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

HEADNOTE

Investment Contract – Security – Trading – Acts in Furtherance of a Trade – Exemptions – Trading in Ontario – Market Intermediaries

The sole issue was whether the Respondents were trading in securities without registration contrary to s.25(1) of the Act. The Respondents, none of whom were registered under the Act, offered a high yield program that had such characteristics sufficient to constitute an "investment contract" and, as such, a "security" as per the definitions contained within the Act. By accepting funds from investors, by attempting to forward the funds to purchase a bank guarantee, or debenture in order to gain access to the high yield program and by repeatedly providing proof of funds letters to third parties, it was found that the Respondents' actions constituted acts in furtherance of a trade. On the issue as to whether the Respondents were exempted from the requirement to be registered, the Respondents were all based in the Toronto area, had bank accounts in the Toronto area and carried on business in the Toronto area. The trading occurred in Ontario. A substantial part of the Respondents' time during the relevant period was involvement or attempted involvement in the high yield program. This, together with a finding that the investors deposited monies with the Respondents in Toronto and the monies were accepted by the Respondents for the purpose of acquiring high yield programs results in a finding that the Respondents were market intermediaries and were not exempted from the requirement of s.25 of the Act to be registered.

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

Hearing Dates: November 17, 18, 2003. January 29, 2004

Panel:	**H. Lorne Morphy, Q.C.**	Commissioner (Chair of the Panel)
	M. Theresa McLeod	Commissioner
	Suresh Thakrar	Commissioner
Counsel:	Karen Manarin	For the Staff of the OSC
	David C. Moore	Solicitors for the Respondents
	Kenneth G.G. Jones	Lett, Milehouse and Pierrepont

REASONS

1. This hearing involved only the Respondents Patrick Fraser Kenyon Pierrepont Lett ("Lett"), Milehouse Investment Management Limited ("Milehouse") and Pierrepont Trading Inc. ("Pierrepont") (collectively, the "Respondents"). Proceedings against the other Respondents have either been previously dealt with or will be dealt with separately from this hearing.

2. In the Amended Statement of Allegations, it is alleged that these Respondents traded in securities without being registered contrary to section 25(1)(a) of

the *Securities Act*, R.S.O. 1990, c.S.5, as amended. If established, Staff is asking that sanctions be ordered under sections 127(1) and 127.1 of the Act.

3. At the outset of the hearing, Staff and the Respondents requested the Panel determine whether the Respondents had acted contrary to section 25(1)(a) of the Act prior to hearing any submissions concerning possible sanctions. The Panel agreed to this request.

4. The hearing was held on November 17 and 18, 2003 with additional submissions being heard on January 29, 2004.

A. The Facts

5. At the outset of the hearing, an Agreed Statement of Facts was filed as well as a Joint Hearing Brief consisting of six volumes of documents. No other evidence was called.

6. Paragraphs 2 – 19 of the Agreed Statement of Facts state:

> 2. Patrick Fraser Kenyon Pierrepont 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 Investment Management Limited and Pierrepont Trading Inc. (collectively referred to as the "Companies").
>
> 3. Each of the Companies is incorporated under the laws of Ontario. Neither of the Companies has been registered in any capacity under the Securities Act.
>
> 4. Lett was previously a registrant but he is currently not registered under the Act and was not registered during the material record.
>
> 5. BMO Nesbitt Burns Inc. was registered as a Broker/Investment Dealer under the Act.

6. John Craig Dunn was registered under the Act from October 1994 to August 2002 as a trading officer with Nesbitt at its branch located at 1 Robert Speck Parkway, Mississauga, Ontario. From July 1986 to February 2002, Dunn was the Branch Manager of the Nesbitt branch located at 1 Robert Speck Parkway, Mississauga, Ontario.

7. John Steven Hawkyard was registered under the Act from October 1989 to April 1997 as a salesperson of Bank of Montreal Investment Management Limited, a dealer in the category of Mutual Fund Dealer. From March 1996 to April 1997, Hawkyard was the Manager of the Bank of Montreal – Private Banking Services Branch located at 1 Robert Speck Parkway, Mississauga, Ontario.

