SIPA
SMALL INVESTOR PROTECTION ASSOCIATION

August 11, 2004

Mr. Pat Hoy, MPP
Chair
Standing Committee on Finance and Economic Affairs
Room 1405, Whitney Block
Queen's Park, Toronto, ON, M7A 1A2

Subject: Five Year Review of the Securities Act

Dear Mr. Hoy;

There are many issues being discussed that have an effect on investors generally and there are many who are addressing those issues. SIPA and many others representing investors have made submissions to various committees and groups, including the Five Year Review Committee, yet the approach to investor protection remains fundamentally flawed.

Recommended best practices and recommended guidelines fail to provide protection when the monetary rewards gained by ignoring guidelines and breaching the rules are high. The self regulatory approach to providing investor protection has failed the small investor.

Notwithstanding the fact that many of the issues such as mutual fund governance, insider trading, and late trading are important and effect all investors, SIPA believes the major problem facing individual investors is the risk of extreme loss due to widespread wrongdoing in the investment industry.

SIPA's primary concern is twofold.

Firstly, there are fraudsters who prey on the public and are registered by the regulators to operate in one regulatory jurisdiction. They are able to continue operating long after there is evidence of wrongdoing. Investigations are not disclosed to the public and many investors are victimized during the investigation process. If a provincial regulator stops the fraudulent activities, the perpetrators of the fraud often continue their operations in another provincial jurisdiction. There is a lack of investor protection.

An example is Synlan Securities and Richard Smith recently banned by the BCSC and fined $750,000. Synlan and Smith were previously banned by the OSC and

found guilty in criminal court. Our fractured regulatory system could not prevent them operating in another jurisdiction and taking advantage of still more victims. A copy of the BCSC decision is appended.

The second issue is the widespread wrongdoing in the investment industry that directly causes investor loss. In many cases seniors have lost the majority of their life savings due to this wrongdoing. The regulators are unable to effect protection and are powerless to order restitution except in Manitoba. The regulators and ministries responsible contend that victims can seek justice through civil litigation. For many victims this is not possible.

A recent Ontario Appeals Court decision in the Hayward vs. Hampton Securities case vividly illustrates this problem. Mrs. Hayward, in her eighties, depended upon her financial advisor. She complained to the firm and to the regulators. They did not help to resolve the dispute. She was compelled to launch a civil action and won in lower court. The decision in her favour was appealed. The Appeals Court upheld the decision.

The decision, a copy is appended, indicates there was discretionary trading without authority, high leverage, excessive trading and unsuitable investments. Mrs. Hayward was 92 years old when she received the decision. Why did not the regulators pick up on these issues when she made her complaint? Were the regulators seeking a balance between investor protection and fostering capital markets? Or was there a conflict of interest in our regulatory system that precluded a wise decision to settle this dispute for Mrs. Hayward?

The fact that industry will "defend vigorously" situations that appear morally and ethically indefensible suggests that self regulation will not provide investor protection. Change must be made.

SIPA believes the regulatory system has failed the individual investor. Although the regulators say that investor protection is important, there are no remedial powers utilized to effect protection for small investors.

If all industry participants followed the rules, recommended best practices and the Securities Act there would be fewer disputes. The problem is there are widespread practices of wrongdoing. The rules are regularly broken, there is failure to properly supervise, and there are condoned practices of churning, leveraging, and selling inappropriate investment products.

Why is this done? The investment industry is commission driven. The leaders of the industry seem to be motivated solely by profit. While there may be written codes of ethics and recommended best practices, these are often ignored or a blind eye is turned. The problems are systemic and change is needed.

Will changing the rules help? It hasn't seemed to help much so far. More stringent enforcement and remedial regulation are required.

What can be done?

The Act

One of the purposes of the Act is "to provide protection to investors from unfair, improper or fraudulent practices."

The FYRC Report states "the concept that registered dealers and advisors 'deal fairly, honestly and in good faith with clients is not set out in the Act, although this must surely be considered a cornerstone of securities regulation in Ontario." SIPA believes this principle should be incorporated in the Act and not set out as a rule. This concept is of fundamental importance.

Restitution or Compensation Order

The FYRC report states "The Commission has no authority under the Act to make a restitution or compensation order. This is consistent with the objective of regulatory legislation in general and the Commission's public interest jurisdiction which is protective, not remedial." The FYRC notes that the Manitoba Securities Commission and the FSA in the United Kingdom have the power to order restitution.

