Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 Patrick Fraser Kenyon Pierrepont Lett, Milehouse, Investment Management Limited, Pierrepont Trading Inc., BMO Nesbitt Burns Inc., John Steven Hawkyard and John Craig Dunn

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S. 5, AS AMENDED

AND

IN THE MATTER OF
PATRICK FRASER KENYON PIERREPONT LETT,
MILEHOUSE INVESTMENT MANAGEMENT LIMITED,
PIERREPONT TRADING INC., BMO NESBITT BURNS INC.,
JOHN STEVEN HAWKYARD AND JOHN CRAIG DUNN

IN THE MATTER OF
JOHN CRAIG DUNN

HEADNOTE

Conduct Contrary to the Public Interest – Misleading Representations – Proof of Funds Letters - Public Interest Jurisdiction – Registrant – Branch Manager of Registered Dealer

From July 1986 to February 2002, Dunn was a registrant and a branch manager of a registered dealer. From January 1996 to October 1999, he provided or caused others to provide Patrick Fraser Kenyon Pierrepont Lett ("Lett") with letters that contained misleading representations (referred to as the "Proof of Funds Letters") regarding the accounts of Milehouse and Pierrepont at Nesbitt. These letters were intended to be relied on by third parties and intended to mislead the reader into believing three things: (1) that there were funds in the account; (2) that the money would be held in the Nesbitt account for a specified period of time, where in fact there was no such facility; and (3) the monies in the account belonged to the account holder and were of a non criminal origin, when appropriate steps were not taken to ensure this assertion was true. Seven investors deposited $21 million dollars into the Lett accounts during the period in question.

The panel held that the respondent's actions, in preparing and signing such letters and causing others to prepare and sign these letters, were contrary to the public interest. The panel ordered: (1) pursuant to clause 1 of subsection 127(1) of the Act, Dunn's registration be terminated for a period of 10 years and that Dunn be prohibited permanently from having a supervisory or managerial role with a registrant; (2) pursuant to clause 8 of subsection 127(1) of the Act, Dunn be permanently prohibited from becoming or acting as a director or officer of a registrant; (3) pursuant to clause 6 of subsection 127(1), Dunn is reprimanded; and (4) pursuant to subsection 127.1(2) of the Act, Dunn shall pay the costs of Staff's investigation and the hearing in the amount of $126,938.50.

Hearing Dates: May 10, 12, 13, 2004.

Panel:	**Wendell S. Wigle, Q.C.**	**Commissioner (Chair of the Panel)**
	Paul K. Bates	**Commissioner**
Counsel:	**Karen Manarin**	**For Staff of the Ontario Securities Commission**

REASONS

[1] This hearing, held on May 10, 12, and 13, 2004, involved the Respondent John Craig Dunn ("Dunn") , the proceedings against the other Respondents having already been heard.

[2] At the outset of the hearing, Commissioner Davis recused himself from the Panel in that he had sat on two prior settlement hearings in this matter and two of the witnesses to be called had testified before him on those hearings. This hearing proceeded before Commissioners Wigle and Bates who constituted a quorum under section 2(11) of the Ontario *Securities Act* (the Act).

[3] From July 1986 to February 2002, Dunn was the Branch Manager of the BMO Nesbitt Burns Inc (Nesbitt) branch located at 1 Robert Speck Parkway, Mississauga, Ontario and from October 1994 to October 2002 was registered under the Act as a trading officer with Nesbitt. A branch of the Bank of Montreal (BMO) was located across the hall at the same address. All references to Nesbitt and BMO will be with respect to the branch locations at the same address.

[4] In the Amended Statement of Allegations (“Allegations”), it is alleged that Dunn between January 1996 and October 1999 provided or caused others to provide Patrick Fraser Kenyon Pierrepont Lett ("Lett") with letters that contained inaccurate representations (referred to as the "Proof of Funds Letters") regarding the accounts of Milehouse Investment Management Limited ("Milehouse") and Pierrepont Trading Inc. ("Pierrepont") at Nesbitt, which are referred to collectively as the "Lett Accounts" and that Dunn's actions, which included preparing and signing such letters and causing others to prepare and sign these letters, were contrary to the pubic interest.

[5] Dunn, although he received notice of this hearing, did not attend or defend against the allegations.

Facts

[6] The hearing was conducted pursuant to Section 15 of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22, as amended (the "*SPPA*").

[7] The following individuals appeared under summons and testified at the hearing.

1. John Hawkyard (Hawkyard) was the Branch Manger of the adjoining BMO and in April 1997 joined the Nesbitt branch across the hall, where Dunn was the Branch Manager;

2. Rose Indovina (Indovina) was employed by the same branch of the BMO;

3. Dan Swiaty (Swiaty) was employed at the same branch of the BMO.

4. Andreas Kiedrowski (Kiedrowski) was employed as a co-branch manager of the Nesbitt branch;

5. Lett opened accounts on behalf of his companies Milehouse and Pierrepont at the Nesbitt branch and the BMO branch. Dunn was the Investment Advisor for the accounts located at the Nesbitt branch; and

6. Lorne Switzer – Switzer, was at all material times, the Vice-President of Retail Compliance at Nesbitt.

Brian Clarkin, an Assistant Manger of Investigation in the Enforcement Branch of the Ontario Securities Commission, also gave evidence.

Overview and Background

[8] The following documents were marked exhibits at the hearing.

