Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 Reasons

3.1.1 David G.C. Andrus

**IN THE MATTER OF THE SECURITIES ACT,
R.S.O. 1990 c. S.5, AS AMENDED ("the Act")**

AND

**IN THE MATTER OF
DAVID G.C. ANDRUS**

Hearing:	**June 9, 11 and 19, 1998**	
Panel:	**Morley P. Carscallen, FCA**	**Vice-Chair**
	Derek Brown	**Commissioner**
	R. Stephen Paddon, Q.C.	**Commissioner**
Counsel:	**Jay Naster**	**for Staff of the**
	Brian Butler	**Ontario Securities Commission**
	James Douglas	**for the Respondent**
	David Gore	

DECISION AND REASONS

These proceedings were commenced by Notice of Hearing dated March 5, 1998 in which the staff ("Staff") of the Commission requested orders under section 127 of the Act in respect of the registration of David G.C. Andrus ("Andrus") and the application of exemptions contained in Ontario securities law to Andrus. The Staff's request was grounded in the following allegations contained in the Statement of Allegations of Staff attached to the Notice of Hearing.

BACKGROUND

1. Provident Financial Services Inc. ("PFSI") was at all material times registered as a mutual fund dealer and limited market dealer pursuant to the Securities Act, R.S.O. 1990, c.S.5, as amended (the "Act"). On December 16, 1997, the Commission accepted the application of PFSI to voluntarily surrender its registration.

2. Provident Investment Counsel ("PIC") is and was at all material times registered as an investment counsel/portfolio manager pursuant to the Act.

3. At the request of staff of the Commission ("Staff"), on November 12, 1998 and independent monitor (the "Monitor") was appointed by the PFSI and PIC to oversee their operations, including the approval of all deposits and withdrawals in the accounts of PIC and PFSI. On December 3, 1997 the monitor's engagement was terminated and the operation of PIC and PFSI came under the control of Keybase Financial Group and Keybase Investment Inc., a registrant under the Act.

4. David Andrus ("Andrus") was the president, compliance officer, and majority shareholder of PFSI and PIC. As of December 11, 1997 Andrus entered into an agreement to become a minority shareholder of PIC and vice-president. Andrus is and was at all material times registered as an investment counsel/portfolio manager pursuant to the Act.

5. Mrs. G.L. [Gwendolyn Lennox] is a client of PIC whose account was managed by Andrus. She is an 85 year old widow who is not competent to manage her financial affairs. During the material time, Andrus had trading authority over her accounts as well as a power of attorney.

6. Mr. N.S. and Mrs. E.S. [Nelles Silverthorne and Elizabeth Silverthorne] are clients of PIC whose accounts were managed by Andrus. N.S. is 97 years of age. E.S. is 86 years of age. During the material time,

Andrus had trading authority over their accounts as well as a power of attorney.

7. As at November 30, 1997 the reconciled bank balances of the trust and operating accounts of PFSI and PIC were as follows:

PFSI trust account:	$8,579.42
PFSI operating account:	$3,002.71
PIC trust account:	$ .95
PIC operating account:	$1,728.38

OVERVIEW

8. In the period June 1, 1996 to September 30, 1997 Andrus repeatedly withdrew funds from the trust accounts of PFSI and PIC for his own direct or indirect personal benefit. The source of the client funds which were deposited to the PFSI or PIC trust accounts, came from client bank or trading accounts over which Andrus had discretion as portfolio manager and/or power of attorney.

9. During the relevant period, approximately $809,150.43 was withdrawn by Andrus from the bank or trading accounts of G.L., N.S. and E.S. and deposited to the PIC or PFSI trust accounts ($489,618.44 from accounts of G.L. and $319,531.99 from the accounts of N.S. and E.S.). In defiance of his duties as a registrant and in breach of the trust reposed in him, Andrus failed to sue these funds for the benefit of his clients.

