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

AND

IN THE MATTER OF
DARYL WILLLAM KUCHINKA

AND

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DARYL KUCHINKA FINANCIAL-INSURANCE SERVICES LTD.

D E C I S I O N

Hearing Held June 7 and 8, 1995

Before: Marcel de la Gorgendiere, Q.C.
Rand Flynn, Commission Member

Appearances: Patti Pacholek, representing Commission staff
R. W. Leurer, representing the Respondent

Decision dated July 12, 1995

DECISION

This decision is the result of a hearing to consider whether any and all of the exemptions contained in subsection 135(l) of *The Securities Act, 1988* (the "Act") should not apply to the Respondent or the Respondent's company. The evidence in this matter was not disputed. The dispute between the staff of the Commission and the Respondent is over the interpretation that should be placed on certain circumstances and as a result of the interpretation whether it would be in the public interest for the Respondent to be able to continue to exercise his exemptions under the Act in order to continue to function as a Deposit Agent.

The Respondent is a life-time resident of Macoun, Saskatchewan who has carried on business in a number of different capacities, but principally as an insurance agent and income tax advisor. He has taken part in a considerable number of worthy activities which can be reasonably be taken as an indication that he is held in good regard by members of the community. For example, he has served as a director of the Estevan Co-operative Association for over 10 years and is presently its president.

From at least 1986 the applicant acted as a general insurance agent for the Co-operators General Insurance Company and as a life insurance agent for Co-operators Life Insurance Company. It was while acting in such capacity that the first series of events occurred which are identified by the staff of the Commission as constituting evidence of a course of conduct establishing justification for determining that it is in the public interest to remove the Respondent's exemptions. These instances involved the Respondent receiving money for policy applications on 11 occasions between February 1992 and March 1993 without submitting the applications to the insurer. There was also an instance where the Respondent settled a claim using his own funds for a person whose insurance was never placed and who had a claim.

At this time, the Respondent was in a constant struggle with the insurance company to comply with new procedures established by the company for underwriting insurance. As a result of these difficulties, the Respondent's agency status with the insurance company was terminated and a number of other irregularities were discovered. In total, these irregularities involved a failure to deal with applications promptly and submit them to the insurers because in the opinion of the Respondent, the applications involved some matter that would not be dealt with either favourably or promptly by the company. The Respondent put the applications together with cheques payable for premiums with a number completed in blank on the file and they were never negotiated. After the termination of the sponsorship of his insurance agency, the Respondent could no longer act as an insurance agent. The Respondent then became licensed to sell mutual funds on behalf of Pro-Fund Distributors Ltd. in January 1994. In May of the same year, the

Respondent applied for a hail insurance license but was refused by the Insurance Councils of Saskatchewan who were aware of the circumstances involving his termination of sponsorship by the Co-operators. On December 30 1994 the Respondent completed a renewal application to the Securities Commission in regard to his mutual fund salesperson status in which he indicated that there had been no change in status from the information which had been previously given in his last application for registration when, in fact, he had been refused a hail insurance license subsequent to his first application and prior to his renewal application.

The Respondent presented evidence personally in regard to these instances which the Commission has considered carefully in order to weigh whether it is in the public interest that his right to operate under the exemptions in the Act should be continued. The Commission listened to a detailed explanation of the Respondent's good conduct as an insurance agent for a number of years prior to the instances that were referred to, then heard his description of about why he felt the changes in operating procedures caused him to behave in such a fashion. The Respondent himself referred to the "stupidity" of his conduct. It was suggested that his "stupidity", indicated by a failure to resolve the problems of his customers' applications and the risk to which he was exposing either them or the insurers, was not motivated by any desire of personal profit or gain. The Commission has to look at the evidence and assess the likelihood of a similar type of conduct recurring and if it assesses the likelihood as affirmative, there would be no justification to allow the Respondent to operate under the exemptions in the Act. It would clearly not be in the public interest.