8. In April 1997, Hawkyard moved from the Bank of Montreal to Nesbitt and, from November 1997 to August 2202, was registered as a salesperson of Nesbitt at 1 Robert Speck Parkway, Mississauga, Ontario, the branch which was managed by Dunn. The Nesbitt branch was located in the same building and adjoins the Bank of Montreal branch.

9. Lett first met Dunn in the 1980s or early 1990s and considered him to be a friend. Prior to opening the Nesbitt accounts, Dunn had business dealings with Lett. Dunn had loaned monies to Lett for an offshore investment. In November 1995, Lett opened an account in the name of Milehouse at the Nesbitt Mississauga Branch, which is the branch that Dunn managed. Lett also opened an account in the name of Pierrepont in February 1997 and a second Milehouse account in May 1998 at the Nesbitt Mississauga branch (collectively, these accounts will be referred to as the "Respondents' Accounts")[1]. Dunn was the Investment Advisor responsible for the Respondents' Accounts at the Mississauga branch.

10. Dunn introduced Lett to Hawkyard as a client with substantial net worth who was intending to embark upon a high yield program as referred to below. Lett

---

[1] The Respondents admit as evidence the brokerage firm records contained in the Joint Hearing Brief, Volumes 3, 5 and 6 (Disclosure Brief, Volumes 12, 15 and 16).

and Hawkyard's relationship was strictly business. Lett opened bank accounts at the Bank of Montreal Branch located at 1 Robert Speck in Mississauga as follows; a personal bank account in May 1996, accounts in the name of Pierrepont in January and April 1997 and an account in the name of Milehouse in May 1998.[2]

11. During the period April 1996 – February 1999, seven individuals or entities transferred, deposited, or caused approximately US $21 million to be transferred, or deposited into the Milehouse accounts at Nesbitt or at the Bank of Montreal in Mississauga.[3]

NAME	**DESCRIPTION**	**AMOUNT**
Constantin Nasses[4]	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
A. H. Velarde[5]	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	US $5,200,000

---

2 The Respondents admit as evidence the banking records contained in the Joint Hearing Brief, Volume 4 (Disclosure Brief, Volume 13).

3 Attached as Appendix A is a schedule detailing the "Transfers or Deposits by Individuals or Entities". All parties admit as evidence the source documents in the Disclosure Brief that inform this schedule: Joint Hearing Brief, Volumes 3, 4, 5 and 6 (Disclosure Brief, Volumes 12, 13, 15 and 16).

Attached as Exhibit "B" is a schedule which outlines "Examples of the Respondents' Communications to and Documents Involving Other Parties re: High Yield Program". The Respondents agree to the admission in evidence of all source documents supporting Appendix "B".

4 Nasses has some association or connection with a bank called the Arab Commerce Bank and the Arab Commerce Trust. Lett met Nasses through David Friedenbach (an American who initially was going to be involved with Milehouse) and Mirza Hadi (a UK resident). Nasses initially sent $10 million so that he could enter a high yield program promoted by Friedenbach and Hadi.

5 Velarde is an attorney in Virginia, U.S.A. Verlarde, who worked closely with Friedenbach, also wanted to access the program.

	settled the charges.	
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 or 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

12. The Respondents 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 Respondents to the program. The descriptions of the high yield program are not all consistent but have the following characteristics. The high yield program was to include the purchase on margin of a bank guarantee or debenture, issued by a foreign bank, through the Respondents' 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.

13. Between April 1996 and March 1999, the Respondents requested and received 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
June 10, 1996	Nesbitt Burns	Dunn
July 23, 1996	Nesbitt Burns	Dunn
August 28, 1996	No letterhead	Hawkyard & Indovina
September 19, 1996	Bank of Montreal	Hawkyard & Indovina
December 18, 1996	Bank of Montreal	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 7, 1997	Bank of Montreal	Indovina
October 23, 1997	Bank of Montreal	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
March 9, 1999	Nesbitt Burns	Dunn & Kiedrowski

14. Some of the Proof of Fund Letters were subsequently sent to third parties outside Ontario. The Proof of

Funds Letters were considered to be necessary for the high yield program.

15. As noted above, several of the Proof of Funds Letters were on the letterhead of the Bank of Montreal. Lett told a representative of Nesbitt and a representative of the Bank of Montreal that the letters would confirm Lett's ability to purchase on margin a bank instrument or guarantee and that the bank of Montreal was more widely recognizable in Europe than Nesbitt.