10. During the relevant period Andrus withdrew from the PIC and PFSI trust accounts approximately $789,027.15 for his own direct or indirect personal benefit. The transactions respecting the diversion of the trust funds and the source of those funds are summarized as follows.

DIVERSION OF TRUST FUNDS

11. On June 28, 1996 Andrus withdrew $500,000 from the PIC trust account for the benefit of Five Mildenhall Road Inc. ("FMR"), a company for which he was the sole officer, director and shareholder.

12. On July 15, 1996, Andrus electronically transferred $40,000 from the PIC trust account into his personal bank account.

13. On August 2, 1996, Andrus transferred $50,000 from the PIC trust account to the PIC operating account which funds covered the operating account's overdraft position.

14. On November 14, 1996, a $20,000 cheque was issued made payable to a bank from the PFSI trust account and allocated as a payment to a client. In fact, of these funds, $7,500 were used to pay Andrus's outstanding personal VISA account and the remaining $12,500 remains unaccounted for.

15. In a series of eight transactions between February 21, 997 and July 25, 1997, Andrus electronically transferred to his personal bank account a total of $140,835.56 of client funds held in the trust account of PFSI. Each transaction was misrepresented in the books and records of PFSI as being a transfer for the benefit of a client.

16. On June 26, 1997, Andrus electronically transferred $9,691.59 of client funds held in the trust account of PFSI into the account of a Toronto law firm to settle the accounts of Andrus for legal services rendered unrelated to the affairs of either PFSI or PIC. This transaction was misrepresented in the books and records of PFSI as being a transfer for the benefit of a client.

17. On September 11, 1997, Andrus electronically transferred to his personal bank account $25,000 of client funds held in the trust account of PIC. This transaction was misrepresented in the books and records of PIC as being a transfer for the benefit of a client.

18. On September 29, 1997, a $25,000 cheque was issued from the PFSI trust account purportedly for the purchase of a money market instrument for a client. The $25,000 was actually made payable and deposited into Andrus's personal bank account.

SOURCE OF DIVERTED FUNDS

19. On June 28, 1996 Andrus caused $200,000 to be withdrawn from the trading account of N.S. and E.S. and deposited to the PIC trust account which funds were "loaned" to FMR, a company for which Andrus was the sole officer, director and shareholder. The only security for the loan was a promissory note and the personal guarantee of Andrus. An interest payment of $40,000, which according to the promissory note was due on June 28, 1996, was never paid and the principal remains outstanding. No independent advice was provided to the clients prior to entering into the transaction. A direction purportedly signed by N.S. is dated "this twenty-eighth day of June, 1968".

20. On June 28, 1996 Andrus caused $300,000 to be withdrawn from G.L.'s trading account and deposited to the PIC trust account which funds were "loaned" to FMR. The only security for the loan was a promissory note and the personal guarantee of Andrus. An interest payment of $60,000, which according to the note was due on June 28, 1996, was never paid and the principal remains outstanding. No independent advice was provided to the client prior to entering into the transaction. A direction purportedly signed by G.L. is dated "this twenty-eight day of June, 1968".

21. On July 12, 1996 Andrus withdrew $60,000 from the trading account of G.L. and deposited the funds to the PIC trust account. The funds were not used for the benefit of G.L.

22. On July 12, 1996 Andrus withdrew $30,000 from the trading account of N.S. and deposited the funds to the PIC trust account. The funds were not used for the benefit of the N.S.

23. On December 30, 1996 Andrus withdrew $22,000 from the bank account of E.S. and deposited the funds to the PFSI trust account. The funds were not used for the benefit of E.S.

24. On January 30, 1997 Andrus withdrew $42,531.99 from the Trading account of E.S. and deposited the funds to the PFSI trust account. The funds were not used for the benefit of E.S.

25. On March 14, 1997, Andrus withdrew $50,665.37 from the trading account of G.L. and deposited the funds to the PFSI trust account. With the exception of $11,623.60 used to pay the monthly rent at the nursing home at which G.L. resided, the remaining $39,041.77 was not used for the benefit of G.L.

