November 27, 2007

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: PORTFOLIO STRATEGIES CORPORATION, JOHN DAVID GRIFFITHS and RANDY KENNETH REYNOLDS

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Panel:

Vice-Chair	Ms. L.M McCarthy
Commission Members:	Mr. J.W. Hedley
	Ms. K.E. Hughes

Appearances:

Mr. S. Gingera	)	Counsel for the Commission
T. Manson	)	On behalf of Portfolio Strategies Corporation
G. Wood	)	On behalf of Randy Kenneth Reynolds
T. Crane	)	On behalf of John David Griffiths
E. Szach	))	On behalf of Attorney General of the Province of Manitoba

Portfolio Strategies Corporation ("Portfolio") is one of the Respondents named in a Notice of Hearing and Statement of Allegations both dated June 7, 2007. Also named as Respondents are John David Griffiths and Randy Kenneth Reynolds who, it is alleged, were employed by Portfolio as salesperson and branch manager respectively.

One of the issues set forth in the Notice of Hearing is "whether or not pursuant to Section 148.2 of the (*Manitoba Securities Act*), that Portfolio Strategies Corporation be ordered to pay compensation for financial loss. Subsections 148.2(3) and 148.2(4) of the *Manitoba Securities Act* set forth as follows:

> "148.2(3)
> When so requested by the director, the commission may order the person or

company to pay the claimant compensation of not more than $100,000. for the claimant's financial loss, if after the hearing the commission

(a) determines that the person or company has contravened or failed to comply with

(i)a provision of this Act or the regulations,

(ii) a direction, decision, order or ruling of the commission, or a rule made under subsection 149.1(1),

(iii) a written undertaking made by the person or company to the commission or the director, or

(iv) a term or condition of the person or company's registration;

(b) is able to determine the amount of the financial loss on the evidence; and

(c) finds that the person or company's contravention or failure caused the financial loss in whole or in part.

148.2(4)
If the contravention or failure occurs in the course of the person or company's employment by another person or company, or while the person or company is acting on behalf of the other in any other capacity, the commission may order the other person or company to jointly and severally pay the claimant the financial compensation ordered under subsection (3)."

In its statement of response, Portfolio says that subsections 148.2(3) and (4) are unconstitutional and *ultra vires* the legislature of the Province of Manitoba. The argument is that Section 96 of the *Constitution Act*, 1982, provides that the determination of civil claims and the awarding of financial compensation is within the purview only of federally constituted Superior Courts.

This panel convened to hear arguments and submissions in respect of Portfolio's constitutional challenge. In this connection, we heard from legal counsel for Portfolio, for staff of The Manitoba Securities Commission and for the Attorney General of Manitoba. The questions to be answered, to borrow from the Attorney General's submissions are:

1. Does the Manitoba Securities Commission (the "Commission") have jurisdiction to decide the constitutional issue being raised?

2. If the Commission does have jurisdiction to decide the constitutional issue, at what stage of the hearing should the Commission exercise it?

3. Should the Commission refer the constitutional issue to a judge of the Court of Queen's Bench pursuant to Section 31 of *The Securities Act*?

Associated with question number 2 above is the alternative contention raised by Portfolio that, should the Commission conclude that the determination of the constitutional issue is premature, then proceedings against Portfolio should be discontinued or stayed.

For the reasons that follow, we have decided that:

1. The *Constitution Act* challenge shall be heard by the Commission, not by the Court of Queen's Bench.

2. The constitutional challenge shall be dealt with after the allegations set forth in the June 7th, 2007 Notice of Hearing and Statement of Allegations have been determined on their merits; and

3.There will be no discontinuance or stay granted to Portfolio.

The constitutional challenge has been made by Portfolio to address what it submits to be an unfair state of affairs. Portfolio, it is argued, finds itself before this Commission solely and simply because of a legislative provision which ought never to have been enacted. The argument goes that even the Statement of Allegations concedes (in paragraph 11) that Portfolio was not advised of the improper actions of the other Respondents. Those activities were "off book" and Portfolio has itself committed no breach of the Act. The "fairness issue" is the backdrop against which we are asked to determine the constitutional and procedural issues before us.