The FYRC Report has recommended that the Commission monitor the new restitution powers of the Manitoba Securities Commission. SIPA believes the current regulatory system has failed individual investors. Many have lost the entirety of their life savings due to industry wrongdoing that at times also includes fraud. SIPA has recommended that all the provincial securities commissions be given this power until such time as there is a national investor protection authority that can provide adequate investor protection.

The IDA

The FYRC appears to have accepted that the IDA can function in a dual role of industry representation and regulator. SIPA does not agree that the IDA can provide investor protection except in a general sense. There is too much evidence that individual investors are not well served by the SRO's and industry sponsored organizations. Investor protection must be provided by an authority that is not industry or industry sponsored. It should be provided by a consumer protection agency that is not influenced by industry or rotating industry personnel.

Internet Impact

The Internet is having a major impact on the industry. It can be an amazing tool for those with the skills and time to use it. However many individual investors, particularly the older generations, do not have access to the Internet or the skills to use it. "Access-equals-delivery" should not be applied to communications with individual investors unless they have specifically agreed in writing to this method.

The Wise Persons Committee Report

The WPC Report states, "Individual investors are nearly uniform in demanding systemic change with improved investor protection and enforcement." SIPA is among the 74% of submissions that made specific recommendations for a single regulator in Canada. Most investors do not understand the fractured regulatory system that we have. Those who have been barred from business in one jurisdiction, and subsequently operated in another provincial jurisdiction have victimized some investors.

"It's time for Canada to have a single securities regulator" … "Either we can continue with a fragmented regulatory structure that has served Canada adequately in the past but is ill suited to current realities, or we can choose to create a regulatory structure that helps Canadian capital markets become a source of comparative advantage in the increasingly global marketplace."

SIPA believes it is inevitable that Canada will have a single securities regulator but investor protection cannot wait for that to happen. The provincial jurisdictions need to act now to provide investor protection that is not only prevention but also remedial.

Mutual Funds

We would also take this opportunity to remind you that SIPA has made formal submissions to the Canadian Securities Administrators regarding mutual fund governance and disclosure. We believe major reforms are required to better protect investors who have invested approximately 470 billion dollars in mutual funds.

National Regulator or Harmonized Regulators

Whether Canada opts for a national regulator or whether the provinces succeed in maintaining provincial jurisdictions, Canadian investors will continue to face the risk of losing all of their savings unless the regulators start to provide meaningful investor protection.

The regulators and the government have relied upon the financial services industry doing the right thing. Self regulation and recommended best practices have failed to protect investors and many of our seniors have been deprived of their life savings because our leaders have failed to act responsibly.

Conclusion

Our leaders must take action to provide adequate investor protection. The provincial government should act immediately to legislate the power of restitution to the securities commission. The securities commission should establish an office of investor protection to monitor the complaints received by industry. This office should be empowered to investigate and to order forensic audits in situations where wrongdoing has permeated an organization.

Thank you for the opportunity of presenting our comments.

Yours truly

Stan I. Buell, P.Eng.
President

Cc Premier Dalton McGuinty
Minister of Finance Greg Sorbara
MPP Tony Wong, Markham

Appendix I

2004 BCSECCOM 441

COR#04/104

Richard John Smith and Synlan Securities Corporation

Section 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel Brent W. Aitken Vice Chair
Neil Alexander Commissioner
John K. Graf Commissioner

Date of Hearing July 5, 2004

Date of Decision July 27, 2004

Appearing

Lorne Herlin For the Executive Director

Decision

Background

¶ 1 This is a hearing under section 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. On February 20, 2004, the Executive Director issued an amended notice of hearing alleging that Richard John Smith and Synlan Securities Corporation contravened the Act. Smith is the president and a director of Synlan and is also its secretary and treasurer.

¶ 2 The allegations in the notice of hearing relate to Smith's conviction under the *Criminal Code of Canada* for theft and fraud, sanctions by the Ontario Securities Commission against Smith and Synlan, and a distribution of securities in British Columbia promoted by Smith and Synlan. On the basis of these allegations, the Executive Director is asking that we cease trade Synlan, remove exemptions from Smith, prohibit him from acting as a director or officer of any issuer, and prohibit him from engaging in investor relations activities, and order Smith and Synlan to pay administrative penalties and costs.