26. On September 9, 1997 Andrus withdrew $25,000 from the bank account of N.S. and deposited the funds to the PIC trust account. The funds were not used for the benefit of N.S.

27. On September 25, 1997 Andrus withdrew $90,576.67 from the trading account of G.L. and deposited the funds to the PFSI trust account. When the Monitor questioned this transaction Andrus provided a direction dated September 22, 1997 purportedly signed by G.L. authorizing the withdrawal. As at September 22, 1997 (and for sometime previous) G.L. had been diagnosed by her physician as not competent. The funds withdrawn were not used for the benefit of G.L.

PIC AND PFSI'S BUSINESS PRACTICES

28. An examination of the books and records of PFSI and PIC by staff of the Commission and the monitor disclosed numerous deficiencies, including the following:

    i) the failure to reconcile the PFSI and PIC operating and trust accounts on a monthly basis;

    ii) the failure to maintain proper subledgers accounting for client trust funds;

    iii) the failure to require and/or maintain adequate supporting documentation for disbursements made from the trust accounts;

    iv) the failure to maintain individual client files.

CONDUCT CONTRARY TO THE PUBLIC INTEREST

29. In his capacity as an investment counsel/portfolio manager Andrus failed to deal fairly, honestly and in good faith and abused his power of attorney in respect of his clients, specifically:

    i) Andrus abused his authority and breached the trust reposed in him by withdrawing $809,150.43 from client bank and trading accounts in trust and proceeding to use $798,027.15 of those funds for his own direct or indirect personal benefit.

    ii) Andrus caused his clients to enter into transactions which directly or indirectly advantaged Andrus without ensuring that the clients received independent advice.

30. Andrus used his position as the president of PIC and president and compliance officer of PFSI to over-ride the established system of internal controls and specifically:

    i) Andrus failed to maintain documents required to be maintained to properly record the business transactions and financial affairs of PIC and PFSI; and

    ii) Andrus altered documents to disguise the nature of the transaction and that he was the recipient of funds which were to be held in trust for the benefit of clients.

31. By reason of the foregoing, Andrus engaged in conduct which was contrary to the public interest including, among other things, using client funds held in trust for his own benefit, placing client funds at risk, misleading clients as to the use of their funds and the status of their accounts, and entering into transactions with clients which were to the clients disadvantage.

32. Such further and other allegations as counsel may advise and the Commission may permit".

PRELIMINARY STATEMENT BY RESPONDENT'S COUNSEL

At the commencement of the hearing, Mr. Douglas informed the panel that his client did not intend to dispute the allegations of Staff as attached to the Notice of Hearing and reproduced above. He emphasized that this did not mean that his client admitted the allegations but rather that they would not be disputed for the purposes of this hearing. His client was prepared to surrender his registration voluntarily. Mr. Douglas submitted that we could therefore proceed to hear submissions from counsel as to sanctions based on Staff's allegations without the necessity of hearing what was likely to be voluminous and lengthy evidence in relation to those allegations. Mr. Douglas drew our attention to section 4.1 of the Statutory Powers Procedures Act, RSO 1990, chapter S.22, as amended (the "SPPA"). Section 4.1 states "If the parties consent, the proceeding may be disposed of by decision of the tribunal given without a hearing, unless the Act under which the proceeding arises provides otherwise". Mr. Douglas stated that there was no provision of the Act providing otherwise and that his client was content to proceed without a formal hearing, except for submissions with respect to sanctions. Also, Section 4(1) of the SPPA states "Any procedural requirement of this Act or of the Act under which a proceeding arises may be waived with the consent of the parties and the tribunal".

Mr. Douglas conceded that proceeding in the manner suggested by him would be unprecedented in a Commission hearing but that there was no statutory bar to this approach and taking it would expedite matters. He also pointed out that there would be a full record in the transcript of his application

and hence a record of the position to which his client consented.