Exhibit No. 1	Factum.
Exhibit No. 2-7	Documents, volumes 1-6
Exhibit No. 8	Chart entitled "In the Matter of John Craig Dunn, Account Balances at Issuance of Proof of Funds Letters".
Exhibit No. 9	Settlement agreement between Andreas Kiedrowski and Investment Dealers Association.
Exhibit No. 10	Affidavit of Mr. Lett sworn May 11, 2001 with attachments A to H.
Exhibit No. 11	Booklet containing excerpt of IDA transcript dated April 28, 2004 and Mr. Kiedrowski's settlement agreement.
Exhibit "A"	(for identification) Bundle of documents: Letter from Grace Hession, acting Secretary, OSC, May 7; letter faxed to OSC from Mr. Dunn May 7; Notice of Intention to Act; and copy of Hrappstead case.

The following evidence was called and we find as fact that:

[9] Lett is an individual residing in Ontario and is, and was between January 1996 and October 1999, the President, a Director, and the directing mind of Milehouse and Pierrepont .

[10] Nesbitt is registered as a Broker/Investment Dealer under the Act.

[11] Hawkyard was registered under the Act from October 1989 to April 1997 as a salesperson of BMO Investment Management Limited, a dealer in the category of Mutual Fund Dealer. From March 1996 to April 1997, Hawkyard was the Manager of the BMO – Private Banking Services Branch, located at 1 Robert Speck Parkway. In April 1997, Hawkyard moved across the hall to Nesbitt and, from November 1997 to August 2002, was registered under the Act as a salesperson of Nesbitt, at the branch managed by Dunn.

[12] During the time period of November 11, 1995 to May 4, 1998, Lett opened three accounts in the name of Milehouse and one account in the name of Pierrepont at the Nesbitt office managed by Dunn. Two of the accounts were margin accounts, while the other two accounts were cash accounts.

[13] Dunn introduced Lett to Hawkyard as a client with substantial net worth who was intending to embark upon a high yield program; Lett and Hawkyard had a business relationship; Lett and Dunn had both a personal and a business relationship (Lett described it as a business and friendly relationship: "I used to see John socially at different things and we certainly knew each other. He had been to our offices a number of times. He would be at golf tournaments."); and Lett also opened accounts in the name of Pierrepont in January and April 1997, and an account in the name of Milehouse in May 1998 at the BMO branch.

[14] Between April 1996 and February 1999, seven investors deposited approximately US$21 million into the Milehouse accounts at Nesbitt or the BMO branch at Robert Speck Parkway for the purposes of investing in a trading program, as follows:

NAME	**DESCRIPTION**	**AMOUNT INVESTED**
Constantin Nasses	A resident of Monaco who was charged with insider trading in the United States in 1986 but has failed to respond to the charges.	US $8,000,000
V.A. Velarde	A resident of Virginia who, in June of 1999, was charged by the Securities and Exchange Commission with aiding and abetting two lawyers in a prime bank scheme. This individual settled the charges.	US $5,200,000
Lenzburg Capital Corp.	An Alberta corporation who was later subject to a freeze order obtained by the Alberta Securities Commission, for failing to return funds to investors, as required pursuant to the terms set out in a Settlement Agreement.	US $4,500,000
Greater Ministries International Inc. ("GMI")	A Florida corporation purportedly involved in evangelical missionary work. In 2001, the founder of this organization was convicted of fraud and conspiracy.	US $1,525,000
Dr. Dana	A resident of New York.	US $1,000,000
Dr. Hoppenstein	A resident of New York.	US $1,000,000
Bruce Houran	A resident of Florida.	US $ 250,000
Total:		US $21,475,000

[15] Lett did not create or devise the high yield program but received documentation from third parties which purported to describe the high yield program, and which introduced the investors to the program. The high yield program had the following general characteristics: it was to include the purchase on margin of a bank guarantee or debenture, issued by a foreign bank, through Lett's companies' accounts at Nesbitt. The proceeds from the purchase were to be directed to a third party who was represented as having access to a high yield program. The high yield program was supposed to involve the purchase and sale

of medium term bank notes. The bank notes were to be purchased at a substantial discount based upon a commitment issued by the United States Treasury Department. Substantial profits were to be earned because of the ability of the commitment holder to purchase at a discount. A portion of the profits on the subsequent sale of the bank notes were represented to be used for projects associated with the United States government (i.e., an American foreign policy initiative) or for humanitarian purposes. The balance of the profits would be left in the hands of the commitment holder. According to some of the documents, profits in the range of 100% to 480% would be earned by the commitment holder which would be shared with the respondents and the parties who would have provided funds in the first instance.

[16] According to the Affidavit of Lett (Exhibit 10, attachment G), three investors involved in the matter, Constantin Nasses, Dr. James Dana, and Dr. Reuben Hoppenstein have "[t]o date, made no net recovery."