The first question is:

Can the Commission decide on its own whether its power to make orders for financial compensation is constitutionally sound? Portfolio has referred us to the Martin/Laseur case *(Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, 2003 SCC 54) in which the Supreme Court of Canada conducted an extensive review of cases dealing with charter challenges to enabling legislation for administrative tribunals. Paragraph 48 of the Martin/Laseur case summarizes the results of the Court's analysis:

> "The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to charter scrutiny can be summarized as follows:
>
> 1. The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision.
>
> 2.(a) Explicit jurisdiction must be found in the terms of the statutory grants of authority.

2.(b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from a statute itself.

3. If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charte*r. (emphasis added)

4.The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by:

(a) pointing to an explicit withdrawal of authority to consider the *Charter*; or;

(b) convincing the Court that the examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations."

Those tests aside, Portfolio suggests to the Commission that the cautious, and therefore preferred, approach is to refer the *Constitution Act* question to the Court of Queen's Bench in the absence of expressive legislative authority to decide questions of law. At the same time, Portfolio concedes that the implied jurisdiction to make such decisions does in fact exist.

The Attorney General also cites the Martin/Laseur case as the leading case on the jurisdiction of administrative tribunals to make decisions on constitutional challenges.

The authority of the tribunal flows from the existence of the statutory authority to decide questions of law. Although there is no such explicit authority, a referral to Section 31(1) of *The Manitoba Securities Act* appears to imply authority to determine questions of law because the Commission has, under that section, the authority to refer questions of law to the Court of Queen's Bench. The section does not state that the Commission is required to refer questions of law to the Court but rather states that it may do so. The argument goes that this language implies that the Commission itself may determine questions of law or refer such matters to the Court of Queen's Bench at its own discretion. So, the Attorney General argues that the tests set forth in the Martin/Laseur case do not impede the ability of the Commission to make decisions on constitutional challenges.

However, having dealt with that hurdle, the Attorney General points out the absence of jurisprudence in which the administrative tribunal itself has ruled upon a Section 96 challenge to its own statutory jurisdiction, with the possible exception of the Chrysler Canada case *(Chrysler Canada Ltd. v. Canada (Competition Tribunal)* [1992] 2 S.C.R. 394). The question posed by the Attorney General is "does the *Securities Act* demonstrate the legislative intent to give the Commission authority to review on constitutional grounds the very specific jurisdiction that the legislature clearly intends the MSC to exercise under Section 148.2?" That is a question which this Commission will have had to answer in reaching our conclusion.

Staff of the Commission has argued that the *Securities Act*, in a practical sense, requires that the Commission decide questions of law. The Commission clearly and routinely carries out an adjudicative function. Staff argues that the presence of an adjudicative process is an important factor in finding an implied power to decide questions of law.

Staff also takes the position that the Martin/Laseur test applies equally to a determination of non-charter matters, such as the matter at hand.

In the final analysis, the Supreme Court of Canada has in effect issued a directive to administrative tribunals which are faced with constitutional challenges of constituent legislation. In strong language, the message is that if you are equipped and legislatively enabled to decide questions of law, or to interpret law, you also hold a "concomitant power to determine whether that law is constitutionally valid": from paragraph 34 of Martin/Laseur quoting Cuddy Chicks *(Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 S.C.R. 5); or, as stated in Cooper *(Cooper v. Canada (Human Rights Commission),* [1996] 3 S.C.R.854 (as quoted in paragraph 34 of Martin/Laseur):

If a tribunal does have the power to consider questions of law, then it follows.....that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.

We take the view, although recognizing the cautionary approach described by the Attorney General, that no distinction between charter challenges and Section 96 challenges has been recognized in any of the jurisprudence of which we are aware. In the absence of such a distinction, it is our view that the Commission has the duty to make the constitutional determination on its own unless, as a matter of discretion, it opts to avail itself of Section 31 of *The Securities Act* by referring the question to the Court of Queen's Bench of Manitoba. In this case, we choose not to exercise such discretion and will decide whether Section 96 of the *Constitution Act* renders Subsection 148.2 of *The Securities Act* unconstitutional and *ultra vires* the legislature of the Province of Manitoba.

The second question is:

At what staqe of the hearing should the Commission exercise its jurisdiction to decide the constitutional issue? Counsel for two of the three Respondents, Portfolio and John David Griffiths, prefer that the matter of the constitutional challenge be heard and determined prior to hearing on the merits of the case to be made against the three Respondents. Portfolio notes that

this Commission may, as master of its own procedure exercise what amounts to a broad discretionary range in favour of its position on this issue, and that of Griffiths.

