PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF the Securities Act, R.S.N.B. 1973, c.S-6, as amended,

- and -

IN THE MATTER OF the Registration of Earle Mackenzie Smith

DECISION AND ORDER

Hearing : Friday, September 19, 1997, 1:30 p.m.

Tribunal : Donne W. Smith, Jr., Administrator

Appearances: Edouard O. LeBlanc, Deputy Administrator - for the Office of the Administrator

Earle Mackenzie Smith, Registrant - on his own behalf

I. INTRODUCTION :

This Decision follows a Hearing conducted pursuant to a Summons to Appear (the "Summons") dated September 12, 1997 and issued to Earle Mackenzie Smith ("Smith" or the "Respondent"), a registered salesperson under the Securities Act (the "Act"). The Summons required Smith's attendance before me so that I might consider :

a) whether pursuant to paragraph 12(1)(c)(*v*) of the Act it is in the public interest to suspend or cancel the registration of Smith; or

b) whether pursuant to paragraph 12(1)(f) of the Act that the registration of Smith be made subject to such conditions as I deem necessary.

The Summons alleges that Smith sold mutual funds to some 23 individuals between December 23, 1996 and May 13, 1997 during which time his registration as a salesperson was suspended. Furthermore, it alleges that Smith gave false and misleading statements to the Deputy Administrator with regard to his involvement in securities activities.

At the start of the Hearing, the Deputy Administrator presented a Statement of Admitted Facts signed by both the Respondent and the Deputy Administrator in which Smith admitted the allegations and violations as set out in the Summons. Because the facts are generally not in dispute, Smith used the Hearing as an opportunity to explain his actions and place his arguments before me about the nature of sanctions, if any, which might be imposed as a consequence. Smith was not represented by counsel even though this right was repeated to him. The Deputy Administrator, for his part, also made arguments and spoke to sanctions.

II FINDINGS OF FACT :

While the facts are relatively straight forward and not in dispute it is important for purposes of this Decision to outline them here. I have made reference not only to the Summons and Statement of Admitted Facts but also to registration documentation of Smith on file in this Office. As well information submitted at the Hearing will be noted.

The Respondent, Smith, was first registered as a salesperson under the Act on January 5, 1996. At that time he was employed by and registered with Fortune Financial Group Inc., a mutual fund dealer. In order to receive registration, Smith filed proof of successful completion of the Investment Funds Institute of Canada investment funds course.

Smith remained registered until September 30, 1996 at which time he resigned from the employment of Fortune and his registration was suspended. It was reinstated for the next registration year when he transferred to Regal Capital Planners Ltd., another mutual fund dealer after he submitted a renewal application, Form 6. Certificate of Registration #97-893 was issued by this Office, effective November 1, 1996 to expire on October 31, 1997. Shortly thereafter on November 7, 1996 the sponsorship of Smith was withdrawn by Regal Capital Planners Ltd. and his registration was again suspended, effective that date. The registration indices at this Office indicate that Smith's registration still remains suspended.

Smith admits that between December 23, 1996 and May 13, 1997 he sold mutual funds to some 23 investors, either individually or jointly. These investors are identified in the Summons and Statement of Admitted Facts. Smith also admits that he gave a false and misleading statement to the Deputy Administrator on May 23, 1997 when, as a consequence of an examination conducted of Fortune Investment Corporation, Smith's sales activities were discovered.

On that date Smith denied to the Deputy Administrator that he made the mutual fund sales to the named 23 clients or that he received any commissions for soliciting or effecting trades. Smith admits that he originally expected to receive some $10,500.00 as commission, of which $5,000.00 had been paid to him by the time of the Hearing. In the Statement of Admitted Facts, the Respondent acknowledges his duty as a registrant to comply with the Act, regulations, policies and conditions of registration attaching to his Certificate of Registration and that he knew or ought to have known that the enumerated trades were violations of the Act.