The Commission was convinced, however, after listening to the Respondent’s explanation and other evidence that the conduct that took place, while clearly not in the public interest was also a complete aberration from his previous and subsequent conduct. We assessed other activities of the applicant, including his successful income tax practice and his representative position in the community in a number of organizations which were maintained even after the general community would have been aware of the reasons for terminating his insurance license. We concluded that in this case the irrational conduct over a short period of time did not constitute an indication of likely future conduct. Furthermore, the Commission notes that previous to its decision, the, Insurance Council of Saskatchewan granted the Respondent a license to sell hail insurance. Evidence given by an officer of the Insurance Council indicates that they were aware of the circumstances leading to initial termination of the sponsorship of the Respondent's insurance licenses. The new license was granted on his recommendation and assessment that it was unlikely that the Respondent would ever indulge in such abnormal conduct. He felt that as the Respondent, had been out of the business for a year, it was reasonable to assume that the danger of indulging in such conduct was clear and it would not likely happen again to the detriment of the public interest.

The Commission feels that in assessing the items presented as justification for removal of exemptions, the Commission should give careful consideration to the interpretation of the conduct that is placed upon it by the regulatory body that is charged with determining the public interest in regard to those circumstances. The Insurance Council had decided that the conduct was such that a period of one year's deprival of a license was sufficient to ensure compliance with conduct that would be in the public interest in regard to the resumption of insurance sales. Should the Securities Commission second guess the effect of the same conduct? This would leave two different explanations of what is likely to effect the public interest proceeding from the same facts, a dichotomy that is also not in the public interest. While the Commission reserves the right to place a different interpretation on the same set of facts depending upon the nature of the circumstances, and its relevance to the expertise of the deciding body, in this particular instance it chooses to defer to the previously exercised judgement of the Insurance Council.

The Commission therefore having concluded that at this time the previous conduct of the Respondent was not such as to establish that it would be contrary to the public interest that his exemptions be withdrawn went on to consider the effect of the statements of the Respondent in his Uniform Application for Registration for a mutual fund licence and in the renewal statement. In regard to the January 6, 1994 application for a mutual fund sales license, the Respondent in question 12C) said **"No"** in response to the following question:

> **Are you now, or have you <u>ever</u> been registered or licensed, or applied for registration or a licence, under any legislation which requires registration or licensing to deal with the public, in any capacity <u>other than trading in securities, commodities or commodity futures contracts</u> in any province, territory, state or country?"**

The Respondent's solicitor pointed out that elsewhere on the form (question 8A)) it was indicated that he had been employed by himself from 1984 to the present as "Owner, Manager Accounting, Insurance Sales" and that was ample reason to accept the Respondent’s evidence that he did not intend to deliberately misrepresent the fact that he had been licensed to sell insurance, but that he had misread the question and thought it had to deal with whether he traded in commodities. The Commission accepts that disclosing his insurance business is not consistent with any inference that the Respondent was attempting to hide his status and does not take this as evidence of character that could be considered reprehensible for failure to disclose information which is required even if it is for a most important aspect of administration of the provisions of the Act.

The final question then is what interpretation should be put on the application for renewal? There was no statement attached to it showing a change from the information

given in the previous application for registration when, in fact, the applicant had been refused a hail insurance license prior to his renewal. The Respondent's evidence was that in not having the original application in front of him and not being aware that he had not correctly responded to the question on the initial application, he inadvertently overlooked the question of insurance status. Again, after having considered the Respondent's explanations, it accepts that the statement, while inaccurate, was not made consciously in order to deceive the Commission in regard to the application or the renewal. While the conduct was imprudent, reckless and negligent, the Commission has to determine whether it was sufficiently so as to warrant removal of the exemptions.

In coming to the conclusion that it did not, the Commission considered the fact that the Respondent had carried out his business as an agent for Pro-Fund Distributors Ltd. without any problem or complaint and was released by Pro-Fund solely out of its estimation of possible difficulties once it became aware of the inaccuracies in the application and renewal. Given the fact that the sales manager for Pro-Fund did not explain the nature of the questions being responded to on the application or renewal and did not ask whether there were any questions that the applicant might have, one could see that Pro-Fund might have concerns when it turned out that the applicant did not understand all of the questions or had not carefully considered them. In any event, the Commission does not feel that the Respondent deliberately attempted to mislead the Commission and does not think that the he has displayed conduct which would lead it to believe he would actually act contrary to the interest of the public in the future.