The Proof of Funds Letters

[17] Between April 1996 and June 1999, Dunn provided and caused others to provide Lett with proof of funds letters regarding the accounts of Milehouse and Pierrepont at Nesbitt. The Proof of Funds Letters are as follows:

Date	On Letterhead of	Under Signature of
April 2, 1996	Bank of Montreal	Hawkyard
April 17, 1996	Bank of Montreal	Hawkyard
May 15, 1996	Nesbitt Burns	Dunn & Kiedrowski
May 23, 1996	Nesbitt Burns	Dunn & Kiedrowski
June 10, 1996	Nesbitt Burns	Dunn
July 23, 1996	Nesbitt Burns	Dunn
September 19, 1996	No letterhead	Hawkyard & Indovina
December 18, 1996	No letterhead	Hawkyard & Indovina
January 16, 1997	Bank of Montreal	Hawkyard & Indovina
January 16, 1997	Bank of Montreal	Hawkyard & Indovina
April 7, 1997	Bank of Montreal	Hawkyard & Indovina
April 29, 1997	Bank of Montreal	Indovina
July 17, 1997	Bank of Montreal	Indovina
August 25, 1997	Bank of Montreal	Indovina
October 23, 1997	No letterhead	Indovina
November 20, 1997	Bank of Montreal	Indovina
December 2, 1997	Bank of Montreal	Hawkyard & Indovina
March 31, 1998	Bank of Montreal	Hawkyard & Indovina
April 6, 1998	Bank of Montreal	Hawkyard & Indovina
June 16, 1998	Bank of Montreal	Indovina
November 19, 1998	Bank of Montreal	Dunn & Swiaty
December 9, 1998	Bank of Montreal	Dunn & Swiaty
March 9, 1999	Nesbitt Burns	Dunn & Kiedrowski
April 16, 1999	Nesbitt Burns	Dunn & Kiedrowski
April 19, 1999	Nesbitt Burns	Dunn & Kiedrowski
June 3, 1999	No letterhead	Dunn & Kiedrowski

[18] All the Proof of Funds Letters were signed except for the letters dated September 19, 1996, December 18, 1996 and June 3, 1999.

[19] In 1996, Dunn communicated with the head office of Nesbitt and sought verification that the margin required for the types of instruments that Lett was attempting to purchase was 4%. In addition, Dunn communicated with other members of Nesbitt and discussed the method for clearing this type of instrument for Lett.

[20] Hawkyard testified that Dunn advised him that these types of investments required only a 4% or 5% margin. Dunn had advised Lett that the margin required was 10%.

[21] Lett requested Proof of Funds Letters regarding the accounts of Milehouse and Pierrepont at Nesbitt, explaining to Dunn that they were a necessary component of the high yield trading program and that they would be provided to a third party.

[22] Several of the Proof of Funds Letters were on the letterhead of the BMO; Lett told Dunn that the BMO was more widely recognizable in Europe than Nesbitt; Lett also explained that the letters were considered stale after 30 days and a new letter would then be required; On two occasions, November 19, 1998 and December 9, 1998, Dunn signed on BMO letterhead, even though he was never employed by the BMO. Dunn, in signing the letters, noted on the signature line that he was the Branch Manager of Nesbitt. Hawkyard as well signed on BMO letterhead on two occasions when he was employed as a registrant at

Nesbitt (letters dated December 2, 1997 and April 6, 1998). Hawkyard, in signing the letters, noted on the signature line that he was employed by Nesbitt. Hawkyard testified as to how he viewed the Proof of Funds letters that contained his signature and the circumstances in which he signed them by saying that when all of the Proof of Funds letters were put together in "a nice tidy binder, I mean, it honestly makes me look like a fool".

[23] Switzer testified that he considered Dunn and Hawkyard signing on Bank of Montreal letterhead, while they were employed by Nesbitt, to be a violation of Nesbitt's policies and procedures.

[24] Lett's affidavit, in addition to the testimony of Kiedrowski, Hawkyard, Indovina, Swaity, Switzer, and Exhibit 2 are relied on by staff to demonstrate that all of the Proof of Funds Letters were prepared and signed by Dunn or Hawkyard and in some instances, signed or co-signed by Indovina, Swiaty and Kiedrowski.

[25] Lett's affidavit, the testimony of Kiedrowski, Hawkyard, Indovina, Exhibit 3 and Exhibit 2 confirm that Lett provided wording for the Proof of Funds Letters that included the following: that a specified amount of funds was in the account; that the funds would be held for a specified period of time and a confirmation of the legitimacy of the source of the funds; and Lett discussed the wording to be used in the letters with Dunn and Hawkyard. Hawkyard testified that Lett did not want the letters to reflect that the transaction was being done on margin.

[26] Lett's affidavit and the testimony of Hawkyard and Kiedrowski establish that Lett initially approached Dunn about the Proof of Funds Letters. Dunn and Lett then approached Hawkyard to also provide these letters to Lett. Dunn was Lett's primary contact, and Lett would tell him what he wanted in the letter. Both of them or Dunn alone would meet with Hawkyard to discuss what Hawkyard was willing to put in the letter. Lett discussed the wording to be used in the letters with Dunn and Hawkyard based upon templates provided to him by third parties. Lett, Dunn and Hawkyard would negotiate the wording and Dunn and Hawkyard would decide what they were comfortable signing. Later, Lett dealt directly with Hawkyard, but Hawkyard and Dunn would continue to discuss the contents of the letters.

[27] Indovina testified that on a few occasions, Dunn approached her directly and asked her to sign the letters. She testified that she would take direction from Dunn, with respect to signing the Proof of Funds letters, approximately 30% of the time. The remaining 70% of the time, she signed at the direction of Hawkyard, who was her direct superior. She further explained that Dunn would likely have approached Hawkyard to obtain her signature. Indovina has never spoken to Lett about the Proof of Funds Letters.