At the Hearing, Smith explained his violations firstly, by stressing that his primary concern was the continuation of service to existing clients during the 1997 RSP season; and secondly, by acknowledging that while he knew that he was not registered and should have been, he relied upon his immediate supervisor, Scott Cameron Armstrong, who assured him that his lack of registration was not a problem at that time. Smith explained that he thought he would have to submit a complete new registration package when he returned to Fortune in January, 1997. He did not realize that a transfer request might have merely reinstated his current registration. That he was unaware of this process Smith emphasized when he submitted in evidence a photograph of himself which he said was taken for submission with a new application to be forwarded to this Office in May, 1997. The photograph is dated May 14, 1997.

Throughout the winter, Smith said he was continuously reassured by Armstrong that "everything was OK with the securities commission". Smith admits that he was uneasy and perhaps he should have done more to ensure that his registration was effected if it needed to be.

Smith argues that his primary concern was always his clients. He wanted to ensure that they did not lose out on any tax advantages which might have been available to them during the tax season. During the Hearing, Smith explained in some detail the "borrowing to invest" or leveraging investment philosophy which he used with his clients as well as the degree and extent of financial advice he provided to them.

With regard to the Respondent's false and misleading statements given on May 23 to the Deputy Administrator, Smith said that the "worse thing I ever did was lying to Ed and I apologized to him". His only explanation for doing so was that he became scared when the Deputy Administrator started to ask questions about his sales activities at Fortune.

The Deputy Administrator, in his submissions, argues that the Respondent knew that registration was required in order to trade in securities because he was registered before with two mutual fund brokers. He argues that the Respondent knew that he should not have been selling securities and it was this knowledge that caused him to lie to the Deputy Administrator on May 23. Smith's argument that Armstrong told him his registration was "OK" is merely "convenient". If he had in fact thought that it was "OK", there would have been no reason to lie.

III CONCLUSIONS :

It is clear that the Respondent violated the registration provisions of the Securities Act by selling mutual funds when he was not registered to do so contrary to section 5, and that these violations were not isolated but occurred over a six month period and would have continued had they not been discovered by this Office. While the Respondent admits to these transgressions, he seeks to excuse them by declaring that, whether registered or not, he had an even greater duty to his clients to ensure their affairs were in order during tax season. I cannot accept this argument.

The Securities Act establishes what is acceptable conduct and qualifications for those purporting to provide investment advice. Smith's argument about an overriding concern for his clients, if taken to an extreme, would allow any individual whether qualified or not, to claim a superior client interest as a defense for improper conduct. The requirement to be registered to trades securities is fundamental to the regulatory scheme created by the legislature to protect capital markets and the investing public. Registration ensures that individuals seeking to advise the public meet minimum educational and conduct standards. The Act empowers the Administrator to determine in what circumstances registration will be granted. It does not provide an exemption to Smith for any principle of superior client interest.

I have difficulty accepting the implications of Smith's arguments in favor of an overriding client interest when one considers that registered salespersons were available at Fortune to advise his clients and execute trades for them. Smith acknowledged at the Hearing that should he not be able to obtain reinstatement of registration he would work to ensure his clients are transferred to qualified registered salespersons. If client interest was paramount in early 1997, one might conclude he could have effected the transfer then rather than place his clients in the position of trading with a non-registered salesperson.

Finally, I have difficulty in accepting the Respondent's argument when one considers that his activities were not entirely altruistic. He expected to receive over $10,000 in commissions from his branch manager for his trading activities, and did in fact receive approximately $5,000.

This observation leads me to Smith's argument that he relied upon the assurances of his immediate supervisor that his non-registration status was acceptable to this Office. Throughout the Hearing, the Respondent continually reiterated both his frustration and unease with this assurance but he failed to act upon it. While I accept

that the branch manager has an obligation to ensure that employees are registered to trade, this duty does not eliminate a similar responsibility on the part of the salesperson.

I find convincing the Deputy Administrator's arguments that Smith lied to him in his May 23rd interview because Smith knew he should have been registered. The Respondent really has no other reasonable explanation for his actions during this interview.

IV ORDER :

At the Hearing both the Respondent and the Deputy Administrator spoke of sanctions that should be appropriate in the circumstances. The Respondent asked that he be given benefit of the doubt "because of the situation I was put into" - that is, not having been informed that his registration was not "OK". Smith argued that there was no fraudulent intent and no harm has been demonstrated to clients. Smith seeks reinstatement so that he can continue to service his clients.