Smith's criminal conviction

¶ 3 Smith's criminal convictions stem from a failed financing of commercial real estate. In March 1988, Track Investment Corporation entered into an offer to purchase property in downtown Toronto. Smith, who was an officer of Track, formed a limited partnership to finance the purchase. Investors invested in the limited partnership on the basis that their funds would be held in trust until all conditions precedent to the completion of the purchase were satisfied, including acquisition of title to the property. If any conditions were not satisfied, the limited partnership was to return the investors' funds.

¶ 4 Track withdrew investors' funds before all of the conditions were satisfied. In December 1989, Track failed to make a deposit when required and lost its right to acquire the property. However, Smith and another officer of Track continued to sell units in the limited partnership throughout most of January 1990.

¶ 5 As a result of these events, 31 investors in the limited partnership lost nearly $1.8 million.

¶ 6 In January 1997, Smith was charged with theft and fraud under the *Criminal Code of Canada* and in December 1997, he pled guilty in Ontario Provincial Court to 22 counts of theft over $5,000 and 10 counts of fraud. Smith was sentenced to a term of imprisonment of two years less a day (to be served conditionally) and ordered to perform 180 hours of community service.

Ontario Securities Commission sanctions against Smith and Synlan

¶ 7 Smith was registered with the Ontario Securities Commission as a limited dealer through Synlan. In renewing his registration in 1997 and 1998 he did not disclose to the OSC (in 1997) the criminal charges against him nor (in 1998) his convictions. As a result, the OSC renewed his registration in both years. When these facts came to the OSC's attention, it issued a temporary order in June 1998 suspending Smith's registration. In December 1998, the OSC terminated the registrations of Smith and Synlan, permanently cease traded both of them, and permanently removed their exemptions.

Distributions in British Columbia

¶ 8 Meanwhile, Smith, through Synlan, formed three limited partnerships to raise money to finance residential development units in the United States. Synlan was the promoter of the limited partnerships and owned the general partners of the partnerships. Each partnership was formed to finance a development in a specific community, two in Arizona (the West Valley of the Sun Limited Relationship and the Valley of the Sun Limited Partnership) and one in Florida (the Fairways (I) Limited Partnership).

¶ 9 None of Synlan, Smith, or any of the partnerships filed a prospectus under

the Act, and neither Synlan nor Smith was registered under the Act. Between May 1996 and December 1997, units of the partnerships were sold to 14 residents of British Columbia, purportedly in reliance on the registration and prospectus exemptions contained in sections 45(2)(5) and 74(2)(4) of the Act and sections 90(1) and 129(1) of the *Securities Rules* B.C. Reg. 193/97. Under those sections, the registration and prospectus requirements in sections 34 and 61 do not apply to a distribution if trade has an aggregate acquisition cost to the purchaser of not less than $97,000. Each partnership filed an offering memorandum with the Commission, as well as an exempt distribution report. Each investor paid US$32,000 in cash, and signed a promissory note for amounts ranging from US$85,000 to US$103,000, depending on the total cost of each unit. The offering memoranda stated that rental revenues were expected to be sufficient to cover operating costs as well as all principal and interest on the promissory notes. The memoranda went on to say that if operating costs were insufficient to do so, the promoter (Synlan) would loan the partnership funds sufficient to cover shortfalls, subject to a cap. Using exchange rates in effect during the period the partnership units were sold, US$32,000 was the equivalent of between C$42,000 and C$44,000.

¶ 10 Smith held seminars to promote the sale of the partnerships. Smith also participated in seminars sponsored by Brian Costello, whom Smith and Synlan paid to promote the partnerships. Costello is a financial author, seminar speaker, radio personality and commentator on personal financial matters.

¶ 11 The homes were never built, and the partnerships did not return the investors' funds. The 14 British Columbia investors therefore lost a total of US$448,000 (about C$600,000, using the exchange rates during the relevant period).

¶ 12 Commission staff interviewed 10 of the 14 investors. Some did not realize they had signed a promissory note. Those who did had no expectation that they would ever be required to pay it, as they understood that cash flow from the partnerships would cover it.

Analysis and Findings

Criminal convictions and OSC sanctions

¶ 13 It is well established that a person's conduct in another jurisdiction, and criminal convictions and regulatory sanctions in other jurisdictions based on that conduct, are a legitimate basis for the Commission to make orders in the public interest.

