

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

AND

**IN THE MATTER OF
THE APPLICATION FOR
REINSTATEMENT OF REGISTRATION OF
JOHN DAVID BUSHELL**

**HEARING BEFORE THE DIRECTOR
PURSUANT TO SUBSECTION 26(3) OF THE SECURITIES ACT**

HELD ON: OCTOBER 12, 2000

HELD AT: Ontario Securities Commission
20 Queen Street West
17th Floor
Toronto, Ontario

HELD BEFORE: WILLIAM R. GAZZARD
Director
Capital Markets

APPEARANCES: KATHRYN J. DANIELS For the Staff of the Commission
JOHN D. BUSHELL Representing himself

REASONS

The decision of the Director in this matter was to refuse the application of Mr. John David Bushell for reinstatement of his registration as a salesperson to act on behalf of Bank of Montreal Investor Services Limited ("BOMIS"). This decision was issued on January 26, 2001. The following are the reasons for the decision:

BACKGROUND

At the time of the hearing the applicant was employed by BOMIS. He was previously employed as a salesperson at A.C. MacPherson and Company, Inc. ("MacPherson") from February, 1999 until February, 2000. His registration as a salesperson was suspended on February 7, 2000 as a result of his resignation from MacPherson. Mr. Bushell was ill and did not work from December, 1999 until his resignation in February, 2000. Prior to becoming a salesperson, Mr. Bushell was employed by MacPherson as a telemarketer commencing in October or November, 1998. MacPherson was an investment dealer and a member of the Investment Dealers Association (I.D.A.) whose registration was terminated by the Ontario Securities Commission (the "Commission") by an order dated April 6, 2000 pursuant to section 127 of the *Securities Act* (Ontario) (the "Act").

The suspension of Mr. Bushell's registration remains in effect until notice of employment is received from another dealer and reinstatement of registration is approved by the Director in accordance with subsection 25(2) of the Act. The first of these conditions has been satisfied; however, Staff of the Registration Branch of the Commission opposed reinstatement of the applicant's registration. Accordingly, a hearing was convened before the Director on October 12, 2000 pursuant to subsection 26(3) of the Act.

EVIDENCE

Mr. Bushell gave the only testimony presented at the hearing. He testified that he commenced his employment with MacPherson as a telemarketer. He became registered as a salesperson in February, 1999, and assumed the role of a "junior" salesperson at MacPherson. As a salesperson, he cold-called clients from lead cards generated by the telemarketing department of MacPherson. His job was primarily to inquire about the sale of a single security chosen by the firm and which the firm owned as principal at the time. He would sell a single security for up to a month. Once a sale was made, Mr. Bushell testified that the client information, including the know-your-client form and client mailing details, were passed on by the trading manager to a "senior" salesperson who would then act as the client's broker. Once the

client had been passed on to a “senior” salesperson, Mr. Bushell had no further contact with the client. Mr. Bushell testified that he earned commissions at the rate of 15% on sales to a client if the sale was from a principal position held by the firm, and at a rate of 7½ % on subsequent sales from principal trades made by “seniors” where the senior salesperson sold the client securities from a principal position. Agency trades made by Mr. Bushell generated a commission of 1% of the value of the sale.

Mr. Bushell testified that he did not know how the prices of the securities he sold from principal positions were determined except that they were set through a dealer market. Furthermore, he stated that he made no effort to investigate how prices were set. However, he acknowledged that on occasion, when MacPherson moved from marketing one security to the next, both the volume of trading of the security no longer being sold and the price would drop.

Mr. Bushell testified that he was aware of the large mark-ups, in excess of 100%, on securities, which he sold from the firm’s principal positions. He also acknowledged that in making recommendations to a client, a salesperson must carefully analyze client information and the quality of the security being sold.

Mr. Bushell testified that he completed know-your-client forms, performed suitability screening on clients, periodically declined unsuitable clients, advised clients that the securities he was selling were being sold from a principal position and were high-risk securities, and was not involved in high pressure sales practices.

SUMMARY OF THE APPLICANT’S SUBMISSIONS

Mr. Bushell argued that the moment he became employed by MacPherson he was “doomed” and his career was put in jeopardy. He submitted that he was placed in a situation where his integrity would be questioned through no fault of his own, given that the problems at MacPherson began before he joined the firm. Mr. Bushell submitted that he had applied for employment at MacPherson because it was a member of the Investment Dealers Association and as such he expected that it was a reputable firm. As well, he submitted that he had no reason to believe that anything untoward was being done at MacPherson until the moment where he learned, through the Canada Newswire, of the Commission’s action against MacPherson.

Mr. Bushell testified that he first learned of the Commission’s investigation of MacPherson through the Canada Newswire when he was at home due to illness. He stated that this news prompted him to return to work so that he could assess the situation, and that he did not engage in any sales at that time. Mr. Bushell submitted that he believed that it would have been wrong to engage in sales through MacPherson under the circumstances, and thus he asked MacPherson for a release.

He submitted that no evidence had been introduced that established that his sales practices were inappropriate and that, in fact, they were appropriate. Mr. Bushell submitted that he did not engage in high-pressure sales practices. He stated that he would decline people where the securities being sold did not accord with their financial needs. As well, he stated that he did not know that the stocks he was selling were being manipulated by MacPherson. Finally, Mr. Bushell submitted that he did not act in a wilfully blind manner.

