signature is written in dark ink and is positioned above a horizontal line.

Marcel de la Gorgendiere, Q.C.
Chairman