The Deputy Administrator argues, on the other hand, that Smith's actions demonstrate a disregard for the legislation which is meant to protect the investing public from dishonest treatment by salespersons. He argues that those who earn their livelihood from selling securities should expect severe consequences if they either mislead this Office or breach the Securities Act. The Deputy Administrator further argues that the Respondent's registration should be canceled immediately and that the Office of the Administrator not consider any new application from Smith for at least five years, a standard regulatory penalty, he states for misrepresentation to a securities regulator.

After full consideration of the evidence and arguments before me I Order that :

1. the salesperson's registration of Earle Mackenzie Smith be canceled immediately;

2. the Office of the Administrator not consider any application for registration from the Respondent for a period of 3 years from the date of this Decision and Order; and

3. should the Respondent seek registration, he submit proof that he has successfully retaken an investment funds course within the six months prior to the date of the application.

The Respondent is reminded that the Securities Act offers avenues of appeal from this decision. However, he should be aware that time limitations may apply.

DATED at Saint John, New Brunswick this 24th day of October, 1997.

Donne W. Smith, Jr.
Administrator

289/97/CA

IN THE COURT OF APPEAL OF NEW BRUNSWICK

Ryan, Turnbull and Drapeau, JJ.A.

B E T W E E N:

EARLE MacKENZIE SMITH APPELLANT **- and -** **THE ADMINISTRATOR OF THE SECURITY FRAUDS PREVENTION ACT** RESPONDENT	Michael D. Brenton, Esq. for the Appellant Peter A. MacNutt, Q.C. for the Respondent
APPEAL FROM DECISION OF	Donne W. Smith, Jr. Administrator October 14, 1997
DATE OF HEARING	March 11, 1998
DATE OF DECISION	June 23, 1998
REASONS FOR JUDGMENT BY	Turnbull, J.A.
CONCURRED IN BY	Ryan, J.A. and Drapeau, J.A.

THE COURT

The appeal is allowed but without costs. The order of the Administrator is varied.

TURNBULL, J.A.

Earle MacKenzie Smith sold mutual funds while not registered to do so as required by the **Security Frauds Prevention Act**, R.S.N.B. 1973, c. S-6 which may be cited as the **Securities Act**. See s. 45. He also misled the Deputy Administrator appointed under the **Securities Act** about those sales. Mr. Smith now appeals the length of the prohibition imposed against any application for his re-registration ordered by the respondent, the Administrator appointed under the **Securities Act**. That Order, dated 14 October 1997, followed a hearing by the Administrator into Mr. Smith's actions. The Administrator ordered that:

> 1. the salesperson's registration of Earle Mackenzie Smith be cancelled immediately;
>
> 2. the Office of the Administrator not consider any application for registration from [Mr. Smith] for a period of 3 years from the date of this Decision and Order; and
>
> 3. should [Mr. Smith] seek registration, he submit proof that he has successfully retaken an investment funds course within the six months prior to the date of application.

Any appeal from the Administrator's order requires the permission prescribed by section 37(3) of the **Securities Act** which reads:

> 37(3) An appeal lies to the Court of Appeal, from any decision or order of the Administrator, upon any question as to his jurisdiction or upon any question of law, but such appeal shall be taken only by permission of a judge of The Court of Queen's Bench of New Brunswick given upon a petition presented to him within fifteen days after the rendering of the decision or

> the making of the order appealed from, and upon such terms as the judge may determine.
>
> [Emphasis added]

In a decision dated 12 December 1997, Mr. Justice Turnbull, a judge of the Court of Queen's Bench of New Brunswick, granted permission for this appeal. After referring to the Administrator's decision imposing penalties against Mr. Smith's manager, Scott C. Armstrong, the Judge said:

> ... I have allowed [Mr. Smith] to raise the question of dissimilarity in the sanctions imposed on the basis this could raise a question of an excessive sanction that would go to jurisdiction.

