August 9, 2000

IN THE MATTER OF: THE SECURITIES ACT

- and –

IN THE MATTER OF: MAX SYSTEMS INC., BARRY BANEK, SHAWN RATTAI, AND RONALD M. FRANK

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

CHAIRMAN:	Mr. D. G. Murray
BOARD MEMBERS:	R. G. McEwen M. S. Fages

APPEARANCES:

Ms K.G.R. Laycock	)	Counsel for the Commission
	)	Counsel for the respondent
Mr. Campbell G. Wright		Max Systems Inc., Barry Banek, Shawn Rattai (May 25 and May 26, 1998)
		Parties represented themselves on May 16, 17 and 18, 2000

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I. Introduction

This matter initially came on for Hearing May 25 and 26, 1998. After being adjourned on May 26, 1998 proceedings were interrupted for two years due to a Court challenge initiated by the respondents Banek, Rattai and Max Systems Inc. After proceeding to the Manitoba Court of Appeal, the matter returned for completion before this Panel. The balance of the evidence as well as argument was presented on May 16, 17 and 18, 2000.

Messrs. Banek and Rattai as well as Max Systems Inc. (the "Respondents") initially represented by Mr. Wright, chose to represent themselves in completing this matter. Ronald Frank, although a witness, was not a Respondent in these proceedings, having entered into a Settlement Agreement at an earlier date. While Ms. Charlotte Frank, a shareholder in Max Systems Inc., was not represented at the Hearing, Mr. Stewart appeared on her behalf during the argument portion of the proceedings and with consent of all parties spoke to the issue of sanctions.

II. Chronology

1. Banek and Rattai are not registrants. Prior to the incorporation of Max Systems Inc. they worked at a business operating under name of Thoughtcraft. Ronald Frank, at all material times the Committee of the estate of Charlotte Frank, his minor daughter, invested $100,000 in Thoughtcraft either by way of purchase of securities or a loan. Evidence indicated that the investment was lost when Thoughtcraft failed.

2. In 1995, Banek and Rattai decided to form a company for the purpose of marketing computer programs owned by Banek. These programs included Medi-Max, a program for medical billings.

3. Banek and Rattai incorporated a numbered company (3346499) as of June 15, 1995. Banek and Rattai were the incorporators and first directors. The company had no money or assets and apparently was to be a distributor of the Medi-Max program (and others). The numbered company entered into a licensing agreement with Banek dated July 13, 1995 (Exhibit 29).

4. Banek and Rattai had discussions early on with Frank about their plans. Frank expressed interest in being involved in the business interests of Max Systems and decided to invest another $100,000 from his daughter's estate. He testified that he hoped to recover the amount he had lost in Thoughtcraft. In the spring of 1995, Frank was being pressured by the Public Trustee to account for the initial investment.

5. As of July 20, 1995, Frank completed a subscription for shares indicating a purchase of 300,000 shares in the numbered company for $100,000 (Exhibit 44). Under date July 21, 1995 the numbered company also issued a promissory note to Frank (acting as committee for the estate of Charlotte Elizabeth Frank) for $100,000 payable in full as of July 31, 1996 and bearing interest at 8.75% (Exhibit 34).

6. Internal corporate documents dated July 20 and 21, 1995 which were subsequently sent to the Securities Commission (Exhibit 19) indicate the following at that time:

Shareholders	**Number of Shares**	**Amount Paid**
Barry Banek	200,000	$1.00
Shawn Rattai	100,000	$10,000
Ron Frank	300,000	$100,000

Director	**Office Held**
Barry Banek	President
Shawn Rattai	Vice-President
Ron Frank	Secretary-Treasurer

7. All the parties verbally had agreed that Ron Frank would be a director although it was never noted as such on any Corporations Branch filings. He was noted as such on internal company records as well as in the various forms of offering memoranda which were subsequently used for trading securities in Max Systems Inc. Evidence indicated clearly that Mr. Frank considered himself a director and he in fact tendered his resignation as such on August 12, 1996 (Exhibit 46).