¶ 14 In *Re Holoboff*, [1993] 29 BCSC Weekly Summary 7, the Commission

made orders against the respondents on the basis of findings made, and sanctions imposed, by the Alberta Securities Commission, and their conviction by the Alberta criminal courts of offences under the *Securities Act (Alberta)*.

¶ 15 In *Re Bodnarchuk*, [1997] 27 BCSC Weekly Summary 7, the Commission made orders against Bodnarchuk after finding that his past conduct showed a pattern of disregard for securities regulation, as shown by sanctions imposed by securities regulators in three other provinces.

¶ 16 In *Re Boyle*, 2003 BCSECCOM 852, the Commission made orders against the respondents based on their convictions in Alberta criminal courts of offences under the *Securities Act (Alberta)* as a result of their conduct in that province.

Distributions of the partnerships

¶ 17 The Act, in section 1(1), defines “trade” to include “a disposition of a security for valuable consideration,” and “distribution” as “a trade in a security of an issuer that has not been previously issued”. Synlan, as the promoter of the partnerships, was therefore trading and distributing securities under the Act. Smith was also trading in the units of the partnerships, because the Act defines trade to include “any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of” a disposition of a security for valuable consideration.

¶ 18 Section 34(1) of the Act prohibits persons from trading in securities without being registered under the Act, and section 61(1) prohibits persons from distributing securities without filing a prospectus, and obtaining a receipt for it, under the Act.

¶ 19 These provisions are unchanged in all material respects from the act that was in force during the relevant period.

¶ 20 Neither Smith nor Synlan was registered under the Act and none of them nor any of the partnerships filed a prospectus, so, in the absence of an applicable exemption, Smith and Synlan contravened sections corresponding to 34(1) and 61(1) of the Act when the partnerships issued units to the 14 investors.

¶ 21 According to the exempt distribution reports filed by the partnerships, the distributions of the partnership units were made in reliance on the registration and prospectus exemptions that correspond to sections 45(2)(5) and 74(2)(4) of the Act and sections 90(1) and 129(1) of the Rules. Under those sections, the registration and prospectus requirements in sections 34 and 61 do not apply to a distribution if trade has an aggregate acquisition cost to the

purchaser of not less than $97,000.

¶ 22 Section 8.4 of BC Policy 45-601 *Statutory and Discretionary Exemptions* states the following regarding the meaning of "aggregate acquisition cost":

. . . the Commission takes the position that consideration may include a promise to pay only if the purchaser is certain, or virtually certain, to be called upon to make payment. This would disqualify commitments under various tax oriented arrangements where the issuer or promoter has held out to the investor a hope or expectation that payment of a promissory note will be waived.

¶ 23 At the time of the distribution of the partnership units, identical language was contained in BC Interim Policy Statement 3-24.

¶ 24 In *Re Barclay Las Vegas Limited Partnership*, [1999] 11 BCSC Weekly Summary 5, the Commission considered the meaning of "aggregate acquisition cost" in the context of an exemption that required an aggregate acquisition cost of $25,000. In that case, limited partnership units were offered for $25,000 per unit. Investors paid $10,000 in cash and $15,000 by way of promissory note. The returns shown in the promotional materials were based on a $10,000 investment, and the commission paid to sales agents valued the units at $10,000. Investors testified that they expected cash flow from the investment to pay off the note. After noting that both the substance and the form of the offering must be considered in determining whether it meets the aggregate acquisition cost requirement, the Commission found that the Barclay offering had an aggregate acquisition cost of less than $25,000.

¶ 25 It is clear from the offering memoranda of the three partnerships, and from the investor interviews, that it was not certain, or virtually certain, that the investors would be called upon to make payment under the promissory notes. On the contrary, investors were encouraged to believe, and did believe, that cash flow from the partnerships would discharge the promissory notes. We therefore find that the aggregate acquisition cost of the partnership units was US$32,000 per unit, or between C$42,000 and C$44,000 using exchange rates in effect at the time of the distribution, well short of the minimum aggregate acquisition cost of $97,000 required by the exemption. Therefore the exemption does not apply and, given that there is no evidence that other exemptions applied, Smith and Synlan contravened the sections of the act in force at the time that correspond to sections 34 and 61 of the Act when the partnerships issued units to the 14 investors.