Mr. Smith's grounds of appeal are summarized as follows:

1) that the penalties imposed by the Administrator "were so severe and extreme in the circumstances" that they constituted an error in law and thus exceeded the jurisdiction granted the Administrator under the **Securities Act**; and

2) that the Administrator discriminated against Mr. Smith when he imposed more severe penalties against him than against other sales persons for "like breaches" of the **Securities Act**, "which discrimination constituted" an error in law and was in excess of the Administrator's jurisdiction.

Thus, this appeal concerns the appropriate standard of review to be used by this Court when reviewing a

decision of the Administrator, which is not protected by a privative clause, when there exists a statutory right of appeal and where the issue is the severity of the penalty for an admitted violation of the **Securities Act**.

Briefly, the relevant statutory provisions concerning registration to sell mutual funds are as follows. Section 5 of the **Securities Act** prohibits anyone from trading in any security, which includes mutual funds, unless the person is properly registered; failure to register constitutes an offence. Section 5(1) of the General Regulation - **Security Frauds Prevention Act** (**Regulation 84-128**) requires that "the application for registration as a salesman shall be made by the broker employing the salesman." Section 10 of the General Regulation provides further that "the registration of a salesman shall be suspended upon termination of employment with a registered broker." In such case, the employer and the salesman must notify the Administrator. And, such suspension continues until a registered broker notifies the Administrator of the salesman's re-employment by endorsing the salesman's application for registration. In addition, a salesman's registration lapses on the 31st day of October each year unless an application for the renewal of the registration is made on or before the 21st of October; see s. 7 of the General Regulation.

Mr. Smith acknowledged that he was not registered as a mutual fund salesman at the relevant time. The circumstances with respect to this failure to register are not in dispute. The evidence before the Administrator was primarily contained in a signed Statement of Admitted Facts. Mr. Smith, now 57, first registered under the **Securities Act** as a mutual fund salesman on 5 January 1996. He was then employed by Fortune Investment Corporation, which employment continued until September 30, 1996 when his registration was suspended because

he resigned from Fortune. His registration was reinstated effective 1 November 1996 when he became employed by Regal Capital Planners Ltd. That registration was due to expire 31 October 1997. However, on 7 November 1996, Regal Capital Planners withdrew its sponsorship of Mr. Smith and, as a consequence, his registration was again suspended because he had no registered employer. At the time of the hearing before the Administrator, on 19 September 1997, Mr. Smith's registration was still suspended.

Mr. Smith rejoined Fortune Investment Corporation in December 1996, but did not apply for reinstatement of his registration. Between 23 December 1996 and 13 May 1997, Mr. Smith, while representing Fortune, engaged in fifteen mutual fund sale transactions to twenty-three investors either individually or jointly. He earned $10,500.00 in commissions from those sales. Fortune personnel, who were licensed under the **Securities Act**, executed the required documents to evidence the sales. Mr. Scott Armstrong, Fortune's Saint John Branch Manager, signed the sale documents from February 15 to May 13, 1997.

On 23 May 1997, the Deputy Administrator, while participating in a national compliance review of Fortune, questioned Mr. Smith about his sales activities. Mr. Smith admits that he made a false and misleading statement to the Deputy Administrator. He denied that he made any sales or that he received any sales commissions. In an affidavit, in support of the application for permission to appeal the Administrator's Order, Mr. Smith deposed:

> However, within three days of our meeting I voluntarily contacted Mr. LeBlanc [the Deputy Administrator] and advised him that the information that I had provided to him

> was incorrect, and I fully disclosed my involvement in the various transactions listed in Exhibit "A" hereto [the Statement of Admitted Facts].

The respondent did not dispute this claim. There was no evidence that any other complaint had been made about Mr. Smith to the Administrator's office.

With respect to Mr. Smith's failure to reinstate his registration, he acknowledged to the Administrator that he knew he was not registered and should have been. He claimed that he was relying on Mr. Scott Armstrong's assurances that "registration was not a problem at that time."