[28] Indovina testified that she never questioned the contents of the Proof of Funds Letters as Dunn and Hawkyard were managers and she trusted that if they asked her something to sign, it would be correct.

[29] Based on Exhibit 3 and the testimony of Hawkyard, Dunn was aware of the funds that were deposited into the account and those that were withdrawn.

[30] Hawkyard testified that prior to signing a letter, he would ensure that there was the required 10% margin in the Lett Accounts. He would rely on an oral communication from Dunn, who was the Investment Advisor of the accounts, that there were sufficient funds in the Lett Accounts at Nesbitt. Hawkyard also relied on his knowledge of what was in the Lett Accounts at BMO.

[31] A bank guarantee or debenture was never purchased and Lett was never able to access the high yield program.

The Balance of Funds in the Accounts

[32] Staff submits that the documents, as summarized in the evidence of Brian Clarkin, demonstrates that the "amount referenced" in the Proof of Funds letters was not contained in the "account referenced", even if all the balances contained in all the Milehouse and Pierrepont accounts (i.e., the accounts at Nesbitt and the BMO) are considered, the referenced funds were not in the accounts.

The Freeze Orders

[33] In April of 1998, the Alberta Securities Commission ("ASC") issued an Order to Freeze Property in the Milehouse account at Nesbitt. The ASC was concerned with respect to $4.5 million (US) that was deposited by Lenzburg Capital Corporation into account #420-07197-24 at Nesbitt held in the name of Milehouse. On April 22, 1998, the Ontario Securities Commission issued a similar direction.

[34] In May 1998, when the ASC issued a freeze order, Nesbitt became aware that Lett was depositing funds from some of the Investors into the Milehouse account. Switzer testified that he was asked to do a review of the account. At that time, Dunn advised Switzer that Lett's accountant had advised him that not all of the funds in the Lett Accounts belonged to Lett.

[35] At that time, Switzer became aware that Dunn, by letter dated March 24 1998, had agreed in writing to terms and conditions with respect to funds deposited by Lenzburg Capital and Constantin Nasses into the Milehouse account. In particular, the Letter of Irrevocable Account Instruction confirmed that Constantin Nasses had deposited US $1.5 million and Lenzburg had deposited US $4.5 million into the Lett accounts. Switzer testified that this confirmed that there were funds in the Milehouse account that were not Milehouse's funds.

[36] According to item 5 of the Letter of Irrevocable Account Instruction contained in Exhibit 3, the funds were to remain credited to the Milehouse account at Nesbitt for one year. Switzer testified that at that time, Nesbitt did not have a mechanism to hold funds. Therefore, Dunn had agreed to condition that required Nesbitt to hold funds, which was something they could not do. Eventually, Lett transferred all the funds out of the Milehouse account, except those that had been deposited by Lenzburg, in accordance with the freeze orders.

[37] Switzer's testimony in addition to Exhibit 3, established that in May 1998, he recommended that the Lett accounts be closed, however, Dunn intervened, and Switzer's superiors decided to keep the Lett Accounts open.

[38] Switzer also testified that in May 1998, he placed restrictions on Dunn and his actions in relation to the Lett Accounts. First, Dunn was told that Lett could not deposit any funds into the Milehouse account unless Lett's lawyer confirmed in writing that the funds belonged to Lett or Milehouse. Second, Dunn was told not to sign any letters unless the letter was approved by Compliance or the legal department. In spite of the restrictions, Dunn continued to prepare, sign and cause others to sign Proof of Funds Letters. Seven letters were prepared post-May 1998, five of which were signed by Dunn. In addition, in March of 1999, funds were deposited into the Milehouse account without the required lawyer's letter, thus breaching another restriction.

[39] In August of 1999, the Lett Accounts were closed.

[40] Switzer reviewed the Proof of Funds letters and testified that based on the wording in the letters, he would have expected that the account referenced in the letter contained the full amount referenced.

[41] Switzer also reviewed the wording in the Proof of Funds letters that attested to the legitimacy of the funds. He said he would have expected Dunn to do due diligence regarding where the money had come from and how it had gotten into the account. Switzer was not aware of any due diligence conducted by Dunn.

[42] Switzer also reviewed the wording contained in the letters indicating that the funds would be held for a period of time and confirmed that Nesbitt had no facility for holding funds.

Issues for Determination

[43] Pursuant to the Commission's public interest jurisdiction under sections 127(1) and 127.1 of the Act, the Commission may consider whether Dunn's conduct was contrary to the public interest.

[44] A determination as to whether Dunn's conduct was contrary to the public interest includes consideration of the following factors, having regard to the Amended Statement of Allegations and evidence in this matter:

a) The Commission is guided by the general purposes of the Act, being the regulation of the securities industry in Ontario and Section 1.1 of the Act. Section 1.1 of the Act animates the Commission's public interest jurisdiction under the Act[1]; and

b) The Commission's role in preserving the integrity of the Ontario capital markets and protecting the investing public through the exercise of a protective and preventative role towards the integrity of Ontario's capital markets.

Position of Staff

[45] Staff asserts that between January 1996 and October 1999, Dunn provided or caused others to provide to Lett, letters that contained inaccurate representations. The inaccurate representations concerned the accounts of Milehouse and Pierrepont at Nesbitt. Lett was a client of John Dunn's, Dunn was the investment advisor of Lett. Lett is the directing mind of two companies, namely Milehouse and Pierrepont.