8. The company financed its operations initially from the funds paid in by Frank and Rattai and subsequently from trading in securities to members of the public. Both Banek and Frank drew salaries. Frank drew $2000.00 per month. His duties were to sell shares to the public. Banek's monthly draw was more than that of Frank. There was no clear evidence as to what salary Rattai was to draw, although, evidence suggested that there were several months when he drew nothing at all from the company.

9. On August 1, 1995, the numbered company filed Articles of Amendment to change its name to Max Systems Inc.

10. On August 25, 1995, Max Systems filed with the Securities Commission a Notice of Intention to Trade in a Security (Form 23). Thereafter Messrs. Banek, Rattai and Frank began, in varying degrees, to market Max Systems securities to the public. As of October through December 1995, the following trades were completed in Max System's shares:

Name	**Amount**	**Date**	**Number of Shares**
Chisick, Mark & Cliff	$35,000.	Nov./95	100,000
Harmax Enterprises	$35,000.	Oct./95	100,000
Michelle Sen	$5,000.	Dec./95	14,286
George Nykulaik	$10,000.	Dec./95	28,572
Doreen L. Skinner	$5,000.	Dec./95	14,286
Greg Radis & Sally Banek-Radis	$10,000.	Nov./95	28,572

Breach of Securities Act and Regulations

1. When a Form 23 is filed to provide Notice of Intention to Trade in Securities pursuant to the prospectus and registration exemptions under section 91 of the Regulation, a Report (Form 27) must be filed within 15 days of the last trade or the end of the 180 day trading period, whichever is earlier. If the Report is not filed the exemptions intended to be relied upon are not available. The Form 27 in this case was not filed. There is, therefore, no doubt that all trades conducted by

Banek/Rattai/Frank/Max Systems are instances of trading without proper registration and prospectus and are breaches of The Securities Act and Regulation.

2. Mr. Wright, when he represented the Respondents admitted that the infractions were clear but that imposing lengthy denials of exemptions was, under the circumstances, harsh. He argued that the breach of the Act and Regulations was technical and that the majority of the shareholders were happy with their investments. It was suggested that a lengthy denial of exemptions was particularly harsh with respect to Mr. Rattai who was represented as not having personally traded in Max Securities with the public. Counsel for the Commission, on the other hand, proposes denials of exemptions for a period of years and sets out in the Statement of Allegations numerous factors that the Panel is urged to consider in addition to the obvious failure to file a Report. For the most part, these factors are public interest factors which the Panel is asked to consider in determining any sanctions to be imposed. The additional factors are as follows:

(i) The Respondents traded in securities after being advised that the offering document they were providing to investors was deficient and not in accordance with the requirements of the Act.

(ii) The Respondents traded in securities to the estate of Charlotte Frank, a minor, knowing that the investment was highly speculative and without giving due consideration to the appropriateness or not of the investment.

(iii) The Respondents orally represented, stated or gave undertakings as to the future value or price of the securities of Max Systems and as to the potential for the securities to be listed on the stock exchange with the intent of effecting a trade.

(iv) The Respondents made oral and written representations which were false or misleading, including the failure to divulge pertinent information to investors in the course of trading in securities.

(v) The Respondents made false or misleading statements written and/or oral, with respect to material facts, or omitted to state material facts, the omission of which made statements of the Respondents false or misleading, to Commission staff in the matter of the investment by a Committee of funds of the estate of a minor in Max Systems.

III. Findings on the Evidence

For the reasons set out above, the Panel finds that the Respondents traded in securities of Max Systems to the public without being registered and without having filed and received a receipt for a prospectus. With respect to the additional factors set out in the Statement of Allegations, the findings of the Panel are as set out below:
(i) The Respondents traded in securities after being advised that the offering document they were providing to investors was deficient and not in accordance with the requirements of the Act.