Decision

¶ 26 In *Re Eron Mortgage Corp.,* [2000] 7 BCSC Weekly Summary 22*,* the

Commission cited a non-exhaustive list of factors that are usually relevant to making orders against a person under sections 161(1) and 162. They are:

- the seriousness of person's conduct,
- the harm suffered by investors as a result of the person's conduct,
- the damage done to the integrity of the capital markets in British Columbia by the person's conduct,
- the extent to which the person was enriched,
- factors that mitigate the person's conduct,
- the person's past conduct,
- the risk to investors and the capital markets posed by the person's continued participation in the capital markets of British Columbia,
- the person's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

¶ 27 Smith and Synlan are threats to the capital markets of British Columbia. In the Track situation, Smith was involved in the misuse of investor funds, and continued to raise funds from investors after it was clear that the premise of the investment could not be achieved. The 31 investors involved lost nearly $1.8 million.

¶ 28 A registrant has a duty to inform the regulator of material changes in the information relevant to the registration. By omission, Smith failed in that duty by misleading the OSC as to his suitability as a registrant, first in 1997 by failing to disclose the criminal charges against him, and again in 1998 by failing to disclose his convictions. The OSC regarded this conduct as so serious that it terminated the registrations of Smith and Synlan and cease traded them and removed their exemptions on a permanent basis.

¶ 29 Meanwhile, Smith and Synlan promoted the distribution of securities in British Columbia in contravention of sections 34 and 61 of the Act, leading to losses to 14 investors of about $600,000.

¶ 30 All of this shows on the part of Smith and Synlan a pattern of deceit and disregard of securities regulatory requirements. Their conduct is serious, they have harmed investors, and have damaged the integrity of British Columbia's capital markets. They are not fit to participate in our capital markets. We must also make orders that will have an appropriate deterrent effect.

Orders

¶ 31 Therefore, considering it to be in the public interest, we order:

Smith

1. under section 161(1)(c) of the Act, that the exemptions described in sections 45 to 47, 74, 75, 98 and 99 of the Act do not apply to Smith permanently;

2. under section 161(1)(d)(i), that Smith resign any position he holds as a director or officer of any issuer, except an issuer owned solely by himself or his family;

3. under section 161(1)(d)(ii), that Smith be prohibited permanently from becoming or acting as a director or officer of any issuer except an issuer owned solely by himself or his family;

4. under section 161(1)(d)(iii), that Smith be prohibited permanently from engaging in investor relations activities;

5. under section 162, that Smith pay an administrative penalty of $250,000;

6. under section 174, that Smith pay, jointly and severally with Synlan, costs of or related to the hearing in the amount of $10,312;

Synlan

7. under section 161(1)(b), that all persons cease trading in, and be prohibited from purchasing, the securities or exchange contracts of Synlan permanently;

8. under section 161(1)(c), that the exemptions described in sections 45 to 47, 74, 75, 98 and 99 of the Act do not apply to Synlan permanently;

9. under section 162, that Synlan pay an administrative penalty of $500,000; and

10. under section 174, that Synlan pay, jointly and severally with Smith, costs of or related to the hearing in the amount of $10,312.

¶ 32 July 27, 2004

¶ 33 For the Commission

Brent W. Aitken
Vice Chair

Neil Alexander
Commissioner

John K. Graf
Commissioner

Appendix II

DATE: 20040607

DOCKET: C39008

COURT OF APPEAL FOR ONTARIO

BORINS, SHARPE and JURIANSZ JJ.A.

B E T W E E N :

JEANNE HAYWARD
Respondent

Diana M. Edmonds

for the respondent

- and -

HAMPTON SECURITIES LIMITED and PETER DEEB
Appellant

Messod Boussidan and James Diamond

for the appellant

On appeal from judgment of Justice Sarah E. Pepall of the Superior Court of Justice dated October 1, 2002.

BORINS J.A.:

[1] Hampton Securities Ltd. ("HS") and its employee, Peter Deeb, appeal from the judgment of Peppall J. awarding damages against them of $288,846.00 inclusive of pre-judgment interest in favour of Jeanne Hayward. In doing so, the trial judge found

that Deeb was in breach of a fiduciary duty to Ms. Hayward. The appellant appeals liability on the ground that the trial judge erred in finding that there was a fiduciary relationship. They also submit that Ms. Hayward's claim should have been dismissed on the ground that she ratified any breach of fiduciary duty. In addition, the appellants appeal from the trial judge's assessment of damages.