In determining Mr. Smith's penalties, the Administrator considered that Mr. Smith knew he was not registered yet sold mutual funds over a six month period "and would have continued had they not been discovered by this Office." He properly rejected Mr. Smith's claim that his duty to his clients during tax season was greater than his obligation to register under the **Securities Act**. With respect to Mr. Smith's argument about his reliance on the branch manager, Mr. Armstrong, the Administrator commented:

> While I accept that the branch manager has an obligation to ensure that employees are registered to trade, this duty does not eliminate a similar responsibility on the part of the sales person.
>
> I find convincing the Deputy Administrator's argument that Smith lied to him in his May 23rd interview because Smith knew he should have been registered.

Before setting-out Mr. Smith's penalties, the Administrator stated:

> The Deputy Administrator argues, on the other hand, that Smith's actions demonstrate a disregard for the legislation which is meant to protect the investing public from dishonest treatment by salespersons. He argues that those who earn their livelihood from selling securities should expect severe consequences if they either mislead this Office or breach the Securities Act. The Deputy Administrator further argues that the Respondent's registration should be cancelled immediately and that the Office of the Administrator not consider any new application from Smith for at least five years, a standard regulatory penalty, he states for misrepresentation to a securities regulator.
>
> [Emphasis added]

Mr. Smith claims that the severity and extremity of the prohibition against registration and its discriminatory application to him in the circumstances constitutes an error in law that caused the Administrator to exceed his jurisdiction. In particular, he argues that his three year prohibition from registration should not have been greater than Mr. Scott Armstrong's nine month prohibition; and, in general, that there is no New Brunswick standard regulatory penalty of a five year prohibition from registration "for a misrepresentation to a securities regulator", as represented to the Administrator by the Deputy Administrator. We were not referred to any cases outside New Brunswick dealing with registration prohibitions for misrepresentation to a securities regulator. Nor were we advised that the Deputy Administrator referred any such cases to the Administrator. However, Counsel for Mr. Smith and the Administrator provided us with copies of what they considered were all the similar fact decisions and orders (twenty-six) of

the Administrator between 1990-1997; they are only available from the Administrator. I will summarize these cases before discussing the appropriate standard of review to be applied to any review of the term of Mr. Smith's prohibition from applying for registration under the **Securities Act**.

As noted, Mr. Smith's manager, Mr. Scott Armstrong, was also penalized by the Administrator in a decision and order dated 22 October 1997, two days before the Smith Decision. Mr. Armstrong had 14 years experience in the securities industry, while Mr. Smith had less than two. The Administrator found that Mr. Armstrong directed and processed under his own name some 33 separate, mostly mutual fund, trades by three persons (including Mr. Smith) who were not registered under the **Securities Act** and by one person who did not comply with the restrictions attached to his certificate of registration. In addition, the Administrator found that Mr. Armstrong:

> ... made a materially false statement to this Office when he indicated in completing a termination notice that the named salesperson left the employment of Fortune in good standing when in fact that salesperson had been dismissed for cause.

For these actions of misrepresentation and trading offences under the **Securities Act**, the Administrator suspended Mr. Armstrong's registration as a sales person for nine months and imposed these conditions for re-registration: the successful completion of approved securities industry courses and a written undertaking by a third party supervisor to supervise Mr. Armstrong and report quarterly to the Administrator for one year. For Mr. Armstrong's violations of the standards of conduct while acting as a branch manager, the

Administrator imposed a three year prohibition against Mr. Armstrong considering any managerial position in the securities industry.

Apart from Mr. Smith, there were three other unregistered persons whose sales were directed and processed by Mr. Armstrong. There was no record of any decision or order of the Administrator penalizing one of those persons in the similar fact cases filed with us. In the case of the other unregistered person, the Administrator confirmed a fourteen day suspension proposed in a Settlement Agreement between that person and the Deputy Administrator with respect to five sales. In the case of the person whose registration was restricted to mutual fund securities only, the Administrator confirmed a two day suspension proposed in a Settlement Agreement between that person and the Deputy Administrator with respect to ten trades in the security. In both cases there is no record that either person misled the Administrator or the Deputy Administrator.