16. Pierrepont and Milehouse also executed corporate documents reflecting their intent to enter into these programs.[6] Lett and his Companies entered into agreements, executed Letters of Intent and authored correspondence in an attempt to enter into high yield programs.[7]

17. The Respondents did not purchase a bank guarantee or debenture and were never able to access the high yield program.

18. The Respondents acknowledge that their involvement or attempted involvement in the high yield program constituted a substantial portion of their business activities during the relevant period.

19. The Respondents agree that the documents contained in the joint hearing brief and any other documents referred to herein may be admitted into evidence without formal proof. The Respondents and Staff reserve the right to raise issues regarding the relevance of these documents and to provide context.

---

[6] Attached as Appendix "C" ("Corporate Documents Executed by Respondents Pierrepont or Milehouse") is a schedule which outlines the corporate documents executed. The Respondents agree to the admission in evidence of all source documents supporting Appendix "C".

[7] Attached as Appendix "D" ("Respondents' Attempts to Access High Yield Program") is a schedule which outlines the attempts to access the high yield program. The Respondents agree to the admission in evidence of all source documents supporting Appendix "D". Attached as Appendix "E" ("Respondents' Communications of Documents Relating to Other Individuals or Entities") is a schedule which outlines further communications regarding the program. The Respondents agree to the admission in evidence of all source documents supporting Appendix "E".

B. Issues for Determination

7. The relevant portion of section 25(1) of the Act provides that no person shall trade in a security…unless the person or company is registered as a dealer…

8. Having regard to the Amended Statement of Allegations and the evidence before us, a determination as to whether the Respondents breached section 25(1)(a) of the Act involves a determination of the following issues:

(a) did the Respondents trade in securities which involves both the question as to whether there was trading and, if so, was it of a security as those terms are defined in section 1 of the Act?

(b) are the Respondents exempt from the requirements for registration by reason of the exemptions found in the Act and the Regulations?

(c) if there was trading in securities, was that trading in Ontario?

C. Position of Staff

9. Staff made two submissions as to what was the security alleged to have been traded by these Respondents.

10. Initially Staff asserted the high yield program as set out in paragraph 12 of the Agreed Statement of Facts described the program as including the purchase and sale of a bank guarantee or debenture, a medium term bank note and a commitment issued by the United States Treasury Department. These three components of the high yield program, Staff submitted, satisfied the definition of security found in section 1(1) "security" subparagraph (e), of the Act.

11. When additional submissions were heard on January 29, 2004, Staff also argued that the high yield program was in and of itself a security under section 1(1)

"security" subparagraph (n), of the Act in that it meets the requirements as found in judicial authorities for being an investment contract.

12. As to trading, Staff's position was that there was no actual trading but rather acts in furtherance of a trade which fell within the definition of trade or trading found in section 1(1) "trade" subparagraph (e), of the Act.

13. Staff's position was that the Respondents acted as market intermediaries by engaging in the business of trading in securities in Ontario and as such, they were not exempt from registration and that the trading was done in Ontario.

D. Respondents' Position

14. Counsel for the Respondents argued that the evidence fell short of establishing the existence of any security being traded in Ontario.

15. In his submissions regarding whether there was a security being traded, Respondents' counsel made reference to a statement in the Amended Statement of Allegations regarding the high yield program:

> The program has characteristics of a prime and bank interest scheme and, as such, has no basis in reality.

Counsel submitted that Staff cannot allege on one hand that the attributes of a high yield program do not exist and on the other hand contend that the non-existent attributes constitute a security.

16. Counsel further submitted that paragraph 12 of the Agreed Statement of Facts simply refers to descriptions of the high yield program derived from documents of

third parties and there is no evidence that any of those attributes existed so as to establish there was actually an investment contract as was being asserted by Staff.

17. As to trading, it was argued that any act in furtherance of a trade must be within the particulars alleged by Staff in paragraph 22 of the Amended Statement of Allegations in order to comply with section 8 of the *Statutory Powers Procedures Act*.

18. In respect of these acts in furtherance of a trade, the Respondents urged that they must be read in the context of paragraph 12 of the Agreed Statement of Facts which sets out that the Respondents did not create or devise the high yield program but received documents from third parties which purported to disclose the high yield program and which introduced the Respondents to it.