The evidence is clear that Darrell Briscoe, then Senior Analyst for the Commission, wrote to Max Systems to the attention of Banek a letter dated October 5, 1995 advising that the offering memorandum forwarded to the Commission was deficient and did not comply with Regulation

91(b) requirements. The letter (Exhibit 11) further went on to say that there should be no further solicitation of trades to the public until the deficiencies in the offering memorandum were rectified.

There was further correspondence between Banek and Mr. Briscoe over the next number of weeks and an amended offering memorandum was prepared and forwarded to the Commission. Max Systems, per Banek, was advised that the amended offering memorandum remained deficient. The Commission in fact never approved an offering memorandum for Max Systems.

The two offering memoranda were placed in evidence and reviewed by Commission counsel. The Panel agrees with the position adopted by Mr. Briscoe that the offering memoranda were deficient. This area is dealt with in greater detail below.

Despite the fact that the Commission had clearly indicated to Max Systems that the offering memorandum was deficient and solicitations to the public for Max Systems' securities should be curtailed, the trades listed in the these Reasons nonetheless took place. The Respondents, or certain of them, did trade in securities using a deficient offering document despite being advised by the Commission that the offering document was indeed deficient. It is clearly contrary to the public interest to trade in securities without proper disclosure on the basis of deficient offering documents. The fact that the trades were conducted knowingly and in disregard of Commission directions only exacerbates the offense.

(ii) The Respondents traded in securities to the estate of Charlotte Frank, a minor, knowing that the investment was highly speculative and without giving due consideration to the appropriateness or not of the investment.

Charlotte Frank was involved in an automobile accident and suffered serious injuries. During her recovery, Ron Frank was appointed as her committee by the Court of Queen's Bench. The estate of Charlotte Frank was significant, having received the proceeds of a settlement for Charlotte's injuries. Frank, as committee, invested $100,000 of Charlotte's money into Thoughtcraft, which was lost and subsequently invested another $100,000 of her money into Max Systems. The investment in Max Systems was characterized by the documents both as a subscription for shares and as a loan. The oral testimony from Frank and Banek also conflicts as to the nature of the investment. Regardless of its form, by Banek's own admission the investment in Max Systems was highly speculative. As such, in the opinion of the Panel, this was clearly not a suitable investment to be made by a committee. Nor did Frank obtain Court authority for this investment.

Frank knew both Banek and Rattai from their earlier mutual connection with Thoughtcraft. Frank was aware of Banek's plans to market his computer programs and wanted a chance to get involved at the outset. He became financially involved (albeit with someone else's money) shortly after incorporation. When asked during the Hearing if he considered himself a "founder" of Max Systems, he replied in the affirmative.

Upon becoming involved with the Company, it was agreed Frank would become a director and an employee drawing a salary. It was after Frank became involved that the Company adopted the name Max Systems and filed the Form 23 with the Commission. Banek testified that the decision to attempt to raise funds by trading in securities to the public was made by the three directors

after Frank acquired his shares. Frank's duties then became the marketing of Max Systems shares. In addition, Frank was disclosed as a member of the management team and a major shareholder in the offering memoranda (Exhibits 27 and 50) used in the sale of securities to the public.

From their past involvement with Frank and their discussions concerning Max Systems, Banek and Rattai were aware that Frank was investing with his daughter's money. The fact was also clear by the wording of the initial promissory note (Exhibit 34). In addition, Banek and Rattai were well aware that an investment in Max Systems was highly speculative. Banek testified that he advised the public investors of this fact.

It is contrary to the public interest for highly speculative securities to be sold to the estates of those who are unable to look after their own interests. Committees, in fact, are forbidden to use funds in their care for such speculative investments. The Respondents knew or ought to have known that Frank should not be investing with these funds. The fact that the source of funds was known to the Respondents is a matter for consideration by the Panel.

> (iii) The Respondents orally represented, stated or gave undertakings as to the future value or price of the securities of Max Systems and as to the potential for the securities to be listed on the stock exchange with the intent of effecting a trade.