[46] These letters were intended to be relied on by third parties and intended to misled the reader into believing three things: (1) that there were funds in the account; (2) that the money would be held in the Nesbitt account for a specified period of

[1] Section 1.1 of the Act states that purposes of the Act are, (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets.

time, where in fact there was no such facility; and (3) the monies in the account belonged to the account holder and were of a non criminal origin, when appropriate steps were not taken to ensure this assertion was true.

[47] Seven investors deposited $21 million dollars into the Lett accounts during the period in question.

[48] A crucial component of the high yield trading program Lett sought to participate in was the proof of fund letters which the respondent, Dunn, was involved in.

[49] Dunn's actions, which include preparing and signing the letters and causing others to prepare and sign the letters, is conduct contrary to the public interest.

Position of Respondent

[50] Dunn did not defend and did not attend the hearing.

[51] Dunn's counsel informed staff on April 21, 2004 that Dunn would not be defending and not attending in this hearing.

[52] On May 7th, 2004, Dunn submitted a letter dated May 7, 2004 to the Secretary of the Commission in which he requested the letter to be filed with the members of the panel.

[53] Staff submitted the decision of the British Columbia Securities Commission, *Hrappstead*, *Re*; [1999] 15 B.C.S.C.W.S. 13 *("Hrappstead*"), as guidance regarding the weight to be attributed to the letter from Dunn to the Panel. The respondent in *Hrappstead* elected not to appear before the British Columbia Securities Commission, and instead submitted an affidavit. The British Colombia Securities Commission then admitted the affidavit on the basis that it was relevant. However, because Hrappstead chose not to appear, the panel gave no weight to the affidavit because it contradicted *viva voce* evidence produced at the hearing, provided no opportunity for cross-examination, and no opportunity for the panel to view the demeanor of the respondent. Those factors were considered by the Panel in *Hrappstead* to be important in determining credibility and the weight to be attached to the evidence in light of the circumstances.

[54] This panel accepted Dunn's letter of May 7, 2004 as filed and marked it for identification purposes; but reserved on the issue of the weight, if any, that would be attributed to the letter.

Degree of Proof Required

[55] The appropriate standard of proof to be applied in this case is "clear and convincing proof based upon cogent evidence". This standard of proof is appropriate since the potential consequence of an order that could be imposed by the Commission in this matter, and as requested by staff, would interfere with Dunn's ability to earn a livelihood in the securities industry.

[56] "Clear and convincing proof based upon cogent evidence" is a higher standard of proof than the "balance of probabilities" standard.

[57] Further, requiring proof that is "clear and convincing proof based upon cogent evidence" has been accepted as necessary to make findings involving discipline or affecting one's ability to earn a livelihood.

[58] This is such a hearing and our decision could impact Dunn's ability to earn a livelihood in the securities industry. We will make our decision herein based upon the standard of clear and convincing proof based upon cogent evidence.

Analysis

Dunn's Letter of May 7, 2004:

[59] Regarding Dunn's letter of May 7, 2004, marked for identification purposes, we find that we cannot consider it as evidence in this proceeding. The letter is not an affidavit. We did read the letter, giving careful consideration to all of the concerns raised by Dunn, including his present circumstances; however, even so, we do not attribute any weight to the letter, particularly in view of the very clear evidence before us.

The Proof of Funds Letters

[60] Twenty six Proof of Funds Letters were filed with us. These letters were intended to be relied on by third parties and mislead a reader that there was sufficient money in the account to buy the debentures; that the money would be held in the account for a specified period of time, when in fact no such facility to ensure this existed; and that the monies in the account belonged to the account holder and were of non-criminal origin, when nothing was done to ensure this was true.

[61] In the affidavit of Lett, at paragraph 14, he agrees the Proof of Funds Letters were a part of a high yield investment program, which was never actually launched. The high yield investment program resulted in the loss of investor funds.

Misrepresentations Contained in the Proof of Funds Letters

[62] The Proof of Funds Letters contained numerous misrepresentations and the Proof of Funds Letters, in general, misrepresented the funds that were actually contained in the Lett Accounts.

[63] A plain reading of the letters indicated that the accounts contained the full dollar amount referenced in the letter and did not indicate that the referenced accounts were to make a purchase on margin. Switzer, a senior member of compliance within the securities industry, stated that these letters misstated the funds in the account. Hawkyard, testified that Lett did not want the letters to reflect that the transaction was being done on margin.

Inability to "Hold" Funds in Nesbitt Account

[64] Some of the Proof of Funds Letters indicate that the money would be “held” in the Lett Accounts. Switzer and Kiedrowski testified that at the time that the Proof of Funds Letters were written, Nesbitt was not able to place a "hold" on the funds in the Lett Accounts.

Legitimacy of Funds

[65] The Proof of Funds Letters attempted to serve to confirm the legitimacy of Lett's financial ability to fulfil the high yield trading program. The wording contained in the Proof of Funds letters included phrases such as “clean, clear and of non-criminal origin”, as demonstrated in Dunn's letter of February 23, 1999. Switzer testified that there was no evidence of due diligence by Dunn or any other signatories to the letters to confirm the legitimacy of the funds.