19. Counsel argued that there was no evidence that the Respondents engaged in any activities to solicit or encourage any investment in the high yield program or that they made any representations to prospective investors regarding it.

20. Counsel argued that any activities within the program by the Respondents were in furtherance of purchasing – not selling and accordingly, were outside the definition of trading as found in section 1(1) of the Act and relied on the decision of *Re Burnett* (1983), 6 O.S.C.B. 2751**.**

21. As to the receipt of funds, it was argued that the mere receipt of funds falls short of any act in furtherance of a trade unless there was evidence that the monies were received as a result of solicitations for the specific purpose of acquiring the security.

22. On the question of whether there was trading in Ontario, Mr. Moore submitted that there was not sufficient nexus to Ontario for the activities to be considered as trading in Ontario.

23. On the issue as to whether the Respondents were market intermediaries, Mr. Moore submitted that while it was admitted in the Agreed Statement of Facts that his clients were involved in the high yield program for a substantial portion of their business activities during the relevant period, such activities were in fact acts in furtherance of purchases in connection with the high yield program. Accordingly, it was argued, that this did not mean that the Respondents spent a substantial portion or any portion of their business activities in the business of trading in securities in Ontario and that the Respondents were not market intermediaries.

E. Relevant Statutory Provisions

24. Section 25(1) of the Act provides that no person or company shall, (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer.

25. Section 1(1) of the Act provides:

> "Security" includes:
>
> (e) any bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate…
>
> (n) any investment contract.
>
> "Trade" or "Trading" includes:

> (a) any sale or disposition of a security or valuable consideration, whether the terms of payment are beyond margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith.
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.

26. Section 35(1) Exemption of Trades – subject to the regulations, registration is not required in respect of the following trades:

> Clause 5: A trade where the purchaser purchases as a principle if the trade is a security which has an aggregate acquisition cost to such purchaser of not less than $97,000 or such other amount as is prescribed.

27. Section 27(1) of the Regulations raised the threshold from $97,000 to $150,000.

28. Section 206 of the Regulations provides:

> "the exemptions from registration contained in subsections 35(1) and (2) of the Act or in any other part of this Regulations are unavailable to market to a market intermediary except in respect of (a) a trade referred to in paragraphs 1, 6, 7, 8, 19, 20 or 22 of subsection 35(1) of the Act…

29. Section 204(1) of the Regulations defines market intermediary as:

> "market intermediary" means a person or company that engages or holds himself, herself or itself out as engaging in Ontario in the business of trading in securities as principle or agent, other than trading in securities purchased by the person or company for his, her or its own account for investment only and not with a view to resale or distribution, and without limiting the generality of the foregoing, includes a person or company that engages or holds himself, herself or itself out as engaging in the

> business of (a) entering into agreements or arrangements with underwriters or issuers, in connection with distributions of securities, to purchase or sell such securities, (b) participating in distributions of securities as a selling group or member, (c) making a market in securities, or (d) trading in securities with accounts fully managed by the person or company as agent or trustee, whether or not the person or company engages in trading in securities purchased for investment only.

F Degree of Proof Required

30. In addition to the submissions raised concerning section 25(1)(a) of the Act, Mr. Moore argued that as the allegations against the Respondents involved what he called improper conduct contrary to Ontario securities law, cogent and convincing evidence was required. He conceded that the effect of this submission would be that this standard of proof would be required in all cases before the Commission. He cited no authority for the proposition.

31. Requiring proof that is "clear and convincing and based upon cogent evidence" has been accepted as necessary in order to make findings involving discipline or affecting one's ability to earn a livelihood.

32. This is not such a hearing. Rather, it is a hearing to determine whether or not the Respondents traded in securities without registration contrary to section 25(1) of the Act.

33. In *Bernstein* v. *College of Physicians and Surgeons (Ontario)* (1977), 15 O.R. (2nd) 477 at 470 (Div.Ct.). O'Leary J. stated:

> 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 involving the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.

34. In making our decision herein, we will have regard to that direction.

G. Analysis

Was There a Security?

