

January 10, 2001

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: GREGORY DAVID KLASSEN

-and -

IN THE MATTER OF: ROBERT CHARLES NAPPER

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

Acting Chairman:	Mr. E. O. E. Bergman
Board Members:	Mr. W. J. A. Bulman Mr. K. S. Kristjanson

Appearances:

Mr. Christopher P. Besko)	Counsel for the Commission
Mr. Jonathan B. Kroft)	Counsel for the Respondent - Gregory David Klassen
Mr. Kevin T. Williams)	Counsel for the Respondent - Robert Charles Napper

REASONS FOR DECISION

Pursuant to a Notice of Hearing and Statement of Allegations dated January 31, 2000 a hearing was convened on October 17 and 18, 2000. The hearing was convened to consider the motions presented by the respondent and staff counsel for further documentary disclosure and more detail with respect to the matter raised in the Statement of Allegations.

A hearing was convened to consider motions for disclosure raised by Mr. Napper. Similar motions were also raised by Mr. Klassen in parallel proceedings. However, as Mr. Klassen's hearing has been settled by way of a settlement agreement and order of the Commission, there is no need to rule on the motions raised by Mr. Klassen.

During the course of the hearing a number of requests for disclosure made by the parties were satisfied. The panel instructed the respondent and staff counsel to provide a list of outstanding issues relating to disclosure that remained to be considered before the hearing on the matter raised in the Statement of Allegations could commence. This list was received on November 14, 2000 and consists of the following:

Robert Charles Napper

1. Is staff required

(a) reports made

(b) summonses issued

(c) documents obtained from counsel for Guentert and Peters in relation to their

(e) documents concerning

2. Are the open-ended allegations contained in the Statement of Allegations appropriate and the responses to such allegations sufficiently particularized?

Staff

1. Does the Commission have jurisdiction to make the requested order that the respondents disclose documents and the names of witnesses they intend to call?

- *In the Tetrault decision the panel extensively canvassed the Commission's jurisdiction and found that the Commission did have jurisdiction.*
- *The panel specifically considered each of the points raised by the respondents in their submissions in determining that they had jurisdiction.*

2. Ought the Commission make the orders in this case?

- *The order does not prejudice the respondents in defending themselves against the charges.*

The *Tetrault* decision of the Commission dated May 21, 1999 provides the following general principle to be applied in examining issues relating to disclosure:

Fairness and natural justice obviously require the position of the respondent to be protected. He must receive adequate notice of the case he has to meet and be provided with

It is the view of the panel that in addition to protection of the respondent, it is consistent with the requirement for fairness and natural justice that all parties to the proceeding have sufficient pre-hearing disclosure of the nature of the evidence to be presented at the hearing to properly prepare. Permitting a party to withhold the basis for a position to be advanced at a hearing does not protect the interests of that party. Once the withheld evidence is presented at a hearing, it is not uncommon to permit an adjournment of the proceedings to allow the opposing party to prepare evidence in response. It is the view of the panel that the ability of each party to a hearing to present the strongest possible positions should not be compromised by procedural tactics which can only result in delaying the hearing.

Dealing with each of the matters raised in the motions:

1. Documents concerning general industry practice in connection with the MTS transaction.

This item is not a specific allegation made in the Statement of Allegations. The panel has had difficulty (even after receiving arguments from counsel) defining what is meant by this term. At best this appears to be a legal standard which may be applied by a panel in reviewing the respondent's conduct at the hearing of the matter. Each party to the hearing is in a position to argue what legal standard should be applied to determine whether the allegations have been proven. This is not a matter that relates to relevant evidence that is required to be disclosed before the commencement of the hearing.

2. Reports made by staff to the Commission leading to authorization of charge.

The report is not evidence presented to establish the allegations which form the basis for the hearing, but is a confidential report to a panel of members of the Commission (not the panel that conducts any subsequent hearing) to make a decision whether or not to proceed to a hearing or court. The report is at best an interpretation of the evidence made by a member of staff, it is not in itself evidence of the respondent's conduct. Requiring disclosure of the report would effectively prevent Commission staff from having internal communication and discussion relating to a matter under investigation. In addition, not disclosing the report does not prejudice the respondent as the respondent will have received disclosure of all relevant evidence considered in preparing the report prior to the hearing

3. Summonses issued by the Commission in the course of the investigation

Summonses are not evidence but are a tool of investigation used to gather evidence. If no evidence is gathered under a summons, or if the information gathered is irrelevant to the hearing, there is no prejudice to the respondent by not disclosing the fact one or more ineffective summonses were issued.

4. Documents obtained from counsel for Guentert and Peters in relation to civil action.

The panel accepts the position of staff that it has disclosed all documents that are relevant to the proceedings. Through the course of civil litigation there were certain documents received from a lawyer, Mr. Paterson, over which he asserts a claim of privilege. As the panel finds all documents relevant to the proceedings have been disclosed it is not necessary for the panel to rule on the claim of privilege or to rule that the additional documents relating to the civil proceeding be disclosed.

The respondent is free to call the parties to the civil dispute as witnesses to the hearing if they have evidence relevant to the proceedings.

5. Are open-ended allegations contained in the Statement of Allegations appropriate and the responses to such allegations

The panel has reviewed the allegations and find that they are sufficiently particularized for the respondent to understand what activities he is alleged to have done. The panel finds the allegations are not open-ended and the respondent is in a position to respond to the allegations by providing his own evidence in defense to refute any evidence presented by staff at the hearing.

With respect to whether the allegations are appropriate, the purpose of the hearing is to determine whether the allegations are appropriate. The respondent is free to present evidence and argument at the hearing to show one or more of the allegations are not substantiated.

6. Does the Commission have jurisdiction to make the requested order that the respondents disclose documents and the names of witnesses they intend to call?

The panel relies on the *Tetrault* decision of the Commission dated May 21, 1999.
The panel therefore orders that:

- (a) The motions raised by the respondents be dismissed;
- (b) The respondent shall produce to staff counsel for inspection and copying all documents in the respondent's control or power upon which the respondent will rely at the hearing;
- (c) The respondent shall produce to staff counsel the names and addresses of witnesses the respondent anticipates calling at the hearing; and
- (d) Payment of costs of these motions be determined at the end of the proceedings.

January 10, 2001

"E. O. E. Bergman"

Acting Chairman

"W. J. A. Bulman"

Member

"K. S. Kristjanson"

Member