SUMMARY OF STAFF’S SUBMISSIONS

Ms. Daniels stated that Staff of the Commission recommended that Mr. Bushell not be registered at this time. She submitted that for the Director to come to the same conclusion, Staff must demonstrate that Mr. Bushell is either not fit for registration, or that his registration is otherwise objectionable.

Ms. Daniels submitted that under securities legislation, both salespersons and dealers who employ salespersons have an obligation to act honestly, fairly, and in good faith toward their clients. She submitted that in the decisions of the Commission in Price Warner Securities (2000), 23 OSCB 5653 and Gordon-Daly Grenadier Securities (Re) (“Gordon-Daly”) (2000), 23 OSCB 5541, the practice of selling securities to clients at excessive mark-ups was found to be a failure to deal honestly, fairly, and in good faith with a client.

Ms. Daniels submitted that Mr. Bushell was wilfully blind as to what was going on at MacPherson. In that regard, Ms. Daniels referred to the Director’s Decision in Jaynes (Re) (2000), 23 OSCB 1543, and the conclusion reached by Ms. Wolburgh-Jenah that wilful blindness is not a proper and compelling defence.

Ms. Daniels asked the Director to find that Mr. Bushell, by not acting in his clients’ best interests, failed to act honestly, fairly, and in good faith towards his clients and, therefore, is not fit for registration.

DIRECTOR’S FINDINGS

As a registrant, Mr. Bushell was subject to Part 2.1 of OSC Rule 31-505 and was under an obligation to act fairly,

honestly, and in good faith with his clients. In my view, Mr. Bushell failed to met this obligation in two related ways. First, he sold securities to clients at excessive mark-ups. In this regard, I accept the proposition set out in Gordon-Daly which states that, "Principal sales by a dealer at excessive mark-ups, especially when the dealer is able to set the selling price because it is a party to most of the trades in the securities, just cannot be considered to be fair dealing or in the interests of clients."

Mr. Bushell admitted that most of the sales he made to clients were from a principal position and the mark-ups on those securities were often in excess of 100%. I find the size of these mark-ups to be analogous to those in the Gordon-Daly decision which were found to constitute excessive mark-ups; therefore, the sales were not in the best interests of his clients.

Essentially, Mr. Bushell's defence was that he assumed that the mark-ups resulted from prices set by the market, and that as a result they were appropriate. In effect, he denies knowing that such mark-ups were excessive. Even if I accept Mr. Bushell's statement that he did not realize that the mark-ups were excessive, the view of the Commission as set out in the Gordon-Daly settlement does not require that the registrant believe that mark-ups were excessive in order to find that he or she did not act in the best interests of his or her clients. In my view, being unaware that such mark-ups are excessive is not an appropriate defense.

I accept Staff's submission that Mr. Bushell was wilfully blind that the mark-ups made by MacPherson were excessive. Mr. Bushell had been at the firm for 14 months and had been employed as both a telemarketer and a "junior" salesperson; he was or should have been aware of the firm's methods of operation and sales practices. As well, Mr. Bushell admitted that he knew that after a period of time, when the promotion of particular securities by MacPherson had ceased, the volume of trading and the price of the securities fell. He was also aware of the remarkable size of the mark-ups and the high commission he was paid to sell such securities and he either knew or ought to have known that this diverged from the industry standard. The *Jaynes* decision provides that, "Wilful blindness is not a proper or compelling defence," and I would add that this particularly applies where wilful blindness is motivated by financial gain.

Mr. Bushell also failed to act in accordance with his duties as a registered salesperson by neglecting to determine the suitability of the securities he was selling to his clients. Mr. Bushell stated that he simply sold the securities that he was told to sell by MacPherson without doing any analysis to determine if these securities represented an appropriate investment for individual clients. In the circumstances, the suitability obligation included an inquiry into how prices of securities were set and their appropriateness for particular clients, taking into account the prices being paid.

While I accept that Mr. Bushell did not act dishonestly or fraudulently, neither did he meet the standard of conduct required of a registrant while at MacPherson, and thus I have decided against allowing reinstatement of Mr. Bushell's registration at this time. However, in the interests of fairness I will provide some guidance as to actions that Mr. Bushell could take which would incline me to look favourably upon his application were he to reapply and were the matter to come before me. First, as noted in *Re Jaynes* (2000), 23 OSCB 1543 and *RE Curia* (2000) 23 OSCB 7505, this is a case, where, in my opinion, it is would be of benefit for the applicant to have a period of reflection and to spend time in an environment which has well-established compliance procedures. However, given that Mr. Bushell has been unregistered for a year and has been employed with BOMIS, he has in my view spent sufficient time away from the industry. Second, Mr. Bushell would strengthen a future application by retaking and successfully completing the Conduct and Practices Handbook course. Mr. Bushell should also be prepared to demonstrate good conduct during the period while his registration was suspended. Finally, he should be made aware that in relation to any future application for reinstatement that he may elect to file, the Director responsible for considering the application may decide that additional remedial terms and conditions be placed on his registration.

June 30, 2001.

"William R. Gazzard"