[66] Tab 1 through 11, and tab 13 through 27 of Exhibit 2 contains various Proof of Funds letters, each letter referencing a dollar amount available for the specific proposed transaction. Exhibit 8, a chart by which staff summarized the date of the letter, account referenced, the letterhead the proof of funds letter was printed on, the signature contained on the letter, the amount referenced in the letter in US$, the balance that was actually in the reference account in US$, and the total in Nesbitt and BMO accounts in US$. The total balance of funds contained in the Lett Accounts were included in the summary since Hawkyard and Swaity testified that they would have considered the total balance of funds contained in all of the Lett Accounts. As a result of a review of these various proof of funds letters in combination with the evidence contained in Exhibit 8 (demonstrating the actual balance contained in the referenced accounts and the total balance in the Nesbitt and BMO accounts), that the representation in the letters are inaccurate as the amount referenced in the proof of funds letters was less than the actual balance in the referenced account, or the total in the Nesbitt and Bank of Montreal accounts.

Registrants

[67] Dunn's conduct must be considered in the context that Dunn was a registrant and a branch manager of a registered dealer. Staff argued that the requirement that an individual be registered in order to trade in securities is an essential element of the regulatory framework put in place to achieve the purposes of the Act.

[68] In *Brosseau v. Alberta Securities Commission*, (1989), 57 D.L.R. (4th) 458 at 467 (S.C.C.) ("*Brosseau*"), L'Heureux-Dube J. acknowledged that "Securities Acts in general can be said to be aimed at regulating the market and protecting the general public."

[69] Pursuant to section 25 of the Act, a person or company is prohibited from trading in a security unless the person is registered. The requirement that individuals and companies be registered to trade in securities is an essential element of the regulatory framework put in place to achieve the purposes of the Act. Through the registration process, the Commission attempts to ensure that those who engage in trading activities meet the necessary proficiency requirements, are of good character and satisfy the appropriate ethical standards.

[70] The Supreme Court of Canada in *Gregory & Co. v. Quebec (Securities Commission),* [1961] S.C.R. 584 pp. 4-5, which sets out the following:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons who therein carry on such a business. For the attainment of this object, trading in securities is defined in s. 14; registration is provided in s. 16 as a requisite to trade in securities ...

> The Act Respecting Securities, 3-4 Elizabeth II, c.11, is not marketing legislation within the meaning attending the legislation considered in these cases. In order to protect the public against fraud, it provides for the establishment and operation of a control and supervision over the conduct, in the Province of Quebec, of person engaged, therein, in carrying on the business of trading in securities [emphasis added]

[71] Registration serves an important gate-keeping mechanism which ensures that only properly qualified and suitable individuals are permitted to be registrants. The investing public must be entitled to expect and rely on the fact that any one who acts as an advisor has satisfied the necessary proficiency and good character requirements.

Branch Managers

[72] Staff argued that as a Branch Manager, Dunn was responsible for supervising and setting an example for other employees. The Commission considered a similar situation in the context of a s. 26 application in *Re Charko* (1991), 15 O.S.C.B. 3989 at p. 7 ("*Re Charko*"). In refusing Charko's application for registration, the Commission stated that,

> As a senior employee of McConnell in 1987 and 1988, Charko had a duty, which he failed to properly discharge, to ensure that his activities and those of his subordinates were in compliance with the Act. Because of Charko's participation in these contraventions and his failure to discharge his compliance duties as a senior employee of McConnell, I find the Applicant to be unsuitable for registration.

[73] Staff submitted that that branch managers are in a supervisory position and, therefore, are held to a higher duty than other registrants. Investment Dealer's Association Regulation 1300.2 requires that a branch manager be designated for each member and states that the branch manager shall "ensure that the handling of client business is within the bounds of ethical conduct, consistent with just and equitable principles of trade and not detrimental to the interest of the securities industry." Staff submits that this Regulation indicates the heightened responsibility of the branch manager, and note that the IDA Regulations mandated the minimum standards that must be adhered to.

[74] It was submitted that the higher duty required of branch managers is also reflected in the fact that branch managers are required to pass the Branch Managers Course offered by the Canadian Securities Institute.

[75] Dunn's conduct was particularly egregious as he was a registrant and a branch manager during the period when he signed these letters or caused others to sign them. The branch manager holds a crucial role in compliance in the securities industry.

[76] In *Re Mills* (2000), 23 O.S.C.B. 6623, p.25, the Investment Dealer's Association considered this point and held as follows:

> Branch managers have an important role under the self-regulatory system in our securities markets. The obligations requiring supervision of retail client accounts are intended to ensure appropriate handling of client accounts for the benefit of both the client and the firm, as recognized in Burns Fry's Manual. The performance of these obligations takes place in a wide variety of circumstances, involving many clients and many accounts, each having its own characteristics and objectives. It is for this reason that the Policy establishes only minimum standards and expressly states that in some situations a higher standard may be required. That standard is reasonableness, which is frequently determined in hindsight and is invariably fact-driven in its application to the specific relationships and circumstances under consideration.

Proof of Funds Letters

[77] We find that Dunn was the Investment Advisor of the Lett accounts, and that Dunn confirmed the funds on deposit for Hawkyard and Swiaty.

[78] Switzer testified that Dunn's remuneration was commission-based and could have included a component based on the branch's production. We find , based on Kiedrowski's testimony, that Dunn indicated to Kiedrowski there would be prospect of large commissions in the future as a result of all of the work being done for Lett.