[2] Ms. Hayward was a client of HS for a period of twenty months after transferring her accounts to that brokerage firm in October 1997 from another brokerage firm. She did so at the urging of her investment advisor, Peter Deeb, who had been employed by the previous firm and who, with his father, established HS in the autumn of 1997.

[3] Ms. Hayward's claim is confined to the twenty month period that she was a client of HS. Throughout this period Ms. Hayward operated a non-discretionary account with HS under terms that would permit HS, and more specifically her investment advisor, Deeb, to trade securities in her account only with her prior authorization. Because Deeb, who was Ms. Hayward's exclusive investment advisor, was required to obtain her prior authorization to carry out trades for her account, this arrangement, in and of itself, did not create a fiduciary relationship between Ms. Hayward and Deeb: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

[4] The appellants submit that the trial judge erred in finding that there was a fiduciary relationship between Ms. Hayward and Deeb. Therefore, the issue with respect to liability is whether, on the facts found by the trial judge, a relationship that began as a contractual relationship between a broker and his client that required the broker to obtain his client's prior authorization to execute trades in her account, as a result of the broker's conduct changed its character to a fiduciary relationship.

[5] The trial judge found that when Ms. Hayward moved her account to HS in October 1997, she was eighty-five years old and had become dependent on Deeb as a result of his role as her investment advisor for the previous seven years. Throughout the period of twenty months that Ms. Hayward maintained an account with HS, Deeb operated the account as if it were a discretionary account. He made sixty-eight trades in this period. Each trade was made without Ms. Hayward's prior authorization. In addition, the trades that he made were not in conformity with Ms. Hayward's investment objectives. In doing so, Deeb acted contrary to the terms of Ms. Hayward's written contract with HS designating her account as non-discretionary and stipulating her investment objectives, and in breach of the rules of the Toronto Stock Exchange and the internal rules of HS. Most of the trades were improvident and resulted in losses and significant increases in Ms. Hayward's margin position. Moreover, in respect to one of the securities that Deeb purchased for Ms. Hayward's account, Med-Emerge, he failed to disclose a conflict of interest.

[6] Although Ms. Hayward recognized that the trading was not in accord with the non-discretionary nature of her account, at first she said nothing. However, as her losses mounted and the margin grew, she began to complain to Deeb that he was trading in her account without her prior authorization. When she complained, Deeb assured her that there was nothing to worry about as he was taking care of her.

Consequently, Ms. Hayward permitted the trades to continue. Although there was a notice on her monthly statement from HS indicating that if she had a complaint concerning her account she should contact HS's compliance officer, she declined to do so. She was concerned that if she complained, Deeb, who in effect was the company's compliance officer, would cover his tracks. However, she did write letters of complaint to the Ontario Securities Commission and the Investment Dealers Association of Canada that produced no results.

[7] As pointed in *Hodgkinson* by LaForest J., there are five interrelated factors to be considered when determining whether a financial advisor stands in a fiduciary relationship to his client: vulnerability, trust, reliance, discretion and professional rules or codes of conduct. As noted by this court in *Hunt v. TD Securities Inc.* (2003), 229 D.L.R. (4th) 609 at para. 41, these factors are not intended to be exhaustive and evidence relevant to one factor may be relevant as well to a consideration of one or more of the other factors.

[8] In concluding that there was a fiduciary relationship between Deeb and Ms. Hayward, the trial judge found that although Ms. Hayward had designated her account to be non-discretionary, from the outset Deeb disregarded her instructions by assuming total control and dominance of her account. When she protested that he was executing trades in her account without her consent, he assured Ms. Hayward by convincing her that if she continued to place her trust in him that all would be well. Thus, the trial judge concluded that in disregarding the non-discretionary nature of Ms. Hayward's account and operating the account as if it were a discretionary account, Deeb created a fiduciary relationship. By assuming control of her account, Deeb made Ms. Hayward dependent in the sense that she was at his mercy to suitably invest her money. As the trial judge found: "Deeb had assumed power over her investments and she was at his mercy."