35. As has been noted, Staff in its submissions took two positions to support its plea that what was being traded was a security within section 1(1) of the Act. The first was that paragraph 12 of the Agreed Statement of Facts describes the high yield program as involving the purchase and sale of a bank guarantee or debenture, a medium term bank note and a commitment issued by the United States Treasury Department.

36. Staff submitted that each of these components of the high yield program satisfy the definition of security as defined in section 1(1) “security” subparagraph (e), of the Act.

37. Staff’s further position was that the high yield program itself is a security in that it is an investment contract within section 1(1) “security” subparagraph (n), of the Act.

38. Paragraph 18 of the Amended Statement of Allegations states:

> Seven investors (the “Investors”) deposited approximately U.S. $21 million into the Lett accounts at Nesbitt or the Milehouse account at the Bank of Montreal for the purpose of investing in an intended trading program.

39. The “intended trading program” equates with what is described in the Agreed Statement of Facts as the "high yield program".

40. The allegation in paragraph 18 of the Amended Statement of Allegations clearly asserts that what is alleged as being traded is the high yield program itself and not the components of it. Paragraph 12 of the Agreed Statement of Facts defines the high yield program as including the bank guarantee, the medium term bank notes and the U.S. Treasury Department commitments.

41. In that it is alleged that it was the high yield programs that were being traded, not the components of those programs, the issue for determination is whether the high yield programs are investment contracts so as to qualify as a security under section 1(1) “security” subparagraph (n), of the Act.

42. Mr. Moore argues that the high yield program as referred to in paragraph 12 of the Agreed Statement of Facts cannot be a security by reason of the statement in the Amended Statement of Allegations that “the program has characteristics of a prime bank instrument and as such has no basis in reality”.

43. Mr. Moore argues that Staff cannot assert that something has no basis in reality and at the same time maintain that it qualifies as a security under the Act. We do not accept that submission. We understand that statement as simply going to the merits of the program as an investment – not to the question as to whether or not it comes within the definition of security found in section 1(1) of the Act. It is clear from other parts of the Agreed Statement of Facts that the Respondents have admitted pursuing high yield programs which must have been "real" for the Respondents to have pursued in the first place.

44. Mr. Moore further argued that the very language found in paragraph 12 of the Agreed Statement of Facts was such that it did not enable one to ascertain what the actual characteristics of the high yield programs were so as to determine whether it was in fact an investment contract. That submission overlooks the statement found within paragraph 12 of the Agreed Statement of Facts that "the descriptions of the high yield program are not all consistent but have the following characteristics". This is followed by a description of those characteristics.

45. Mr. Moore's submission further overlooks other statements in the Agreed Statement of Facts such as found in paragraphs 10, 11, 14, 16, 17 and 18 which refer to the high yield program without any suggestion that there is any ambiguity or uncertainty as to its nature.

46. The Act does not define investment contract. It has, however, been the subject of numerous judicial decisions both in the United States and in Canada. Those decisions were recently considered by the Commission in the matter of First Federal Capital (Canada) Corporation and Monte Morris Friesner (2004), 27 O.S.C.B. 1603. In discussing the requirements of an investment contract it was stated in that decision:

> [24] In *Securities and Exchange Commission* v. *W.J. Howey Co. et a,* 328 U.S. 293(1946), the Supreme Court of the United States enunciated a three-part test to determine whether a scheme constitutes an investment contract. The three requirements are that the scheme involve (i) an investment of money, (ii) in a common enterprise, (iii) with profits solely to come from the efforts of others.
>
> [25] In *Howey*, Mr. Justice Murphy stated with respect to the meaning of "investment contract":

> [i]t had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was place upon economic reality. An investment contract thus came to mean a contract or scheme "the placing of capital or laying out of money in a way intended to secure income or profit from its employment"… In other words, an investment contract for purpose of the *Securities Act* means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interest in the physical assets employed in the enterprise… It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

[26] He stated"

> [i]t follows that the arrangements whereby the investors' interests are made manifest involve investment contracts, *regardless of the legal terminology in which such contracts are clothed"* (italics added)… the test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.

[27] This test was refined and endorsed by the Supreme Court of Canada in *Pacific Coast* at page 540. In that case, the court observed:

> … to give a strict interpretation of the word "solely" … would not serve the purpose of the legislation. Rather we adopt a more realistic test, whether the efforts made by those others than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise . . . The expression "common enterprise" has been defined to mean . . one in which the fortunes of the investor are interwoven with and dependent upon the efforts

> and success of those seeking the investment of third parties.

