

IN THE MATTER OF
THE SECURITIES ACT
R.S.O. 1990, c.S.5, as amended
AND
IN THE MATTER OF
TERRY G. DODSLEY

REASONS OF THE ONTARIO SECURITIES COMMISSION

1. The Statement of Allegations alleges that Terry G. Dodsley ("Dodsley"), who has never been registered with the Ontario Securities Commission ("OSC") in any capacity, has been trading and advising in securities contrary to subsections 25(1)(a) and 25(1)(c) of the *Ontario Securities Act* (the "*Act*"), and the public interest. Staff of the OSC seek an Order pursuant to section 127 and section 127.1 of the *Act*.

2. The facts in this matter are not in dispute. What is in issue is whether they amount to activity which is contrary to subsections 25(1)(a) and 25(1)(c) of the *Act*. Dodsley's position is that they are not and, alternatively, if they are, asks for relief under the *Constitution Act 1982* in that he argues that the sections are an infringement of his rights under section 2(b) of the Charter.

The Facts

3. Commencing in October of 1999, Dodsley, for a two-week period, placed in a community newspaper the following advertisement in the form of a business card.

4. About the same time, Dodsley had a website www.cashgalore.com/comtrade.htm. The website appeared as follows:

5. An OSC investigator, using a pseudonym, responded and requested that Dodsley send him information. In replying to the request, Dodsley advised the Staff investigator that:

(i) he would realize \$100,000.00 on commodity trading or else Dodsley would not get paid his commission;

(ii) he was an expert in this specialized field and that one benefits from "our years of research that provide the top money makers in the world to manage your account for you";

(iii) that his fee was 20% payable only if profits exceeded \$100,000.00.

6. In another e-mail from Dodsley to the Staff investigator, it was stated:

"You have heard of mutual funds? Forget them. The client earns 34 times the profit from commodity trading. Our clients are guaranteed income of \$100,000.00 R.O.I. which is substantiated in one year using 15 methods such as daily bank statements."

7. Following the receipt of this, the Staff investigator wrote to Dodsley requesting

material from him as to how he could make money in commodities trading and as to how he could get involved through Dodsley in such trading.

8. In response, Dodsley sent to the investigator a package of material which included the following:

(a) a two-page statement by Dodsley entitled "UNLIMITED PROFIT NO RISK" in which Dodsley promotes commodity trading as an investment alternative that pays a higher R.O.I. than mutual funds, stocks, equities or bonds. In the statement, Dodsley advises -- that he receives no fee unless the client makes profits exceeding \$100,000.00 -- that he acts as an intermediary between "my clients, superbrowsers, and commodity trading advisers" -- that one can purchase his research material for \$490.00;

(b) an affidavit marked "Draft Copy" signed by Terry Dodsley in which he sets out the terms of his fee which is that a client deposits with him \$20,000.00 in escrow which will be returned to the client after 12 months unless profits are made of \$100,000.00;

(c) a disclaimer document which states: "to comply with stringent regulatory requirements and avoid any misunderstandings, this disclosure document identifies Mr. Terry Dodsley as an intermediary --- consultant --- representative --- information broker --- paralegal agent providing assistance by research. ... Mr. Dodsley is and does not act as a commodity trading adviser nor sell or buy any commodity or futures contract or handle or control any of the client's funds. ... Mr. Dodsley does not directly advise accounts for compensation on the current status of trading in futures contracts or options, nor offer advice, opinions, or judgment. ... All trading decisions are your own based on educational materials supplied.";

(d) a two-page document written by Dodsley which included the following statements: "Consulting assistance and 7 years of expertise from an experienced trader including on-going research. ... Weekly advisory service by e-mail showing Commodity Trading Adviser recommended trades, entry and exit prices plus open equity";

(e) a further document prepared by Dodsley in which he describes himself as the client's agent and attaches a sheet which compares commodity futures returns of 186% average to a 15% return anticipated in mutual funds;

(f) a printed document entitled "commodities as an investment - the opportunity of a lifetime";

(g) a page prepared by Dodsley which lists a number of commodity traders with telephone numbers;

(h) a brochure on a program offered by J & K Global Marketing Corporation which brochure states it is: "another fantastic high yield program";

(i) material on what is described as "a loan program that will return 10 to 1 every four months operated by Roman Riquelme Foundation";

(j) information on a program operated by G.B.C. which is headlined as "returns from 20-32% per month";

(k) information on a loan program operated by Special Invite XI which promotes a loan program for profit return of 10 - 30% per month in addition to interest.

Discussion

(1) Acting as an Adviser

9. Subsection 25(1)(c) of the *Act* prohibits any person or company from acting as an adviser unless the person or company is registered as an adviser with the OSC. Adviser is defined in the Act as meaning: "a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities...".

10. Staff counsel and counsel for Dodsley agree that the leading case on the meaning of "adviser" is the decision of the British Columbia Securities Commission in *Re Donas*. In that decision it was stated:

The concise Oxford Dictionary of Current English (1990 ed.) defines "advice" as "words given or offered as an opinion or recommendation about future action or behaviour...".