Mr. Douglas indicated that, should we not accept his submission, he would not participate in the evidentiary portion of the hearing and would withdraw until the time came for submissions on sanctions. Mr. Gore would remain to take notes.

Staff indicated that it did not consent to the proposals by Mr. Douglas and hence that the requirement of the SPPA that all parties consent was not met. Mr. Douglas replied that Staff did not have the status of a party separately from the Commission and that the matter was entirely within the discretion of the panel. In response to a question from Commissioner Paddon, Mr. Douglas indicated that his client would not be prepared to treat the allegations of staff as constituting an agreed statement of facts.
On consideration, we concluded that it was in the public interest for the panel to hear evidence in the matter and establish a direct basis of facts for our final conclusions and any action that might be taken with respect to sanctions. We did not find it necessary to consider whether Staff was a party to the hearing for the purposes of Section 4.1 of the SPPA.

Mr. Douglas withdrew after listening to Mr. Naster's opening statement.

EVIDENCE PRESENTED

Staff filed with the panel seven volumes of documentary evidence consisting largely of copies of accounting records, bank statements, cheques and other transfer documents, accountants working papers, account analysis and similar documents evidencing the movement of funds within and out of the Provident companies. Staff also called nine witnesses.

PAUL SILVERTHORNE

Paul Silverthorne, the son of Nelles and Elizabeth Silverthorne, gave evidence as to the ages, being 97 and 86 respectively, and state of health of his parents. Mr. Silverthorne testified that his father has had an active mind but has been slipping in the last two years. There are times of lucidity but "he is fading away". Mr. Silverthorne indicated that he had no part in the management of his parents' financial affairs and that he believed the only help they received was from Andrus.

Elizabeth Silverthorne was in frail physical health but "mentally, I think she is pretty good". Nelles Silverthorne had always made all the major decisions in connection with their financial affairs.

Mr. Silverthorne was shown a direction authorizing the debiting of a TD Green Line account to make a loan to 5 Mildenhall Road for $200,000. The document bore the signature "L. Nelles Silverthorne". Mr. Silverthorne said he had never seen his father sign his signature other than as simply "Nelles Silverthorne".

SELMA HARRIS

Selma Harris is a nurse and coordinator of Sheppard Village, a retirement home. She is a registered practical nurse. Ms. Harris was Gwendolyn Lennox's nurse from her arrival at Sheppard Village in 1992 until her death in the spring of 1998. Ms. Harris testified that Gwendolyn Lennox was in good physical and mental health when she came to Sheppard Village but that there had been deterioration in recent years.

Ms. Harris identified as genuine the signature Harold E. Kay, MD appearing on a letter dated May 26, 1998 concerning Ms. Lennox. The letter stated that Mrs. Lennox was suffering from progressive Alzheimer's Dementia and could not have understood the nature and content of a direction she had signed on September 22, 1997. The witness was shown the direction to Andrus dated September 22, 1997 authorizing and directing him to transfer $90,000 from her account to PFSI in trust. Ms. Harris stated her belief that Mrs. Lennox would not at that time have understood the document.

ALEXANDER WRIGHT

Alexander Wright was, in 1997, a Vice-President of PFSI and a shareholder in the Provident Group. He testified as to the history of his connection with the company and as to his departure in November of 1997 when problems with client accounts became apparent. He indicated that the back office for both companies reported to Andrus. Mr. Wright and Andrus had agreed that neither of them would have unfettered access to the accounting system. Mr. Wright discovered on November 10, 1997 that Andrus had obtained such access for himself. He was then shown by the Group's manager of operations a transaction going through the system transferring $90,000 out of Gwendolyn Lennox's account into an account that was not hers and being used in part to pay two other clients who had been demanding monies owed to them. Mr. Wright asked the bookkeeper to call the Ontario Securities Commission and was informed that she already had.

