

November 23, 2000

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: DAVID WAYNE FINLEY

**REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION**

CHAIRMAN: Mr. D. G.
Murray

BOARD Mr. W.J.A.
MEMBERS: Bulman
Mr. R.G.
McEwen

APPEARANCES:

Mr. Chris Besko) Counsel for the Commission
Mr. Thor J.) Counsel for Mr. David Wayne
Hansell) Finley

The decision of the panel was delivered on June 27, 2000. The issue of penalty was argued October 3, 2000. A decision was deferred, the panel opting to deliver same in written form.

Mr. Besko, staff counsel, pointed out that the panel had made findings against Finley as to recommending an unsuitable investment strategy

1. Reprimand;
2. Requirement to successfully challenge the CSI Conduct and Practices Course examination; and
3. Costs in the sum of \$4,000.

Mr. Besko argued that Finley's record-keeping was so sloppy that the review necessary in order to challenge the examination was warranted both as a needed refresher for Finley as to proper procedures and as a means of investor protection.

In the area of costs Mr. Besko presented a Bill of Costs prepared pursuant to the Regulation. The Bill of Costs was drafted on the basis of hearing time and related expenses only and contained no component for costs of investigation. There was no explanation offered for the staff's decision to

base the Bill of Costs solely on hearing time, however, this decision is not questioned by the panel.

The Bill of Costs, based on 5 1/2 days of hearing and related costs totals \$11,873.64 and the panel finds this sum to be reasonable. Mr. Besko, on the basis that several serious allegations against Finley were not made out at the hearing, indicated that staff was willing to accept a reduced award of costs of approximately 1/3 of the sum calculated according to tariff, being \$4,000.

Mr. Hansell, counsel for Finley, pointed out that his client had operated in the industry for sixteen years with a clean disciplinary record. He agreed that while the findings against his client were not insubstantial, other serious allegations leveled against Finley, including discretionary trading, were found by the panel not to have been proved.

Mr. Hansell argued that section 5(1)(i) of The Securities Act allows for costs to be awarded against an unsuccessful party in favour of a successful party. On this basis he suggested that his client was the successful party in having defended against the majority of the allegations levied. He even argued that on this basis Finley should be entitled to costs against the Commission. The fact is, of course, that the Commission is not a party to this type of disciplinary proceeding and the basis of an award of costs in this matter is section 28(1) of The Securities Act.

Messrs. Besko and Hansell disagreed as to the reason the hearing required 5 1/2 days to complete. Mr. Besko argued that Finley's failure to cooperate in refusing to voluntarily give a statement or to agree to the preparation of an Agreed Statement of Facts resulted in a hearing that was longer than necessary. Mr. Hansell countered that his client cannot be faulted for relying upon his legal rights and that Commission staff could have shortened the hearing by issuing a subpoena to Finley requiring his attendance at an interview.

Certainly Mr. Finley cannot be faulted for relying on his legal rights. Neither, however, will the panel find fault with Commission staff for not exercising all of the steps open to them if they consider them to be inadvisable or unnecessary for the purpose of proceeding to a hearing.

Mr. Hansell suggested that costs should be assessed on the basis of the Tetrault decision of the Commission where costs of \$1,500.00 were levied against the registrant. There are certain similarities between Tetrault and the matter at hand in that the hearing lasted several days, numerous serious allegations against the registrant were successfully defended and in the end Tetrault was faulted for unacceptable record-keeping and for having recommended an unsuitable investment. There is no similarity, however, in degree of fault in the two cases. Tetrault's record-keeping irregularities were small in scope compared with those of Finley and his unsuitable recommendation was in connection with a single investment out of several, as opposed to recommending an unsuitable strategy of investing which included leveraging and margining.

The recommendations of Mr. Besko are reasonable and are accepted by the panel. As a result the panel makes the following determination:

1. A reprimand shall be placed on Finley's file with the Commission
2. Finley shall be required to successfully challenge the CSI Conduct and Practices Course examination within six months of the date of these Reasons.
3. Costs are assessed against Finley in the sum of \$4,000.00 also payable within six months of the date of these Reasons.

November 23, 2000

"D. G. Murray"
D. G. Murray
Chairman

"R. G. McEwen"
R.G. McEwen
Member

"W.J.A. Bulman"
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Member