This allegation, if proven, represents a breach of sections 69(2) and (3) of The Securities Act. These sections are contained in Part VIII of the Act dealing with trading in securities generally and prohibit making representations as to the future value of a security or that it will be listed on a stock exchange with a view to making a trade. This issue arises in the evidence of Doreen Skinner. Ms. Skinner is the sister of Ron Frank. Skinner purchased 14,286 shares of Max Systems Inc. for $5,000. She testified that in discussions with Banek before acquiring her shares, he advised her that he expected to be providing a $.20 per share dividend within one year. She testified that he also advised that he planned to list the securities first on the Alberta Stock Exchange and then The Toronto Stock Exchange.

Ms. Skinner's credibility was brought into question by the Respondents. Notes on the file of Commission investigator, Marc Boily, concerning a conversation he had with Ms. Skinner were introduced as evidence. Mr. Boily's notes suggested that he believed she asked him to make a record of a conversation that did not in fact take place. The suggestion was made by the Respondents that Ms. Skinner had asked Mr. Boily to falsify his records and, as such, her evidence was untrustworthy.

The Panel found Ms. Skinner to be a very earnest witness who was somewhat excitable. She does not present herself as someone with any level of sophistication in the area of capital markets and investments and in giving testimony did not always make herself clear in her initial response. Nonetheless the Panel found her to be forthright and she appeared to answer questions honestly to the best of her ability. She was quite taken aback when the reference in Mr. Boily's notes was referred to and she stated earnestly that she would not presume to tell Mr. Boily what to put on his file and certainly would not ask him to lie. The Panel accepts Ms. Skinner's evidence and

feels that the notation on Mr. Boily's file is likely as a result of miscommunication as opposed to dishonesty.

Banek did not test Ms. Skinner in cross examination as to the alleged representations nor did he deny making them when giving his own testimony. The Panel finds that Banek did make representations as to future value of the securities and as to future listing with a view to making a trade in breach of sections 69(2) and (3) of The Securities Act.

> (iv) The Respondents made oral and written representations which were false or misleading, including the failure to divulge pertinent information to investors in the course of trading in securities.

The fact that Mr. Briscoe expressed concerns about deficiencies in the offering memoranda in his correspondence with the Respondents is persuasive that it was in fact misleading and there were numerous omissions, and the Panel in fact has made that finding. Two of the items of omission in the offering memorandum specifically pointed out by staff counsel are as follows:

> 1. The offering memorandum contained no reference to the fact that a large investment had been made in the company by the Committee of an estate. This may well have been a concern to potential investors, particularly any investors aware of the rules governing investments by Committees.
>
> 2. There was a lack of disclosure about the financial history of the principals of the company. Specifically, no information was included about Banek's earlier bankruptcy proceedings. This type of information is important to prospective investors and failure to include it in the offering memorandum is contrary to public interest.

There are numerous other instances of failure to divulge raised by Commission counsel which the Panel has not found necessary to restate.

> (v) The Respondents made false or misleading statements written and/or oral, with respect to material facts, or omitted to state material facts, the omission of which made statements of the Respondents false or misleading, to Commission staff in the matter of the investment by a committee of funds of the estate of minor in Max Systems.

The initial promissory note of July 21, 1995 (Exhibit 34) clearly indicated that a loan was made from Ron Frank "acting as committee" for the estate of Charlotte Elizabeth Frank". This became a bone of contention with the Public Trustee as a result of which Darrell Briscoe, on behalf of the Commission, sought clarification by letter to both Max Systems attention: Barry Banek (Exhibit 17) and to Ron Frank (Exhibit 18). The response to Mr. Briscoe came in a subsequent letter (Exhibit 20) which enclosed a redrafted promissory note for $100,000 signed by Ron Frank and Barry Banek in favour of Charlotte Frank dated November 27, 1995. The earlier promissory note clearly setting out that the money was advanced by Frank as a Committee was never sent to Briscoe.