DEANNA TAYLOR

Deanna Taylor is a compliance officer with the Compliance Team of the Ontario Securities Commission. Ms. Taylor testified as to the registration status of PFSI and PIC and that of Andrus. As a consequence of a call from the bookkeeper at the Provident Group, Ms. Taylor attended at their offices on November 11, 1997. She met with Andrus and asked him certain questions. Her testimony was as follows:

"A. I asked him a number of questions and included the fact that, you know, was PFSI having financial difficulty, and he said, "No way", they were okay. I said, "have you paid staff salaries in the last two weeks?" and he said, "Yes, everything has been paid." I said, "Have you paid your commissions in the last two weeks?" and he said, "Yes, everything was paid." "Have you done your capital calculations? Is the company on-side in its capital requirements?" and he said, "Yes, they were done and the company was on-side in its capital requirements."

Q. That is what he said to you?

A. That is what he said to me.

Q. Was there any question raised in respect of the trust accounts of the company?

A. Yes, I asked him about the trust account and he said currently there were a few thousand dollars in the trust account as at the end of October, I believe, and that there were no problems with the trust account.

Q. Now, if I can just go over that list. Mr. Andrus indicated to you that PFSI was not in any financial difficulty?

A. Yes, he did.

Q. Based on your subsequent involvement in this matter, did that representation prove to be incorrect?

A. It was incorrect.

Q. Mr. Andrus indicated to you that all employee salaries and commissions had been paid up to date.

A. That is right.

Q. Based on your subsequent involvement in respect of this matter, did that prove to be incorrect?

A. That proved to be incorrect, that is right.

Q. Mr. Andrus indicated that the monthly capital calculations had been up to date and were on-side. Again, based on your subsequent involvement, did that prove to be incorrect?

A. It proved to be incorrect, that is right.

Q. And, lastly, he indicated there were no problems in connection with the trust accounts. Based on your involvement, did that also prove to be an incorrect statement?

A. That was incorrect".

Ms. Taylor also testified that as a consequence of her attendance on November 11, 1997 she made a number of observations in connection with the books and records of PFSI. She testified in part:

"Q. And, if I could just take you to page 5, am I correct that we see an itemization of concerns that were identified?

A. That is right.

Q. So, you were able to ascertain that the operating account of PFSI was in an overdraft of in excess of $40,000?

A. That is right.

Q. And that the limit on that account was $25,000 in terms of its overdraft protection?

A. That is correct.

Q. You were also able to ascertain that cheques had been returned for non sufficient funds?

A. That is correct, they were all "NSF" cheques.

Q. And these cheques were for commissions and salaries?

A. They appeared to be for commissions. Some of them were cheques that were paid to fund companies at Trimark that were reversed.

Q. You also note that according to the trust account balance as per PFSI's records there was a balance of $44,105; is that correct?

A. That is correct.

Q. I am sorry, that would be in accordance with the bank records?

A. That is according to the bank statements, yes.

Q. I am sorry. And, was there an effort to ascertain what the dealer's records reflected as being the balance in that account?

A. Yes, we tried to do that.

Q. And were you able to ascertain that, based on...

A. No, no. We got a copy of the general ledger from Mr. Abrahams, and the general ledger as at October 31st showed a balance of approximately $550,000 compared to the bank's 44,000.

Q. And, was there any reconciliation of that?

A. We couldn't. We didn't have any documents to do any reconciliation.

Q. Were you also informed of the fact that certain commission payments had not been made to certain branch offices?

A. We got a copy of a memo done by Ernst & Young following their review in August, and it indicated that they had contacted the branch manager, I think it was in North Bay, and he indicated to them that a number of cheques had been NSF commission cheques.

Q. So, based on your experience as a compliance officer, and I didn't ascertain...how many years have you been in compliance?

A. I have been in compliance approximately 12 years.

Q. So, based on your experience with compliance, how would you characterize the books and records of PFSI as at the point in time that you went in on the 11th of November?

A. Very bad shape. Very bad shape.

Q. And did you bring that to the attention of the chief compliance officer, Mr. Andrus?

A. I did.

Q. And, did he have an explanation?

A. He says Mr. Abrahams told him everything was fine, and everything balanced, and capital calculations were done and he had no idea that it was this bad".