It is because the very nature of advising involves the offering of an opinion or recommendation to others that the *Act* requires advisers to be registered and to meet certain conditions as to their education and experience. This requirement is intended to protect the public, as was acknowledged by L'Heureux-Dubé J. in *Brosseau v. Alberta Securities Commission* (SCC) 57 D.L.R. (4th) 458 at p. 467...";

Securities Acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this court in *Gregory & Co. Inc. v. Quebec Securities Commission* (1961), 28 D.L.R. (2d) 721 at p. 725, [1961] S.C.R. 584 at p. 588, where Fauteux J. observed:

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the Province or elsewhere, from being defrauded as a result of certain activities initiated in the Province by persons therein carrying on such a business.

As indicated by the definition of "advice", the nature of the information given or offered by a person is the key factor in determining whether that person is advising with respect to investment in or the purchase or sale of securities. A person who does nothing more than provide factual information about an issuer and its business activities is not advising in securities. A person who recommends an investment in an issuer or the purchase or sale of an issuers securities, or who distributes or offers an opinion on the investment merits of an issuer or an issuers securities, is advising in securities. If a person advising in securities is distributing or offering the advice in a manner that reflects a business purpose, the person is required to be registered under the Act." [emphasis added]

Re Donas, [1995] B.C.S.C.W.S. 39 [Quicklaw version, pp. 4-5]

11. On the basis of the material sent to the Staff investigator, the advertisement in the community newspaper and the website, we find that Dodsley acted contrary to subsection 25(1)(c). Dodsley held himself out as an investment consultant, specified his consulting fee for the services he offered, and clearly advertised certain specific and types of investments.

12. Counsel for Dodsley argued that the nature of the information provided by Dodsley was authored by third parties and Dodsley simply recommended or offered an opinion on the merits of investing in commodities generally and that each person is asked to exercise his or her own judgment as to the merits of an investment. We do not accept that position. While certain of the materials were authored by third parties, much was authored by Dodsley and that which was authored by third parties was sent in a package

which contained handwritten notes of Dodsley and was sent in a manner in which he expressly or impliedly made recommendations as to investments.

13. It was also argued that the disclaimer contained in the material expressly advised clients that Dodsley's services are other than as an adviser. Again, we do not accept that position in that the material distributed by Dodsley and its contents are not consistent with the content of the disclaimer. Further, we are of the view that having regard to the purpose of section 25 of the *Act*, it would be inappropriate for one who acts in contravention of section 25 to seek to avoid the consequences thereof by some form of disclaimer. Section 25 has been enacted to protect investors and it would be contrary to that purpose to be able to avoid its requirements simply through a disclaimer. To give any credit to such a disclaimer, in the circumstances, is to avoid the very purpose for which section 25 of the *Act* was enacted.

(2) Trading in Securities

14. Subsection 25(1) of the *Act* prohibits one from trading in securities unless the person is registered as specified in the subsection. The definition of trade in the *Act* includes any act, advertisement or conduct directly or indirectly in furtherance of any sale or disposition of a security for valuable consideration. The issue here is not whether Dodsley specifically sold any security but whether he was acting directly or indirectly in furtherance of a sale of a security for valuable consideration.

15. In the material, Dodsley promotes commodity trading and certain other specific securities. He provides a list of brokers who deal in commodities. He also promotes the sale of the material he has assembled in order that the recipient will have access to various brokers and other entities selling those securities. These are all actions directly or indirectly in furtherance of a trade of those securities. Accordingly, we find that the conduct of Dodsley is contrary to subsection 25(1)(a) of the *Act*.

The Constitutional Argument

16. As noted previously, Dodsley has made an alternative submission that the requirements of subsection 25(1)(a) and subsection 25(1)(c) infringe subsection 2(b) of the Charter. Assuming, without deciding, that there is an infringement of subsection 2(b), we are of the view, having considered the tests in *Regina v. Oakes*, [1986] 1 S.C.R. 103 that the restrictions set forth in section 25 of the *Act* are reasonable and justified. We come to that conclusion having regard to the purposes of the *Act* as found in subsection 1.1 and the requirements found in section 25 to implement those purposes. For those reasons, we find that subsection 25(1) of the *Act* does not infringe Dodsley's rights under the Charter.

Conduct Contrary to the Public Interest and Sanction

17. The conduct of Dodsley in this matter well demonstrates the need for the requirements found in section 25 of the *Act*. His activities in advising and promoting the acquisition of commodities and other specific securities, and suggesting unreasonable returns with little or no risk can only be described as dangerous and contrary to the public interest. The conduct and lack of judgement exhibited by Dodsley should be considered if he ever seeks to be a registrant under the *Act*.

18. By reason of the findings herein, we find that it is in the public interest that Dodsley shall cease trading, directly or indirectly, in any securities for a period of ten years from this date save and except for trading directly in securities beneficially owned by him for his own personal account. The Temporary Order dated December 20, 2000 against Dodsley no longer has any force or effect. We make no order under section 127.1 of the

Act.

February 18, 2003

"H. Lorne Morphy"

"Robert L. Shirriff"