To assist in our analysis of relevant precedent, Portfolio has cited a number of Supreme Court of Canada cases as well as a body of cases decided by administrative tribunals. The most noteworthy of the latter group is Re: A, (*In The Matter of A,B,C,D,E,F,G and H* 30 O.S.C.B. 6921; 2007 CarswellOnt 4897) a decision of the Ontario Securities Commission (the "OSC").

Re: A is a charter case, the main issue of which was "whether the Constitutional Motions brought by the Moving Respondents ought to be heard at the hearing, to be dealt with at the discretion of the hearing panel, rather than in advance of the hearing." The OSC, in reaching its conclusions has in its written Reasons set forth various tests by which it reached its conclusions. Many of the above mentioned Supreme Court cases were considered and counsel for Portfolio has liberally quoted from and referred to Re: A in his submission. The following extracts from that case were emphasized in support of Portfolio's position:

"While proceedings before a specialized administrative tribunal are intended to be more streamlined and less formal than those in the Court system, Commission proceedings must be conducted with caution to ensure fairness to the parties before it, and efficiency in the conduct of such proceedings. It is not uncommon for parties to bring pre-hearing motions to a Commission panel…..in our view, some of these motions should be heard and determined as pre-hearing motions, in advance of the hearing on the merits, so as to promote and advance the goals of fairness and efficiency."

This statement reflects and supports the submission by Portfolio, to which we have previously referred, that discretion in matters of procedure ought to be exercised by an administrative tribunal with an eye toward fairness to the parties involved.

Further, quoting from Re A:

"In reviewing prior Commission decisions, decisions of other administrative regulatory tribunals, as well as subsequent appeals and judicial reviews of such decisions, we note the following:

1. There is a wide variety in the nature, scope and breadth of Commission proceedings, and a great diversity in the outcomes sought and the impacts on the parties. When proceedings are brought to a Commission hearing panel, staff could be seeking a range of protective orders and relief that can affect the ability of the parties to participate in the capital markets. The relatively recent legislative amendments which gave the Commission the power to impose monetary sanctions and cost orders have increased the severity of possible outcomes to persons named as respondents in Section 127 (of the Ontario Act) proceedings.

2. The Commission must ensure its proceedings are fair, that all procedural rights to which respondents are entitled are properly and effectively provided. The manner in which that goal is achieved may depend on the context of such individual proceeding, including the sanctions and outcomes sought, and what is ultimately at stake for the respondents before the Commission.

3. The Commission is responsible for administering the Act, which has an overarching mandate and obligation:

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.

4. Commission proceedings ought to be transparent, fair, effective and efficient, in furtherance of and in light of fulfilling its statutory mandate and obligations.

5. As an administrative tribunal, the Commission, and each hearing panel in particular, are "masters of their own procedure" [(see *Prassad v. Canada (Minister of Employment and Immigration*), [1989] 1 S.C.R. 560]. The Commission has broad discretion in such matters, which must be exercised with due regard to all of the circumstances; interests and rights of the parties. All such elements need to be carefully balanced."

In light of those observations by the OSC, Portfolio urges this Commission to exercise its discretion in favour of dealing with its constitutional challenge on a pre-hearing basis. The issue, it is argued, should be argued now because Portfolio, itself not having been accused of wrongdoing should not have to "endure" a hearing on the merits involving the other two individual respondents.

In its argument, Portfolio also dealt with the body of jurisprudence, including Re: A, which tends to shift the presumptive balance in constitutional matters toward not deciding the constitutional challenge without a proper factual foundation. We will discuss those cases at further length in examining the arguments of the Attorney General and staff on this issue because there is an impressive body of jurisprudence which states in strong language that a constitutional challenge should rarely be heard in a factual vacuum.

Portfolio on the other hand argues that the "factual vacuum" cases ought to be distinguished, reminding us that this case is not a charter case but a Section 96 case. We quote from the written argument provided by Portfolio as follows:

As indicated in R. v. Oakes (*R. v. Oakes*, [1986] 1 S.C.R. 103) a charter analysis starts with the determination whether a right guaranteed by the charter has been violated. Then, if it is found that a charter right has indeed been infringed, a Section 1 charter analysis is carried out to determine whether the charter violation is justified. No such analysis is required in a Section 96 case. (emphasis added) Section148.2 of the Act is either *intra vires* or it is not. There is no subjective element, for instance, to determine whether a Section 96 violation is justified.)