OTHER TESTIMONY

The Staff called four witnesses as to transactions occurring in PFSI and PIC. Tammy Catto and Nancy Whalls, who were with The Toronto-Dominion Bank in Guelph, Ontario and The Royal Trust in Etobicoke, Ontario respectively, testified how certain funds transferred from the Provident group to their organizations were dealt with. In both cases, the funds were used for the benefit of Andrus. Edward Scheck is a chartered accountant and partner in the firm of Hogg, Shain & Scheck who were the auditors of PFSI and PIC. Mr. Scheck testified as to certain accounting deficiencies encountered in the provident group and to bringing to Andrus' attention certain potential irregularities. Mr. Scheck also testified to having supervised and reviewed the work of Mr. David Clarke, an employee of Hogg, Shain & Scheck and to having signed off on that work.

DAVID CLARKE

David Clarke testified as to the results of detailed auditing work carried out by him in respect of the transactions referred to in Staff's allegations above. It is neither practical nor necessary to summarize the voluminous and detailed evidence presented by Staff, through the testimony of Mr. Clarke, to support their contention that the transactions referred to in their allegations had occurred on the basis stated. The evidence traced, step by step and document by document, each transaction from the accounts of the Silverthornes and Gwendolyn Lennox to other uses. We commend Mr. Clarke on the careful and clear nature of his testimony.

DAX SUKHRAJ

Staff called Mr. Dax Sukhraj concerning a letter dated December 2, 1997 from Staff to Mr. Sukhraj as President & C.E.O. of the Keybase Financial Group ("Keybase"), which letter Mr. Sukhraj had signed in acknowledgement and confirmation. The letter related to the proposed acquisition by Keybase of the business of PFSI and an interest in PIC and referred to reimbursement of losses borne by certain clients or former clients of those companies. We concluded this letter and Mr. Sukhraj's evidence were not relevant to our consideration of the conduct of Andrus and they have been excluded in reaching our conclusions.

SUBMISSIONS OF COUNSEL

Mr. Naster

Mr. Naster submitted that it would be in the public interest for the Commission to terminate, on a permanent basis, the registration of Andrus and to order that trading in any securities by Andrus cease permanently. He submitted that staff had met the burden of establishing on the evidence that to protect the public interest such sanctions were required. He drew the attention of the panel to the decision of the Commission in In the Matter of Trend Capital Services Inc. et al (1992), 15 O.S.C.B. 1711 at page 1750:

> "both sections of the Act [i.e. the provisions which correspond to clauses 127(1)1. and 3.] under consideration require us to form an opinion that a decision to sanction is in the public interest. In our opinion there are two issues which require consideration. The first, already mentioned, is whether or not, assuming the conduct is objectionable, there is reasonably likelihood it will be repeated. The second is whether or not the conduct of the Respondents, if objectional, is such as to bring into question the integrity and reputation of the capital market in general. These were the tests which we followed in reaching our conclusions".

Mr. Naster also stated that he would anticipate argument by Mr. Douglas that, if the likelihood of future objectionable conduct could be met by removing the respondent's registration, there would be no public interest served by stripping the respondent of his personal trading exemptions. To do so would be to punish the respondent for misconduct rather than to restrain future misconduct. In In the Matter of Mithras *Management Ltd. et al* (1988), 11 O.S.C.B. 1600 the Commission stated at page 1610:

> "Under sections 26, 123 and 124 [now section 127] of the Act, the role of this Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently or temporarily, as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. In so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out. Equally, however, even if there has been a technical breach of the Act, we may well conclude that, in the circumstances, no sanction is necessary to protect the public interim".

Further, in Mr. Naster's view, even if the panel were to conclude that removal of registration is sufficient to protect against repetition of the objectional conduct, the respondent's exemptions under the Act should still be denied as a deterrent to others who might be tempted to undertake objectionable conduct such as has been presented in this case.

