

PROVINCE OF NEW BRUNSWICK

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

AND

IN THE MATTER OF the
Registration of Fernand
Robichaud;

AND

IN THE MATTER OF the
Registration of Donald MacKay.

ORDERS AND REASONS

(Subparagraph 12 (1)(c)(v) and paragraph 12 (1)(f) of the Act)

Hearings: June 26, 1992

Tribunal: Donne W. Smith, Jr., Administrator

Counsel: Eugene D. Westhaver, Q.C. -for staff of the Office of the
Administrator

Michael MacWilliam -for Fernand Robichaud and
Donald MacKay

Pursuant to separate Summonses to Appear dated December 18, 1991, hearings were conducted on Friday, June 26, 1992 to consider allegations against registrants, Fernand Robichaud and Donald MacKay. The hearings occurred after several adjournments.

Both counsel for Mr. Robichaud and Mr. MacKay as well as counsel for the staff of the Office of the Administrator requested that the evidence given and objections made at previous hearings be adopted for similar purposes here, in particular those hearings involving registrants Clyde Woodworth and Ulysse Kerry. In agreeing to accept this evidence and submissions where applicable, I reiterate as well my decision and reasons more particularly outlined In The Matter Of Clyde Woodworth.

At the outset of these hearings counsel for the registrants stressed that both individuals acknowledge their violations of the trading provisions of the Securities Act. The allegations in the respective summonses were also admitted except, in the case of Mr. Robichaud, allegations 2(d)(i) and (ii), and for Mr. MacKay, allegations 2(d)(i) and (ii). In both instances these allegations relate to concealment of evidence during the course of investigations. Counsel for the Office of the Administrator did not actively pursue these issues at the hearings.

It was agreed between counsel that the purpose of each hearing was to give further evidence and submissions on sanctions. During his hearing Mr. Robichaud gave testimony and was cross-examined. Mr. MacKay, for his part, did not testify.

In both hearings the parties consented to the introduction of additional documentary evidence. These exhibits include certificates of registration for Fernand Robichaud and Donald MacKay as well as a copy of the letter from Money Concepts (Canada) Limited appointing MacKay-Robichaud Insurance Agency Inc. as Regional Vice-President. Of significance also is a letter dated September 7, 1988 from Martin E. Holl, Vice-President, Compliance, Money Concepts Group Capital Corp. to the Administrator and another dated January 27, 1989 from Don MacKay to W. A. (Al) Teeter, Senior Vice-President, Marketing, Money Concepts. The former letter informs the Administrator of the appointment of Donald MacKay as "manager for the Province of New Brunswick" while the latter advises Money Concepts head office of the formation of MacroB Holdings Limited to market real estate investments. The issue of supervisory or compliance functions and the extent of head office knowledge about the sale of real estate limited partnerships are important factors in determining the nature of sanctions to be imposed on the two registrants.

In his testimony at his hearing, Mr. Robichaud denied any responsibility for "compliance" as he understood its meaning under the Securities Act. While his definition was never explained, it remains his opinion that all sales of securities by the Money Concepts franchises are directed from head office. While Mr. MacKay did not testify it may also be concluded that he too believes he had no "compliance" functions. In doing so, both registrants unfortunately exhibit a fundamental lack of understanding of what is meant by compliance.

Whether compliance is viewed in technical terms pursuant to provisions of securities legislation or in more broad, every day language there can be little doubt that Mr. MacKay was the provincial manager and Regional Vice-President for Money Concepts Group Capital Corp. and was charged with supervisory responsibilities. The correspondence referred to above, both from Money Concepts to the Administrator and from Mr. MacKay to Money Concepts, makes reference to Mr. MacKay's positions. The letter to Al Teeter of January 27, 1989 in which Money Concepts is advised of the formation of Macrob Holdings Limited and its purpose is signed by Mr. MacKay as Regional Vice-President.

While it was argued that the 1985 Regional Vice-President agreement did not impose specific compliance or supervisory duties it did require the Regional Vice-President to "use your best efforts to assist us in the development, management and supervision of Money

Concepts Financial Planning Centre Franchises in the region". This duty was still extant in 1988 when approval was granted to Money Concepts to distribute mutual fund securities.

It is difficult for me to accept that Mr. MacKay was neither aware nor knowledgeable of even the most basic supervisory responsibilities which Money Concepts head office advised this Office were placed upon him. Copies of letters from Money Concepts which accompanied the applications for registrations of Clyde Woodworth, Ulysse Kerry and Robert Colpitts were filed as evidence. They make specific reference to Mr. Mackay's responsibility to supervise all representatives. Surely, such duties were important in his role as Regional Vice-President. To Mr. MacKay, as to anyone who supervises or performs "compliance" functions, the most fundamental duty must be to ensure that those employees for whom Mr. Mackay was responsible were distributing only the securities which they were licensed to sell. Unlike Ulysse Kerry or Clyde Woodworth, Donald MacKay was not a "minor player" in the operation of Money Concepts in New Brunswick.

With regard to Fernand Robichaud there is no evidence that he was personally delegated any supervisory responsibilities within the Money Concepts system. Even if no such duties were specifically imposed upon him it can be concluded that as an officer and director of Macrob Holdings Limited he was seen by the other Money Concepts registrants as a key individual in the scheme to

distribute real estate limited partnerships.