We consider this to be a compelling argument and make note of it now in contrast to the "factual vacuum" cases to be examined further in these Reasons. The question as raised in essence is why does the Commission need to know what facts are raised in evidence that the individual respondents have breached the *Act*? It is the Act itself under scrutiny not the facts which allegedly will lead us to apply the impugned section of the *Act*.

As we have said, the Attorney General argues that it is a fundamental principle that constitutional issues should not be decided in a factual vacuum. Two Supreme Court of Canada cases are cited in support of this proposition:

MacKay v. Manitoba , [1989] 2 S.C.R. 357 and *Danson v. Ontario (Attorney General),* [1990] 2 S.C.R. 1086 .

Quoting from MacKay:

"*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the charter and inevitably result in ill considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect Court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel."

The following extracts from Danson appear to lend themselves more appropriately to the matter at hand:

"It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". Adjudicative facts are those that concern the immediate parties:……. "who did what, where, when, how and with what motive or intent……." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements."

The Court then goes on to refer to the fundamental proposition espoused in MacKay and notes that MacKay was heard by the same Court and decided prior to the hearing of Danson. The suggestion in Danson therefore is that the fundamental proposition stated in MacKay further reduces the instances in which administrative tribunals can properly proceed to hear constitutional challenges prior to the establishment of the factual base either in the way of adjudicative facts or legislative facts. However, Danson does go on to say:

"This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack thereof)."

Quoting from Manitoba(Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110 ("Metropolitan Stores"):

"There may be rare cases that where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a Motion Judge. A theoretical example which comes to mind is one where parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate Section 2(a) of *The Canadian Charter of Rights and Freedoms,* could not possibly be saved under Section 1 of the

Charter, and might perhaps be struck down right away……..it is trite to say that these cases are exceptional." (emphasis added)

The argument of Commission staff on this question is similar to that of the Attorney General. Its position is that "it would be premature to consider the constitutional issue before resolving matters raised in the Notice of Hearing and Statement of Allegations (including a determination as to whether a compensation order should be made) on their merits.

In its written Brief, staff refers us to the previously cited Re: A and the following test proposed and applied by the OSC:

"1. Can the issues raised in the Motion be fairly, properly or completely resolved without regard to contested facts and the anticipated evidence that will be presented at the hearing on the merits? In other words, will the evidence relied on the Motions likely be distinct from, and unique of, the evidence to be tendered at the hearing on the merits?

2. Is it necessary for a fair hearing that the relief sought in the motions be granted prior to the proceeding on its merits?

3. Will the resolution of the issues raised in the motions materially advance resolution of the matter, or materially narrow the issues to be resolved at the hearing on the merits such that it will be efficient and effective to have them resolved in advance of the commencement of the hearing on the merits?

If the answer to any of these questions is "yes", in our view, the Commission should hear the constitutional motions as pre-hearing motions, in advance of the hearing, absent, strong reasons to the contrary."

Staff argues that the questions enumerated in Re: A can all be answered "no".

Quoting now from Re: A:

"Due to the potential impact of the resolution of a constitutional issue, Courts have found it to be desirable to hear a constitutional challenge in the context of all relevant facts and circumstances."

Staff and the Attorney General have presented judicial authority which, on the face of things, appears to settle the matter. Such decisions "should not be and must not be made in a factual vacuum".

However, as we have previously stated, we believe there is some merit to Portfolio's argument that those cases essentially deal with legislative provisions which are impugned because of the Charter of Rights and Freedoms. Portfolio argues that the matter before us is a non-Charter constitutional case. We agree with Portfolio when it says that there is no analysis of "adjudicative facts" required in a Section 96 case. Either the impugned section, in this case Section 148.2 of the Act, is *intra vires* or it is not. We believe, as a result, that the above Question number one from Re: A , can be answered in the affirmative.

Having said that, we refer again to the distinction described in the Danson case between adjudicative facts and legislative facts. The latter, as described by Mr. Justice Sopinka in Danson would "establish the purpose and background of legislation, including its social, economic and cultural context." In the light of the passage from Danson, we consider ourselves bound to observe that, at the very least, a foundation of legislative facts must be established before even a Section 96 constitutional challenge could be properly and thoroughly considered.