The other twenty-two decisions and orders of the Administrator do not determine that there was a "standard regulatory penalty," let alone a five year suspension for misrepresentation to the New Brunswick securities regulator. Including the failure to disclose prior criminal convictions and other regulatory discipline proceedings within the term misrepresentation, there were nine such cases considered by the Administrator. In two cases initial registration was refused because of a failure to disclose a past criminal record in the application form. One application was refused because the applicant disclosed five prior fraud convictions. In another, registration was refused because: the applicant sold securities while not registered, misrepresented the security and failed to deliver a prospectus to the client, lied to the investigator and persuaded others to lie to cover up the illegal activities.

Another person's registration was suspended for three months to coincide with the October 31st registration renewal date, and advised re-registration would be refused until pardons for previous criminal convictions were obtained. In the other five misrepresentation cases suspensions ranging from two weeks to twenty months were imposed by the Administrator. Excluding a conditional registration and a reprimand and cost assessment against a corporation for failing to adequately supervise its sales force, the remaining ten cases concerned failures to register under the **Securities Act** and violations of conditions attached to a person's registration. In those cases, the Administrator imposed penalties ranging from a letter of reprimand, to three two week, one one month, one two month, one three month, one four month and two fourteen month suspensions. While caution is necessary when comparing those cases to the facts in this appeal, it is obvious that, in New Brunswick, there is neither a standard regulatory penalty nor a consistent penalty for what appears to be similar violations of the **Securities Act**. For example, in the case of the four month suspension, the person was a branch manager who hired unregistered sales persons to sell securities which she processed as if they were her sales. Moreover, she fabricated documents and not only lied to the investigator but persuaded unregistered salespersons and some clients to conceal her illegal activities from the investigator. Indeed, apart from refusals to register, the range of suspension imposed by the Administrator is from two days to twenty months except for Mr. Smith.

Nevertheless, the issue before us is whether the Administrator erred in law or exceeded his jurisdiction in the manner in which he penalized Mr. Smith. Certainly, the Administrator and the Deputy Administrator knew, or ought to have known, that, in New Brunswick, between 1990 and 1997 there

was no standard regulatory penalty for misrepresentation to a securities regulator.

In **Pezim** v. **British Columbia (Superintendent of Brokers)**, [1994] 2 S.C.R. 557. Mr. Justice Iacobucci, writing for a unanimous court, determined the appropriate standard of review for an appellate court when reviewing a decision of a securities regulator not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of statutory interpretation. Following a review of the nature of the regulatory framework of the securities industry and precedent, he concluded that an appellate court should give judicial deference to the decisions of the securities regulator on issues that fall squarely within its area of expertise. As such, in each case, it is necessary to specifically focus on the question of jurisdiction or the question of law to decide whether it falls within the regulator's specialized expertise and whether deference is warranted.

Mr. Smith is not alleging that the Administrator exceeded his jurisdiction or erred in law in finding that he sold securities when he was not registered and misrepresented that fact to the Deputy Administrator. Nor is Mr. Smith challenging either the cancellation of his registration, albeit that it was suspended at the time of the hearing, or successfully passing an investment funds course as a condition precedent to re-registration. Mr. Smith is, however, challenging the Order establishing the length of time he must wait, three years, before he can apply for re-registration.

In determining the three year prohibition, the Administrator acted pursuant to the broad discretion granted by

section 12 of the **Securities Act**, in particular subsections 12(1)(c)(v) and 12(1)(f) which read:

> 12(1) The Administrator may order that
>
> (c) a registration be suspended or cancelled upon
>
> (v) the Administrator being satisfied that such action is in the public interest;
>
> . . .
>
> (f) the registration of any broker, salesman or sub-agent be subject to such conditions as the Administrator deems necessary.

In New Brunswick, the Administrator has similar powers to those of the Commissions respecting the securities industry in other provinces. See **Pezim**.

Because the Administrator is given a broad discretion to make orders that he considers in the public interest, pursuant to s. 12 of the **Securities Act**, Iacobucci, J. commented in **Pezim** about the standard of review to be applied to such orders at page 607:

> Thus, a reviewing court should not disturb a Commission's order unless the Commission has made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner.