[79] Based on this evidence, we find that Dunn, in signing the Proof of Funds Letters and causing others to sign them, engaged in a course of conduct that was designed to assist Lett in accessing the high yield trading program. Dunn did not verify with anyone at the Nesbitt head office whether the Proof of Funds Letters were appropriate. In May of 1998, Dunn was told by Switzer that he was to refrain from sending out any further correspondence with respect to the Lett Accounts. Despite Switzer's instructions, Dunn signed five Proof of Funds Letters and caused two other letters to be drafted.

[80] Dunn signed two letters on BMO letterhead. According to the testimony of Switzer, this was not proper given the fact that he was not employed by the BMO. In addition, Hawkyard, while a registrant at the branch that was managed by Dunn, also signed two Proof of Funds Letters on Bank of Montreal letterhead, all attempting to confirm funds in the account of Lett, Dunn's client. We find that Dunn acted contrary to the public interest in permitting this to occur.

[81] Based on the documentary and testamentary evidence, we find that there is clear and convincing proof that the respondent, Dunn, provided or caused others to provide Lett with proof of funds letters that contained inaccurate representations concerning the Lett accounts at Nesbitt. We find that Dunn's conduct constitutes conduct contrary to the public interest.

[82] We find that the proof of funds letters were intended to mislead the reader into believing that there were funds in the account; that the money would be held in the Nesbitt account for a specified period of time, where in fact there was no such facility; and that the monies in the account belonged to the account holder and were of a non criminal origin, when in fact, appropriate steps were not taken by Dunn to ensure this assertion was true.

Sanctions

[83] Staff informed the panel, providing a copy of the decision of the IDA panel, that on April 28, 2004, the District Council of the IDA found that Dunn had failed to exercise sufficient supervision and was unable to give unbiased advice with respect to Tee-Comm stock because he had both a business and a personal relationship with Tee-Comm's President and CEO; Tee-Comm had provided Dunn on at least two occasions with free flights to Las Vegas; and Dunn personally held stock in Tee-Comm. Dunn personally benefited from referring clients to and ensuring they kept Tee-Comm stock in their portfolio.

[84] On the same date, the IDA imposed the following penalty with respect to Dunn: a total fine of $100,000; a permanent ban on Dunn acting in any supervisory position with any member of the Association; as a condition of reapproval in any capacity, Dunn must rewrite and pass the examinations based on the Conduct and Practices Handbook for the securities industry professionals and a prohibition on any reapproval prior to the payment of the fines and costs of the investigation, which were affixed at $15,000.

[85] Staff submits that the Commission must consider Dunn's prior regulatory misconduct in determining the appropriate sanction.

The Purposes of the Act

[86] In considering sanctions in this case, the Commission must be guided by the purposes of the Act.

[87] The purposes of this Act under section 1.1 of the Act are:

1) to provide protection to investors from unfair, improper or fraudulent practices; and

2) to foster fair and efficient capital markets and confidence in capital markets.

[88] In *Pezim* v. *British Columbia (Superintendent of Brokers)*, 114 D.L.R. (4th) 385 (S.C.C.) at 406 ("*Pezim*") the Supreme Court of Canada held that the "primary goal of securities legislation is the protection of the investing public".

[89] In *Committee for Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission)* (2001), 199 D.L.R. (4th) 577 (S.C.C.) at 590-591 *("Re Asbestos")*, the Supreme Court of Canada discussed the nature of the Commission's public interest jurisdiction under s. 127 of the Act. The Supreme Court noted that section 127 of the Act granted the Commission "an unrestricted discretion to attach terms and conditions to any order made under section 127(1)". The Court also emphasized that section 127 is a regulatory provision, and agreed that the "purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets." The Commission's role is to "remove from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets."

[90] The Divisional Court in *Gordon Capital Corp.* v. *Ontario Securities Commission*, [1991] O.J. No. 934 ("*Gordon Capital*"), has commented upon what "the public interest" means as regards to the Commission. In so commenting, the Court stated:

> There is no definition of "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion.
>
> The scope of the OSC's discretion in defining "the public interest" standard under subsection 26(1) is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad power of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public.

[91] The role of the Commission in making orders in the public interest is found *In the matter of Mithras Management Ltd. et al* (1990), 12 O.S.C.B. 1600, at 1610 *("Mithras Management"):*

> [T]he role of this Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently or temporarily as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing, we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.

[92] In determining the nature and duration of the sanctions, the Commission in *Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743*,* at 7746; and *M.C.J.C. Holdings and Michael Cowpland* (2002), O.S.C.B. 1133, at 1136, has considered a number of factors which may be summarized as follows:

a) the seriousness of the allegations proved;

b) the respondent's experience in the marketplace;

c) the level of the respondent's activity in the marketplace;

d) whether or not there has been a recognition of the seriousness of the improprieties;

e) the restraint of future conduct that is likely to be prejudicial to the public interest (with reference to past conduct);

f) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets;

g) any mitigating factors;

h) the size of any profit (or loss avoided) from the illegal conduct;

i) the reputation and prestige of the respondent; and

j) the remorse of the respondent.

[93] Regarding the Commission's ability to take general deterrence into account, the Commission stated In *Re Dornford* (1998), 21 O.S.C.B. 7499 at p. 7351 (*"Dornford"*):

> In our view, taking into account general deterrence, in the case before us, would not be for the purpose of punishing Dornford, as argued by Mr. Douglas, but rather for a prophylactic purpose, the future protection of the marketplace not only from actions by Mr. Dornford but also from breaches of trust by others. Although *Mithras* speaks of deterring future improper conduct of a respondent, it does note that the Commission is "here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient." It seems to us that *Warnes* does not in any way indicate that general deterrence can be taken into account for punitive purposes, but rather, in the securities law context, that it can be taken into account in determining what is necessary to restrain conduct by others that is likely to be prejudicial to the public interest in having capital markets that are fair and efficient.