At his hearing Mr. Robichaud also testified that in establishing Macro Holdings Limited and in hiring Marilyn Pollock to distribute real estate limited partnership, through a relationship with J.M. Veilleux Income Property Inc., there was no intent to deceive the general public. The point is made that if there had been such an intent there would not now be the paper trail which has been submitted in evidence during these hearings. Furthermore, it is argued that Money Concepts Group Capital Corp. as broker/employer was made aware of this scheme by Mr. MacKay's letter to Al Teeter of January, 1989. That the senior officers of Money Concepts did not object or take steps to advise Mr. MacKay and Mr. Robichaud of the inappropriateness of this scheme may be evidence of their failure to perform the compliance duties required by the Securities Act, which failure the Office of the Administrator continues to investigate. However, this alone cannot excuse Mr. Robichaud and Mr. Mackay.

In explaining their actions Mr. Robichaud argues in person and Mr. MacKay through counsel that there was no attempt to mislead the public about their lack of registration to sell real estate limited partnerships. While there is little evidence to contradict this contention, it is nevertheless obvious that both Mr. Robichaud and Mr. MacKay earned very substantial commissions as a result of their involvement in the scheme.

Counsel for staff of the Office of the Administrator suggests that the test of responsibility for sales of securities must be the determination of the simple question - upon whom would clients rely for advice regarding their investments: their financial advisors like Mr. MacKay and Mr. Robichaud who acknowledge making the original referrals, or Marilyn Pollock, the legally authorized individual who finalized the sales? If, as some of the Money Concepts registrants have contended, clients rely so completely upon them for financial advice, is it not probable that they also viewed the registrants as salespersons for the limited partnerships?

Counsel in both hearings agree that violations of the Securities Act were made by Mr. Robichaud and Mr. MacKay, namely, the sale by them of real estate limited partnerships when they were not licensed to do so. Having admitted fraud as defined by the Act, the registrants are prepared to accept sanctions.

Counsel for both Mr. Robichaud and Mr. MacKay reiterate that there has been no public complaint with regard to their activities. Each of Mr. Robichaud and Mr. MacKay has been in the financial services industries for a minimum of 20 years. Mr. MacWilliam contends that both have greatly suffered the humiliation and embarrassment which public awareness brings to matters such as these. He stressed in an earlier hearing that senior officers of Money Concepts also

bear responsibility for failing in their duty to supervise Mr. Mackay and Mr. Robichaud.

It can never be repeated too often that the public interest demands only those individuals fully qualified to deal in securities be registered to do so. Without public confidence in the regulatory system, including the scheme of registration of individuals, our securities system is endangered. It is never in the public interest to wait until investors suffer actual monetary loss before taking action to preserve the integrity of the system. Indeed, it is my duty as Administrator to act to prevent such harm. These two hearings are further examples of that action.

With regard to sanctions, I have carefully considered the representations of counsel. However, Mr. Robichaud and Mr. MacKay were leaders, not followers in this scheme to distribute real estate limited partnerships. I believe it is in the public interest that a period of suspension of registration be ordered for both individuals and the length of suspension must reflect their involvement. I recognize that when their employment with Money Concepts Group Capital Corp. was terminated on January 27, 1992, their registration was suspended. This time period will now be taken in consideration.

Additionally, I believe it is in the public interest to award costs against Mr. Robichaud and Mr. MacKay. Along with others they must share their proportion of the expenses of the investigation which has resulted in these hearings. On the otherhand, I agree with counsel that Mr. Robichaud and Mr. MacKay should not be penalized for seeking counsel and adjournments.

THEREFORE, IT IS ORDERED, pursuant to subparagraph 12(1)(c)(v) and paragraph 12(1)(f) of the Securities Act that, with regard to Fernand Robichaud, :

1. His registration as a salesperson remain suspended until March 31, 1993;
2. He pay the sum of \$4,000.00 to the Minister of Finance, this sum being the total amount to be recovered against him pursuant to subsection 25(2) of the Act for costs and expenses occurred while carrying out these investigations and proceedings;
3. Before approval of reinstatement of registration on or after March 31, 1993 he file proof that he has successfully re-taken an investment funds course sponsored by either the Investment Funds Institute of Canada, the Trust Companies Institute of Canada or the Institute of Canadian Bankers; and

4. Upon him requesting reinstatement on or after March 31, 1993 and satisfying the Registrar that the above conditions have been met, the Registrar shall so reinstate his registration subject to the normal requirements of any application for reinstatement.

AND, IT IS ORDERED, pursuant to subparagraph 12(1)(c)(v) and paragraph 12(1)(f) of the Act that, with regard to Donald MacKay:

1. His registration as a salesperson remain suspended until March 31, 1993;

2. He pay the sum of \$4,000.00 to the Minister of Finance, this sum being the total amount to be recovered against him pursuant to subsection 25(2) of the Act for costs and expenses occurred while carrying out these investigations and proceedings;

3. Before approval of reinstatement of registration on or after March 31, 1993 he file proof that he has successfully re-taken an investment funds course sponsored by either the Investment Funds Institute of Canada, the Trust Companies Institute of Canada or the Institute of Canadian Bankers; and

4. Upon him requesting reinstatement on or after March 31, 1993 and satisfying the Registrar that the above conditions have been met, the Registrar shall so reinstate his registration subject to the normal requirements of any application for reinstatement.

DATED at Saint John this 23rd day of July, 1992.

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DONNE W. SMITH, JR.

Administrator