ALISTAIR CRAWLEY

Mr. Crawley requested an opportunity to address the panel on behalf of the Silverthorne family. Neither Mr. Naster nor Mr. Douglas objected to this request and we acceded to it. Mr. Crawley drew the attention of the panel to section 128 of the Act. Section 128 empowers the Commission to apply to the Ontario Court (General Division) for a declaration that a person or company has not complied with or is not complying with Ontario Securities law. If the court so declares, it may issue one or more of a number of orders designed to cure or redress

the particular situation. Mr. Crawley made no suggestions as to particular orders that might be requested.

MR. DOUGLAS

Mr. Douglas re-iterated that his client did not dispute the allegations of staff in this matter but that that should not be taken as an admission of those allegations.

Mr. Douglas urged the panel to remember that its jurisdiction was only a public interest jurisdiction, albeit a broad one, and that we had no jurisdiction in civil, criminal or quasi-criminal matters. He cautioned us about making conclusions of law that exceeded our jurisdiction. Mr. Douglas suggested Staff was encouraging the panel to draw conclusions of law on matters outside its jurisdiction. On being questioned, Mr. Douglas acknowledged that the panel had to reach conclusions as to whether the facts were as alleged and, if so, as to what measures should be taken. His concern was with the labels used in reaching and stating conclusions.

Mr. Douglas submitted that the appropriate jurisdiction of the panel was to impose such measures as were necessary to protect the public from repetition of the conduct engaged in. If Andrus' conduct arose in his role as a registrant, surrender or termination of his registration should be sufficient to protect the public from a repetition of the conduct in the future. It had already been indicated that Andrus was prepared to surrender his registration. If the panel believed that it was necessary to go beyond removal of registration and remove personal trading exemptions in carrying out its public interest jurisdiction, there should be "carve-outs" to permit certain types of trading by the respondent that were not likely to pose a threat to the public. He said that, generally, trading of any kind for one's personal account would fall into this category but other possibilities were to permit trading through an RRSP, personal trading in government securities, personal trading in mutual funds or trading in response to a formal take-over or issuer bid.

Returning to surrender of registration by Andrus, Mr. Douglas noted that the surrender would be pursuant to section 27 of the Act which provides that the Commission may accept surrender if it is satisfied that the financial obligations of the registrant to clients have been discharged and the surrender would not be prejudicial to the public interest. In the course of his submission Mr. Douglas put in evidence a letter to him from Keybase dated June 8, 1998 showing that Andrus had provided to them through PFSI amounts totalling $223,944.67 to be used to recompense clients of PFSI and PIC, including Gwendolyn Lennox and the Silverthornes. No funds had been received since January 1998. Mr. Douglas submitted that Andrus' obligations as a registrant had either been satisfied or were the subject of an undertaking by a third party, Keybase, to indemnify such clients as evidenced by Mr. Sukhraj's acceptance of the December 2, 1997 letter from Staff.

FINDINGS AND DECISION

We have concluded that the allegations of Staff as to the conduct of Andrus have been fully supported by the evidence. During a period of 16 months in 1996 and 1997 he carried out a series of transactions that transferred to his personal benefit, through, inter alia, misuse of his trading authorities and powers of attorney, substantially all of the funds entrusted to his care by the Silverthornes and Gwendolyn Lennox. To thus abuse the confidence of persons who had relied on him to manage their financial affairs is unacceptable conduct in a registrant or anyone else. The fact that those who suffered were elderly and unwell and unable to protect or defend themselves makes such conduct even more repugnant.

Andrus used his position as the president of PIC and PFSI to override normal accounting and control procedures in order to carry out his plans. When questioned about individual transactions or the state of the accounting records in PIC and PFSI he knowingly gave untrue or deceptive answers.

Andrus conduct was such as to give rise to the gravest apprehension as to what his future conduct might be if he is permitted to work or participate in the securities markets in Ontario.