[9] In concluding that what had started as a broker-client relationship became a fiduciary relationship was a result of Deeb's conduct, the trial judge made findings of credibility favourable to Ms. Hayward and adverse to Deeb. She carefully analyzed the evidence and applied the five factors refered to in *Hodgkinson* to the facts as she found them. In brief, the trial judge was satisfied that Deeb, by acting contrary to both Ms. Hayward's instructions and the applicable professional rules and codes, took advantage of his vulnerable elderly client and operated her account virtually as if it were his own.

[10] The trial judge considered and rejected the appellant's contention that Ms. Hayward had ratified, or acquiesced, in the unauthorized trades and that Ms. Hayward was contributarily negligent and responsible for a portion of the loss she sustained by virtue of withdrawing excessive sums for her account, thereby increasing the margin position.

[11] I am satisfied that in the circumstances of this case the trial judge did not err in concluding that Ms. Hayward did not ratify the unauthorized trades because she maintained her relationship with Deeb and did nothing to terminate his unauthorized trading. The trial judge found that Ms. Hayward did not interfere with Deeb's operation of the account as a result of his repeated reassurance that he was taking care of her and that all would be well, resulting in a dependency and powerlessness on the part of Ms.

Hayward. The trial judge reasoned that as there was a breach of fiduciary duty, and that as Deeb's conduct was directed to exploiting her trust and confidence in him it would be unreasonable to interpret Ms. Hayward's conduct as amounting to ratification of Deeb's unauthorized trading. Further, she concluded that as Deeb abused the trust placed in him by Ms. Hayward, he was unable to shelter under the fact that despite her frequent complaints, she was unable to stop his unauthorized trading. I find no reason to interfere with the trial judge's conclusion that Ms. Hayward did not ratify the unauthorized trades.

[12] Nor would I interfere with the trial judge's finding that Ms. Hayward did not contribute to her losses by withdrawing money from her account thereby creating a substantial increase in her margin position. Assuming, without deciding, that contributory negligence applies where there was been a breach of a fiduciary relationship, Ms. Hayward withdrew money that had been earned in one way or another by her investments. This was her money. She was entitled to withdraw it and to use it as she saw fit. This was one of the factors that Deeb should have considered in making the investments that he made on her behalf.

[13] The appellants were critical of the fact the trial judge restricted her review of the evidence to the twenty month period while Ms. Hayward was a client of HS. They say that the trial judge should also have considered the prior seven years when Deeb's operation of her accounts produced a profitable result. The trial judge properly considered the previous relationship between Ms. Hayward and Deeb which she found helpful in finding that there was a fiduciary relationship. Moreover, there was nothing improper in the plaintiff confining her claim to her twenty month tenure as a client of HS during which time Deeb's unauthorized trades were unprofitable. She was entitled to frame her claim as she did. As such, her statement of claim determined the proper parameter of the trial judge's application of the evidence. See *Zraik v. Levesque Securities Inc.*, [2001] O.J. No. 5083.

[14] Given the trial judge's careful review of the evidence, her findings of credibility and her application of appropriate legal principles, I am satisfied that there is no basis on which to interfere with her finding that there was a fiduciary relationship between Deeb and Ms. Hayward for which HS is vicariously liable. I would, therefore, dismiss the appeal on liability.

[15] As for damages, having found that Deeb was in breach of his fiduciary duty to Ms. Hayward, the trial judge awarded damages in the nature of restitution compensating Ms. Hayward for the entire loss of market value in her HS accounts from the time they were opened in October 1997, until they were closed in July 1999, and for the loss of opportunity reflecting the profit that would have resulted had her accounts been properly traded. In calculating damages on fiduciary and restitutionary principles, the trial judge applied principles endorsed by the Supreme Court of Canada in *Hodgkinson v. Simms*.

[16] I would not interfere with the trial judge's assessment of damages. The damages awarded effectively restored to Ms. Hayward the equity that she had at the outset of her relationship with HS that had been diminished by Deeb's improper trading,

together with a sum representing a reasonable return on her monies had they been invested properly. This approach to damages was in accordance with *Hodgkinson v. Simms*. I would, therefore, dismiss the appeal on damages.

[17] In the result, I would dismiss the appeal with costs on a partial indemnity basis fixed in the amount of $15,000.00 inclusive of disbursements and GST.

RELEASED: June 7, 2004 ("SB")

"S. Borins J.A.

"I agree Robert J. Sharpe J.A."

"I agree R. G. Juriansz J.A."