The Panel finds that these actions were intended by Frank and Banek to mislead Commission staff as to the nature of the source of the funds behind Frank's investments. Such actions are contrary to the public interest.

IV. Decision

Clearly the Respondents traded in securities in breach of The Securities Act and Regulations. In addition, there are extenuating public interest factors in evidence that remove this matter from the area of being simply a technical breach. At the same time, the Panel did not find any intended dishonesty in connection with the investments themselves. The Respondents were not marketing empty promises. Max Systems is still an operating company with what appears by the evidence to be a viable product to market. The public investors, the Chisicks, Harmax Enterprises, Michelle Sen and Greg Radis and Sally Banek-Radis (Banek's sister) remain shareholders. The evidence suggests that they are content with their investments. In fact, one of the principals of Harmax purchased additional shares from the estate of Charlotte Frank.

Through the efforts of the Public Trustee and counsel for Charlotte Frank, the shares held in the name of Ron Frank were transferred to his daughter. Doreen Skinner, at her request, had her shares redeemed by Max Systems at the purchase price. Another shareholder, George Nykulaik, who soured on his investment when all the facts were disclosed was directed by Max to a Dr. Silverman who purchased his shares. Despite the fact that the business operations of Max Systems Inc. are and were legitimate the trades occurred and the Panel is left with the fact that illegal trading took place. The Panel must also contend with the public interest issues outlined above.

Barry Banek

Banek is the President of Max Systems. Throughout the period of illegal trading he was its directing mind. He worked closely with Frank in the marketing of securities to the public. Contacts were primarily made by Frank and "the close" was done by Banek. He was involved in all trading transactions. He and Frank also worked together in the "re-characterization" of the transaction in which Frank acquired shares and the subsequent misleading of Commission staff.

Frank is not a subject of this proceeding; Banek and Rattai are the individual respondents. As between the two of them, Banek acknowledges responsibility for the trades and the activities the Panel has considered to be contrary to public interest. Banek testified that only he and not Rattai traded in securities to the public. Banek and Rattai both testified that Banek kept Rattai in the dark about the correspondence with the Securities Commission, the directive not to sell securities pending amendments to the offering memorandum and the redrafting of the promissory note. The two testified that in January 1996 when Banek confessed the problems Max was having with the Public Trustee and the Securities Commission Rattai was angry about being misled. Apparently Rattai then demanded of Frank that he turn his shares over to Charlotte's estate or the Public Trustee.

The Panel felt that this evidence was a little overdone and partially intended to salvage Rattai's ability to deal in the exempt market. Nonetheless the Panel does accept that as between Banek

and Rattai the former is primarily responsible for the illegal trading and associated activities contrary to the public interest. Frank's Settlement Agreement included a denial of exemptions for a period of four years. While Banek was responsible for the operations of Max Systems, Frank was ultimately responsible for the improper investment of his minor daughter's funds. The two should be treated equally. Banek is therefore denied exemptions as well as registration under the Act for a period of four years from the date of this Decision.

Rattai

The degree of Rattai's fault is much less than that of Banek. Commission counsel acknowledged that he took part in only one illegal trade, being the trade to Michelle Sen. Rattai argued that Banek actually made that sale.

Rattai was a social acquaintance of Michelle Sen and her husband, Dr. Robin Sen. They attended the same church. Rattai advised the Sens of the opportunity to invest in Max. The investment was made in the name of Michelle Sen who paid $5,000 for 14,286 shares. She never met Banek. While Banek demonstrated the Medi-Max program for Dr. Sen, Michelle had discussions only with Rattai, signed a share subscription in front of Rattai, received the share certificate from Rattai and gave him the cheque for $5,000. The Panel finds Rattai's actions to be at the very least an act or conduct in furtherance of a trade.