Mr. Douglas suggested that we accept the surrender of Andrus' registration under Section 27 of the Act. We see no reason for such a graceful exit. Whether or not the indemnities of which Mr. Douglas speaks are in place, and we have made no determination on the point, it will make no difference whether Andrus' registration is surrendered or terminated. The registration of Andrus is hereby terminated. We recommend that he never again be registered under the Act in any capacity.

We are unable to accept Mr. Douglas representations that removal of registration is sufficient to protect the public from similar conduct in the future on the part of Andrus. The conduct of Andrus in this matter is egregious and one cannot be satisfied that a similar disregard on his part for the requirements of securities law and the ethics of conduct in the marketplace might not injure the public in the future, albeit not through misconduct in the role of a registrant. Although Mr. Douglas offered precedents for removal of most but not all of the exemptions under the Act, he did not offer any instances of serious misconduct by a registrant where the only sanction was removal of registration.

Although there are precedents for removing most, but not all, exemptions from a respondent whose conduct has been unacceptable, there are also precedents for removing all exemptions. A case in point is In the Matter of E.A. Manning Limited et al ((1995) 18 O.S.C.B. 5317). This was a case involving the conduct of the respondents in their capacity as registrants in which the hearing panel ordered that, in addition to termination of registration, all exemptions under the Act be removed for various of the respondents for periods varying from a few years to permanently. The sanctions were appealed to the Divisional Court ((1996) 19 O.S.C.B. 5557), the grounds being:

"(1) whether the Commission erred in law or in principle in removing the Appellants exemptions under Ontario securities law in addition to the removal of their registration;

(2) in the alternative, whether the Commission erred in law or principle

(a) in making a blanket order removing all exemptions contained in Ontario securities law; or

(b) in failing to consider whether it was in the public interest to remove from the Appellants some, rather than all, of the exemptions contained in Ontario securities law".

In dismissing the appeal, the Court quoted with approval paragraphs 47 and 48 of the Respondent's Factum:

"47. There is no right of any individual to participate in the capital markets in Ontario. Section 35 of the Act provides certain exemptions which allow individuals to make certain trades without being a registered, however the OSC has explicit jurisdiction to remove the exemptions if an individual engages in conduct contrary to the letter or spirit of the Act, whether such conduct causes damage to investors or is detrimental to the integrity of the capital markets. The OSC found that such conduct existed on the facts of the present case.

48. The OSC exercised its public interest discretion in a manner within the core of its regulatory jurisdiction. Its decision was based on voluminous evidence, made in good faith, for the purposes of the Act and on the basis of relevant factors. It is a matter that falls within the OSC's exclusive jurisdiction and one with which the Court should not interfere".

In any event, discretion, by its nature, cannot be fettered by precedents, although the reasons underlying precedents can assist the panel in making the judgements it must make in the exercise of its discretion. Precedents should not be allowed to take the place of such judgements. It is therefore for the panel to weigh the facts demonstrated in the case and decide how far it is appropriate to go in limiting the future activities of a respondent to protect the public interest. Under Section 1.1 of the Act the Commission is specifically directed "(a) to provide protection to investors from unfair improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets". Although excessive regulation should be avoided, when a danger to the public is demonstrated through egregious conduct, as in the present case, it is better to err on the side of safety. Accordingly, we order that trading in any securities by Andrus cease permanently.

Since we have concluded that Andrus' conduct was, in itself, such as to warrant removal from him of all trading exemptions under the Act, it was not necessary for us to consider the issue, as raised by Mr. Naster and disputed by Mr. Douglas, of whether sanctions in excess of those necessary to protect the public from future actions of a respondent can be appropriate as a deterrent to others.

We have noted Mr. Crawley's submission that action by the Commission under Section 128 of the Act should be considered. The submission is not relevant to the hearing under Section 127 that we were conducting.

July 23, 1998.

"Morley P. Carscallen" "Derek Brown"

"R. Stephen Paddon"