[94] In *Re Cartaway Resources Corp.,* [2004] S.C.C. 26 at para 64 ("*Cartaway*"), a recent decision of the Supreme Court of Canada, the Supreme Court of Canada held as follows with respect to the issue of general deterrence:

> The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require different remedial emphasis according to the circumstances. Courts should review the order globally to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest. Nevertheless, unreasonable weight given to a particular factor, including general deterrence, will render the order itself unreasonable. [Emphasis added]

[95] In *Deloitte & Touche v. Ontario Securities Commission*, (Ont. C.A.), [2002] O.J. No. 2350 at p. 11 ("*Deloitte*"), the Court of Appeal noted that it was "open to the Commission to recalibrate the public interest inquiry to reflect the current policies of the

Commission." In the context of the imposition of sanctions, this recognizes that while the law and policy to be applied in considering the propriety of the conduct engaged in is the law and policy which governed at the time of that conduct, the order to be made, if any, is to be responsive to the current policies of the Commission and should be reflective of the current public interest.

[96] Having regard to staff's submissions and the case law, the restraint of future conduct that is likely to be prejudicial to the public interest must be considered in determining the appropriate sanctions in this matter. Accordingly, we will consider, when determining the sanctions, Dunn's prior misconduct which lead to the IDA investigation and the District Council's findings that he had violated the IDA's By-laws, Policies and Regulations.

[97] In determining the sanctions in the instant case, the Commission will carefully consider and weigh all relevant factors, including the following:

(i) At the time of his involvement in this matter, Dunn was a registrant and a Branch Manager. Dunn, with Lett, convinced other employees to sign the misleading Proof of Funds Letters;

(ii) The Proof of Funds Letters provided by Dunn and the other Nesbitt and Bank of Montreal employees were a necessary component of the high yield program, which resulted in John Hawkyard and BMO Nesbitt Burns being named as respondents in this matter;

(iii) Dunn engaged in conduct which provided misleading information, and intended to benefit in the form of commissions resulting from the high yield trading program;

(iv) Dunn's past conduct, including findings by the IDA District Council that he failed to adequately supervise client accounts and provided improper and biased advice to clients in order to benefit personally;

(v) When Nesbitt's compliance department became aware of Dunn's involvement in this matter, Dunn was advised that he was not to sign any further letters for Dunn without first seeking the approval of the legal department. Dunn did not comply with this request and signed four Proof of Funds Letters and caused two other letters to be drafted;

(vi) Dunn signed two letters on Bank of Montreal letterhead. Dunn has never been employed by the Bank of Montreal; and,

(vii) The Proof of Funds Letters were a component of a high yield investment program, which was never actually accessed, and which resulted in the loss of investor funds.

[98] Effective sanctions are warranted in order to protect investors and maintain confidence in the capital markets. Sanctions must be proportionate to the respondent and his misconduct, and fashioned to ensure that the potential for Dunn to engage in similar conduct in the future is minimized. The sanctions must deter Dunn and others from engaging in the same or similar conduct in the future.

Sanctions

[99] We find that it has been established, on the evidence, that the respondent, Dunn, engaged in conduct that is contrary to the public interest.

[100] We consider Staff's proposed sanctions to be extremely fair to Dunn. We would not consider sanctions of any less to be sufficient or appropriate in this matter. Dunn had a gatekeeper role in his position at Nesbitt and as a registered investment advisor. Dunn failed in his gatekeeper role, not just passively, but indeed, actively facilitated the provision to Lett of the Proof of Funds letters containing inaccurate representations concerning the accounts of Milehouse and Pierrepont at Nesbitt. Dunn has not acknowledged his egregious conduct or demonstrated any remorse in this matter, not even in his letter to the Commission dated May 7th, 2004.

[101] Staff asks that Dunn pay to the Commission $126,938.50 as the costs of the investigation and of the hearing, pursuant to section 127.1 of the Act.

[102] Section 127.1 of the Act gives the Commission the discretion to order a person to pay the costs of an investigation and a hearing if the Commission is satisfied that the person has not complied with the Act or has not acted in the public interest.

[103] Counsel for Staff has provided an evidentiary basis for the calculations. The bill of costs that is submitted is in the amount of $126,938.50. The bill of costs set out a description of the work engaged in by litigation counsel and the lead investigator.

[104] Accordingly, and based upon all of the above considerations, it is ordered that the following sanctions will be imposed:

- pursuant to clause 1 of subsection 127(1) of the Act, Dunn's registration be terminated for a period of 10 years and that Dunn be prohibited permanently from having a supervisory or managerial role with a registrant;
- pursuant to clause 8 of subsection 127(1) of the Act, Dunn be permanently prohibited from becoming or acting as a director or officer of a registrant;
- pursuant to clause 6 of subsection 127(1), Dunn is hereby reprimanded; and
- pursuant to subsection 127.1(2) of the Act, Dunn shall pay the costs of Staff's investigation and the hearing in the amount of $126,938.50.

Dated at Toronto this 15th day of June, 2004.

“Wendell S. Wigle”

“Paul K. Bates”