The Panel accepts that Rattai's responsibility overall is much less than that of Banek. Nevertheless, he did conduct an illegal trade, was aware or should have been aware that Frank was acquiring shares with estate funds and in final analysis was at all times an officer and director of Max. The Panel affixes a period of denial of exemptions and registration for Rattai at one year from the date of this Decision.

Max Systems

There is a consideration in connection with Max Systems Inc. that the Panel has deliberated over at some length. Certainly Max Systems, as the corporate entity whose shares were marketed, cannot shed its association with the activities of its principals. At the same time, the majority of the shares in the company are owned by individuals who are innocent of any wrongdoing.

Mr. Stewart, with the consent of all parties, spoke at the end of the hearing to the question of penalty as it concerns Max Systems Inc. and its possible effect on his own client. He pointed out that he does not condone the actions of Banek and Rattai and had nothing to say on their on behalf. He did point out that a lengthy denial of exemptions leveled against Max Systems will potentially cause the greatest harm to those shareholders who had done no wrong. This is especially true of Charlotte Frank, no longer the subject of a committee order, who became the company's largest single shareholder, not by choice but by default.

The Panel acknowledges that the most efficient and economical way for a small company to raise public funds is under the exemptions. Proceeding by way of prospectus for the relatively small needs of a company like Max Systems is cost prohibitive. A complete removal of

exemptions will make it impossible for Max Systems to raise capital outside of traditional third party lending.

No evidence was led on behalf of Max Systems about the company's financial situation. It probably would have been advisable to provide such information but Banek and Rattai were unrepresented for the completion of the Hearing and apparently did not consider this area.

Mr. Stewart, in his address, provided some information not founded on evidence which the Panel chose to hear. He advised that the company was close to turning the corner but was not yet on sound financial footing. He indicated that to their credit, Banek and Rattai had not been drawing royalties or full salaries in order to keep the company afloat. Actually, evidence of this with respect to Rattai had been adduced during the hearing.

He advised that the shareholders who chose to stay in Max were committed to it and his client was simply stuck with it. He argued that if the company is prohibited from accessing the exempt market it could be driven out of business. In that case, all of the innocent shareholders, but particularly Charlotte Frank, would be seriously harmed. The Panel has no evidence before it as to whether the transfer of shares from Ron Frank to Charlotte Frank was accompanied by a cash settlement or a call on a bond. The Panel simply has before it the fact that Charlotte Frank is the single largest shareholder in Max Systems Inc. without choosing so to be.

At the same time the Commission's actions must appear to punish fault and protect any future investors. The Panel has decided that Max Systems Inc. should be denied exemptions for a period of two years from the date of this decision. Having said that, the Panel further orders that during the said two year period, Max Systems may have access to the exemptive provisions of the Regulations provided that prior to any trading in securities it shall have filed with the Securities Commission an offering memorandum and received the Commission's approval thereof. In this manner, the Panel's concern about proper disclosure for the benefit of investors will be met. Obviously during the term of their suspensions, Banek and Rattai may not personally be involved in the trading of Max Systems securities in any respect.

V. Costs

Ms. Laycock, for the Commission, correctly points out that at $1,600 a day for a total for four and one half days, the costs for the hearing alone would be $7,200. Taking into accounts some ancillary witness costs, staff are seeking costs in the amount of $8,000.

The Commission has discretion in the setting of costs. The ability to pay, the likelihood of collection and the effect the requirement to pay may have on an enterprise are all matters the Commission may consider in arriving at a decision. The Panel is satisfied that Banek, Rattai or Max Systems at this time are not in a position to pay costs in the neighborhood of $8,000 even though the amount is justified. In this case, the Panels sets cost at $2,500 to be specifically assessed as to $2,000 payable by Banek and $500 payable by Rattai. In each case, if payment of costs is not received prior to the end of suspension imposed the suspensions will continue indefinitely until such time as the costs have been paid. No assessment of costs is made against Max Systems Inc.

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

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

"*M.S. Fages*"
M. S. Fages
Member