

February 22, 2010

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: PATRICIA McLEAN

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

Panel:

Acting Chair:

Ms. L.M. McCarthy

Commission Members:

Mr. D.H. Smith

Mr. G.S. Posner

Appearances:

Ms. K.G.R. Laycock

Counsel for the Commission

Mr. R.L. Tapper

Counsel for the Respondent

The hearing with respect to the Patricia McLean matter was held on October 16, 2009, and the decision of the panel was issued on December 14, 2009. Subsequent to the issuance of the decision, counsel for Ms. McLean requested an appearance before the panel to address the issue of Ms. McLean's costs, as the reciprocal order requested by staff counsel against Ms. McLean was not approved. A hearing regarding costs was held on January 27, 2010.

Mr. Tapper argued that under section 5(1)(i) costs incurred by Ms. McLean could be awarded against the Commission. Section 5(1)(i) states the following:

5(1)(i) if two or more parties appear in opposition to each other at the hearing, the commission may order an unsuccessful party to pay all or part of the costs of a successful party and may fix the amount of such costs or direct how and by whom they are to be taxed.

As Ms. Laycock argued, however, the language of the section stating that “**if** two or more parties.....” indicates that the parties referred to are two or more respondents, not the Commission. If the Commission was considered a party under this section, there would **always** be at least two parties. A previous decision of the Commission (David Wayne Finley, November 23, 2000) states that:

[Counsel for the respondent] 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. 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....

Other sections of The Securities Act address the issue of costs, but only in the context of recovering costs incurred by the Commission from a respondent. Staff counsel submitted the Ironside decision of the Alberta Securities Commission for the panel’s consideration, which contains the following:

[164] The Act does not authorize a panel conducting an enforcement hearing to order costs incurred by a respondent to be paid by Staff. The Commission, as a creature of Statute, has no power to make any orders unless expressly given it under the Act.

Counsel for the respondent argued that, although the acts are otherwise similar, since the Alberta Securities Act does not have a section comparable to 5(1)(i), the case is not relevant to the matter under consideration. The panel disagrees because, as discussed above, the Commission is not one of the parties contemplated in section 5(1)(i), and concurs with the statement in the Ironside decision that we do not have the authority to order costs against the Commission.

Respondent’s counsel also argued that costs should be awarded to deter Staff from bringing forth frivolous matters. The panel disagrees with this characterization of staff’s application to reciprocate the OSC order against Ms. McLean. Orders that have been issued in one jurisdiction are routinely reciprocated by other jurisdictions across the country. Even though the panel was not persuaded to reciprocate the OSC order against Ms. McLean, it was not frivolous or inappropriate in any way for Staff to have made the application.

Accordingly, the panel rejects the Respondent’s contention that the panel can and should order the Commission to pay some of all of the Respondent’s costs.

"L.M. McCarthy"

L.M. McCarthy
Chair

"D.H. Smith"

D.H. Smith
Member

"G.S. Posner"

G.S. Posner
Member