The Commission considered whether or not it should accept the Respondent's counsel's suggestion that if the exemptions were not removed that perhaps conditions be placed upon the operation of the Respondent under the exemptions as a deposit agent. However, having accepted the evidence that there is a good indication that the Respondent will profit from the lessons that he has learned and because operating under an exemption is not the same situation as operating under a conditional license, the Commission will not impose any direct conditions. The Respondent should be aware that the Commission has an audit program in regard to deposit agents and the Director of the Commission, if concerned, may consider when and if it might be reasonable to involve the Respondent in the program.

Having decided that there should be no removal of the exemptions there is one further matter on which the Commission wishes to rule. The Commission cannot condone a loose and careless attitude towards the completion of documents filed in regard to registration or renewals. While in this particular case the evidence of negligent application to the proper standard for completion of these documents was not so grievous as to warrant the complete removal of the exemptions, the Commission does feel that the Respondent by his conduct has caused considerable work and effort on behalf of the

Respondent by his conduct has caused considerable work and effort on behalf of the Commission in order to determine whether or not in fact his conduct warranted his continued benefit of exemptions under the Act. In these circumstances the Commission feels that it is proper to take advantage of the power given to it under section 161 of the Act to affix the costs of any proceeding before the Commission under which the Commission may order by whom and to whom any costs are to be paid. There may be a question in some minds about an order for costs being made against a party in a hearing who might be considered as having won his case. In our opinion the learned author R. W. Macaulay in "Practice and Procedure before Administrative Tribunals", Volume II at pages 27-9 and 27- 10 correctly states the law:

> *"Administrative tribunals are faced, apart from funding, (see Chapter 26) with three types of costs, each of which has to be dealt with differently. Each kind of cost has different criteria, a different purpose and a different time element.*
>
> *(1)* *Party costs are awarded in favour of or against a party. The basis for these costs is not comparable to the criteria for court costs nor are they for the same purpose.*
>
> *(2)* *Interim costs are very special costs which may be awarded during a hearing to a party and which may be repayable at the end of the hearing if not then confirmed by the tribunal These are costs with which the courts are totally unfamiliar.*
>
> *(3)* *Tribunal costs are incurred by the tribunal to conduct the hearing, including special evidence prepared for it. These are also costs with which the courts are unfamiliar. Tribunal costs are very common with administrative agencies and should not, in my opinion, be paid out of the public purse in a case involving a regulated industry for example. These costs should be recovered at the end of a hearing from one or some of the parties, usually the applicant.*
>
> *The basis of awarding costs by administrative tribunals is derived in each individual case from the specific legislation under review. If the power to award costs is expressly contained in the statute, then the tribunal has the power. If it is not clearly there, the tribunal will not have the power unless it can be found in a general statute or unless it can be implied from the governing legislature. "*

I think that one type of such tribunal costs is referred to by the author on page 27-8 in an excerpt from re Bell Canada v. C.R.T.C. (1982), 41 N.R. 221 that reads as follows:

"The Commission may need, and may possess, the power to charge to an applicant expenses incurred by the Commission as a consequence of that applicant's failure to provide all the information that had to be communicated to the Commission. "

The question, as it often is, is what exactly does the statute authorize?

> *"161 (1) The costs of and incidental to any proceeding before the Commission are in the discretion of the Commission and may be fixed in any case at a sum certain or may, by order of the Commission, be taxed.*
>
> *(2) The Commission may order by whom and to whom any costs are to be paid, and by whom the costs are to be taxed and allowed. "*

The wording in the Act says nothing about party and party costs. It does not restrict the power to any type of hearing, but rather refers to "any proceeding" and they can order to be paid "by whom and to who" the Commission decides "in its discretion".

We think that this discretion can therefore reasonably be expected to apply in favour of the Crown bearing the Commission's costs where there are reasonable grounds to make such an assessment. The Respondent admits he is not without fault and those in similar circumstances should not expect to escape some of the consequences of their conduct. If tribunal costs were not to be included within the discretion of the Commission the legislature would have restricted the discretion of the Commission.

The Commission hereby affixes the costs of these proceedings payable by the Respondent, Daryl William Kuchinka to be $1,000.00, payable to the Minister of Finance for Saskatchewan. The Commission feels that this will set a precedent for proper consideration of the importance of correctly attending to completion of the information and requirements of the Commission.

DATED at the City of Regina, in the Province of Saskatchewan, this 12th day of July, 1995.

Marcel de la Gorgendière, Q.C.
Chairman