Further, at p. 608, he cited with approval the following comment by the Ontario Court of Appeal in **Re Securities Commission and Mitchell**, [1957] O.W.N. 595 at p. 599:

> The opinion of the Commission should not be set aside or altered upon an appeal unless the Commission has erred in some principle of law or unless it appears clearly that the Commission has not proceeded to form its opinion in a judicial manner or unless it appears that the opinion of the Commission is so clearly wrong as to amount to an injustice requiring a remedy on appeal.

Earlier in his **Pezim** judgment, at pages 591 and 592, Iacobucci J. referred approvingly to **Brousseau** v. **Alberta Securities Commission**, [1989] 1 S.C.R. 301 when discussing the judicial assessing of decisions of a securities commission. In **Brousseau**, Madam Justice L'Heureux-Dubé, in an unanimous judgment, at p. 315, approved the proposition by Dubin J. A. of the Ontario Court of Appeal in **Re W.D. Latimer Co. Ltd. and Bray** (1974), 52 D.L.R. (3d) 161 at p. 167 with respect to the obligation of a securities regulator when assessing a disciplinary penalty. He said:

> I view the obligation of the Commission towards its registrants as analogous to a professional body dealing in disciplinary matters with its members. The duty imposed upon the Commission of protecting members of the public from the misconduct of its registrants is, of course, a principal object of the statute, but the obligation of the Commission to deal fairly with those whose livelihood is in its hands is also by statute clearly placed upon it, and nothing is to be gained, in my opinion, by placing a priority upon one of its functions over the other.

A securities regulator, therefore, when assessing discipline must act fairly so as not to impose an unjust penalty on the party being disciplined. It is the Court that will determine if the discipline imposed by the regulator is fair;

recognizing, that the legislated duty of the regulator is not only to protect the public, but also to deal fairly with someone whose livelihood is within the purview of the **Securities Act**. Thus, after balancing these two factors, the securities regulator is duty bound to adhere to the principle of fairness when exercising its discretion with respect to discipline. If it fails to do so, the securities regulator will have made an error in law. This results in an excess of jurisdiction. The test of fairness should be made by reference to a comparison of the facts of the case before it and other similar cases where discipline was imposed. The failure of the securities regulator to properly carry out such a comparison when imposing discipline not only can lead to such a wide variation of discipline as to be unfair and unjust, but also a discipline that is vexatious or capricious. In the event of an anomalous case, some reference to that fact should be made by the securities regulator to explain the disparity in discipline from what would naturally be expected even though the securities regulator may not be bound by precedent.

In this case the Administrator purported to rely on a representation by the Deputy Administrator that there was a standard regulatory penalty for misrepresentation to a securities regulator. That penalty was alleged to be a five year prohibition from registration. Based on the similar fact cases filed with the Court, that representation was incorrect and misleading. Indeed, as already discussed, the three year prohibition is much greather than the penalties imposed by the Administrator in the similar fact cases and there is no explanation for such disparity. Accordingly, the Administrator erred on a question of law by imposing an unfair prohibition thereby entitling this Court to intervene.

Mr. Smith did not defraud the public. There was no evidence that any of the twenty-three investors were prejudiced. There were no public complaints made against him. There was no evidence that he had previously offended the provision of the **Securities Act**. He did not ask others to lie on his behalf. He initiated the contact with the Deputy Administrator to rectify his misrepresentations. Mr. Smith's **Securities Act** registration was initially suspended only because he ceased to be employed by a registered broker. The suspension continued because he failed to re-register when he was re-employed by another registered broker. In these circumstances, I would reduce the prohibition from three years to nine months; the same term imposed on Mr. Smith's manager, Mr. Armstrong. In addition, I would vary the third part of the Administrator's order by deleting the words "within the six months."

DISPOSITION

I would allow the appeal and reduce Mr. Smith's registration prohibition under the **Securities Act** from three years to nine months from the date of the Administrator's Order, October 14, 1997. I would vary the third part of the Administrator's Order by deleting the words "within the six months." In all other respects, I would confirm the other provisions of the Administrator's Order. Section 37(4) of the

Securities Act provides that costs may not be awarded against the Administrator.

WALLACE S. TURNBULL, J.A.

WE CONCUR:

PATRICK A.A. RYAN, J.A.

J. ERNEST DRAPEAU, J.A.