47. Having regard to the test set out above for an investment contract, we find the characteristics of the high yield program, as described in paragraph 12 of the Agreed Statement of Facts, satisfy that test and meet the requirements to constitute a security as defined under the Act.

Were the High Yield Programs Being Traded by the Respondents?

48. As noted earlier, the Amended Statement of Allegations does not allege that there were any actual trades but does assert that there were specific acts in furtherance of trades.

49. Those acts are found in paragraph 22 of the Amended Statement of Allegations and are:

(a) By accepting the funds from the investors.

(b) By attempting to forward the funds to purchase the bank guarantee or debenture (the proceeds would be used to access the high yield program).

(c) By repeatedly providing proof of funds letters to third parties.

50. In considering the acts alleged in furtherance of trades, it is necessary that only one or more of the three acts be established. It is necessary, however, that it be established that any acts were in furtherance of trades to one or more of the seven investors and that they were acts in furtherance of trades of the high yield programs.

51. This is of particular importance in that there is no evidence of solicitation or acts by the Respondents that led to the investors transferring monies to the

Respondents' accounts. The fact that there is no such evidence does not mean that it cannot be found that the Respondents were trading. It does mean, however, that to prove the Respondents were acting in furtherance of trades, it must be established that the alleged acts were acts in furtherance of trades of the high yield programs to one or more of the seven investors.

52. In considering whether this has been established, both the Agreed Statement of Facts and the documents in the six volumes of the Joint Hearing Brief must be considered.

53. The Agreed Statement of Facts and the Joint Hearing Brief were put to the Panel by agreement between Staff and the Respondents as the only evidence in this matter. This means that both Staff and the Respondents understood that they would not have an opportunity through *viva voce* evidence to provide additional evidence in order to provide explanations, elaborations or qualifications as to what has been agreed to in the Agreed Statement of Facts and the documents in the Joint Hearing Brief.

54. Paragraphs 9 – 18 of the Agreed Statement of Facts set out in a logical sequence a comprehensive set of facts starting with the Respondents opening accounts, then receiving the monies and ending with the Respondents attempting to enter into high yield programs. That sequence and the detail of the facts are important and cannot be ignored in considering the issue as to whether there is evidence that the acts alleged in furtherance of the trades were actually for and on behalf of trades in high yield programs to one or more of the seven investors.

55. Having carefully considered the Agreed Statement of Facts, the only reasonable conclusion is that it was intended to convey that the investors deposited their money with the Respondents for the purpose of investing in high yield programs and that the Respondents accepted the money for that purpose and then took steps to access the high yield programs. To conclude, that the monies were deposited and accepted for any other purpose is simply not reasonable. If the Respondents did not intend this to be conveyed by the Agreed Statement of Facts, it should have been expressly so stated therein. This conclusion is expressly supported by footnotes 4 and 5 to the Agreed Statement of Facts.

56. In addition, documents in the Joint Hearing Brief support the fact that the investors deposited monies in the Respondents' accounts for the high yield programs and that they were accepted by the Respondents for that purpose.

57. Tab 54 of the Joint Hearing Brief is a letter dated October 2, 1996 from the Respondent, Lett, to Greater Ministries which contains the following paragraph:

> You have wired to Milehouse Investment Management Limited's account at Nesbitt Burns U.S. $475,000. No specific instruction or purpose was given to the use of these funds either to Milehouse or Nesbitt Burns at the time. However, the money has been used as margin for a high yield bank debenture and trading program. Since that time, you have given us U.S. $100,000 to Bob Douglas who has passed the funds to me and U.S. $150,000 to Milehouse.

58. Tab 393 of the Joint Hearing Brief is a letter dated August 13, 1999 from Lett to Velarde which includes the statement:

> Sometime ago you requested that I provide financial leverage for your clients' funds such that they could make a U.S. $10 million investment into the high yield trading program with Zagaras trading in the UK.
>
> I have followed your wishes to the letter and current that the U.S. $10 million investment is registered in a program waiting for an appropriate syndication to start trading.