But why could such legislative facts not be provided before the hearing? In other words, we believe that the only "factual underpinning" required in this case would be the legislative facts described by Mr. Justice Sopinka in Danson. In our view, by requiring the establishment of such facts, we would not be ruling out an early hearing on the constitutional question raised by Portfolio.

As previously stated, we believe it would be incorrect not to postpone the Portfolio constitutional challenge until after the hearing on the merits. In this respect, we believe that the argument to be preferred is that which was made by the Attorney General, that is that a constitutional challenge should not be heard on an interlocutory basis unless it is unavoidable to do so in the circumstances of the case.

The Metropolitan Stores case did allow that some simple questions of law could be settled summarily. The example given, that of the law imposing the beliefs of a state religion, represented an obvious example of the exception to the rule. The Court observed, on the other hand,: "it is trite to say that these cases are exceptional".

In Re: A, the OSC observed that "due to the potential impact of the resolution of a constitutional issue, Courts have found it to be desirable to hear a constitutional challenge in the context of all relevant facts and circumstances."

The reluctance of the Courts to decide on a constitutional challenge at the interlocutory stage is well established, well documented and practical in its application.

On balance, the decisive characteristic which distinguishes this case from the "rare" or "exceptional" wherein an interlocutory determination can be made is the fact that the application of Section 148.2 to the matter at hand may be moot. As Portfolio has argued, its exposure to the penalties imposed by that Section can only be realized if the facts alleged against the two individual respondents are established in evidence. Those facts have been alleged but not proved. It seems to us that this fact alone would convince us that, particularly in view of the cautious approach consistently applied by the Courts, the constitutional challenge must await the conclusion of the hearing involving the two individual respondents.

The associated question is:

If the Commission concludes that the determination of the constitutional issue is premature, should proceedings against Portfolio be discontinued or stayed? The alternative position taken by Portfolio is that, if this Commission concludes that it is premature to determine the constitutional issue on an interlocutory basis, then Portfolio should be excused from the ensuing proceedings

by way of discontinuance or stay of proceedings. As previously stated, Portfolio referred at the outset of its argument to the Statement of Allegations containing an acknowledgement that Portfolio had not been advised as to some of the impugned activity of the individual respondents. As such, Portfolio takes the position that, as stated in its Brief, "it is both unnecessary and unfair for PSC to be a party in a proceeding which may or may not find a contravention or failure on the part of Griffiths or Reynolds."

Portfolio concedes that it can be brought back into the fray if the case against Griffiths and Reynolds concludes with a finding against those respondents. Portfolio raises the indisputable fact that it will be bothersome and potentially expensive to be a party to a proceeding such as the one contemplated in the matter at hand.

In response, the Attorney General does not take a contrary position. Commission staff, however, strenuously disagrees with the granting of a discontinuance or stay.

Staff notes that Portfolio is "intrinsically interested" in the matter of the allegations made against the individual respondents.

Metropolitan Stores Ltd. was cited as a useful precedent by counsel for Portfolio. This was a case in which the Manitoba Labour Board was asked to stay proceedings in respect of a first contract while the employer commenced a *Charter* challenge. The Labour Board refused to grant the stay and was subsequently reversed by the Manitoba Court of Appeal. However, the Supreme Court of Canada allowed the province's appeal and stated that the Court of Queen's Bench Motion Judge applied the correct principals in refusing the stay.

Although the Metropolitan Stores case, to which we have referred earlier, contains useful discussions relative to constitutional issues and judicial stays in general, it is difficult to apply it to the present application by Portfolio inasmuch as, at least in the context of this aspect of its argument, Portfolio only seeks to be excused as a party to the matter and does not seek a general stay of the proceedings as a whole as contemplated by Metropolitan Stores.

In our view, the preferred argument is that which is made by staff. That is that it would be unfairly prejudicial to Portfolio to allow these matters to be heard in the absence of Portfolio. Unquestionably, Portfolio has an interest in the case against the individual respondents. In fact we agree with counsel for staff when he states that this Commission would be open to criticism by Portfolio itself if we preempted its ability to take an active part in the proceedings which will follow, to the point of being allowed the opportunity to examine witnesses and present its arguments on the merits as evidence unfolds.

Therefore stay or discontinuance requested by Portfolio is refused.

"L.M McCarthy"
L.M. McCarthy
Vice-Chair

"K.E. Hughes"
K.E. Hughes
Member

"J.W. Hedley"
J.W. Hedley
Member