59. Tab 214 of the Joint Hearing Brief is a Joint Venture Agreement dated March 24, 1998 between Milehouse Investment and Lenzburg Capital Corporation which contract is executed by Lett on March 24, 1998. The contract refers to a deposit of U.S. $4.5 million which closely coincides with the fact that the deposit of that amount in the Lett account on March 27, 1998 as noted in Schedule A to the Agreed Statement of Facts. The terms of this Joint Venture Agreement are consistent with high yield programs as set out in paragraph 12 of the Agreed Statement of Facts and also shows that the monies were deposited for and accepted by the Respondents for that purpose.

60. These and numerous other documents in the Joint Hearing Brief clearly demonstrate that the investors' monies were deposited in the Respondents' accounts and accepted by the Respondents for the purpose of selling participation in the high yield program.

61. A further act alleged in Amended Statement of Allegations as an act in furtherance of a trade was the fact that the Respondents repeatedly provided proof of funds letters to third parties. Paragraph 13 of the Agreed Statement of Facts sets out numerous proof of funds letters that were obtained by the Respondents. When paragraph 13 is read in its context in the Agreed Statement of Facts with particular reference to

paragraphs 14 and 15, we find that repeatedly providing proof of funds letters to third parties were acts in furtherance of a trade to the investors by the Respondents which has been clearly established by the evidence.

62. As noted earlier, Mr. Moore's submission is that these activities by the Respondents involved the Respondents purchasing or attempting to purchase debentures and attempting to purchase interests in high yield programs. Relying upon the decision of *Re Burnett* and the definition of trading in the Act, he maintains that these acts of purchase do not constitute trading.

63. The difficulty with this submission is that it may have been applicable if we had found that the securities in issue were the components of the high yield program rather than the high yield program itself. Having found that the high yield program in its totality constitutes a security, the issue becomes whether it was being traded and not whether the components of the program were being traded. The act of purchasing debentures is simply one of the acts required to be carried out by the Respondents in the trading of the high yield programs to the investors.

64. We find that it has been established with clear and compelling evidence that the Respondents have, as alleged, acted in furtherance of trades to the investors of high yield programs or of interests therein. This means that the Respondents were trading in securities as those terms are defined in the Act.

Exemptions

65. Having regard to section 206(1) of the Regulations, if we find that the Respondents were market intermediaries as defined in section 204(1) of the Regulations,

the Respondents are not exempt from having to be registered. In order to make this finding, it is necessary for us to find that the Respondents were engaged in or held themselves out as engaging in Ontario in the business of trading in securities as principle or agent.

66. The Respondents were all based in the Toronto area, had bank accounts in the Toronto area, carried on business in the Toronto area. Most, if not all, of the documents referred to in the Agreed Statement of Facts and in the six volumes of documents composing the Joint Hearing Brief consist of documents that were either sent by the Respondents from the Toronto area or addressed to them in the Toronto area.

67. We have no hesitation in finding that the Respondents were carrying on business in Ontario.

68. Paragraph 18 of the Agreed Statement of Facts is an acknowledgement that a substantial part of the Respondents' time during the relevant period was involvement or attempted involvement in the high yield program. Based on that together with our finding that the investors deposited monies with the Respondents in Toronto and the monies were accepted by the Respondents for the purpose of acquiring high yield programs or interests therein, we find that the Respondents were market intermediaries and accordingly, have no exemption from the requirement of section 25 of the Act to be registered.

Was There Trading in Ontario?

69. The final issue for determination is whether the trading in securities was trading in Ontario. Having found that the Respondents had acted in furtherance of

trading in regard to the high yield programs and as those acts occurred in Ontario, we find that the trading of the securities occurred in Ontario.

* * *

70. Based on these determinations, we find that it has been clearly established through the evidence before us that the Respondents traded in securities contrary to section 25(1)(a) of the Act as alleged.

71. Having regard to this finding, the Secretary of the Commission is asked to arrange a date to hear submissions concerning whether it is in the public interest to make one or more orders under section 127(1) and 127.1 of the *Securities Act*.

Dated at Toronto this 18th day of March, 2004.

"H. Lorne Morphy"
H. Lorne Morphy

"M. Theresa McLeod"
M. Theresa McLeod

"Suresh Thakrar"
Suresh Thakrar