



THE MANITOBA  
SECURITIES  
COMMISSION

June 10, 2020

IN THE MATTER OF:            THE SECURITIES ACT

- and -

IN THE MATTER OF:            WAYNE SOKAL and ESP SOFTWARE INC.

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

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Panel:

Panel Chair:	Mr. J.T. McJannet, Q.C.
Member:	Mr. C.D. Burns
Member:	Mr. D.A. Huberdeau-Reid

Appearances:

Mr. S. Gingera	)	Counsel for Commission Staff
B. Barnes Trickett	)	Counsel on behalf of Wayne
A. Favereau	)	SOKAL and ESP SOFTWARE
	)	INC.
A. Stacey	)	Counsel on behalf of Grant
A. Doyle	)	KAUFMAN

This panel (the “MSC Panel”) of the Manitoba Securities Commission (“MSC”) commenced hearings into this matter on December 2<sup>nd</sup> & 3<sup>rd</sup>, 2019 culminating with this MSC Panel adjourning the proceedings and delivering a Decision to the effect that any party would be entitled to file a Motion before this MSC Panel on any matter dealing with the subject matter of the Notice of Hearing and Statement of Allegations dated the 15<sup>th</sup> day of November, 2018 as amended the 5<sup>th</sup> day of April, 2019.

Mr. Stacey, on behalf of his client, Grant Kaufman (“Kaufman or Applicant”) has filed a Notice of Motion dated March 31<sup>st</sup>, 2020 (“Exhibit No. 1”) and Affidavit of Kaufman sworn November 28, 2019 (“Exhibit No. 2”).

The Kaufman motion seeks a declaration of this MSC Panel:

“that in the particular circumstances of this proceeding the Applicant is not barred from obtaining an order of compensation for financial loss from the Commission against Wayne Sokal and ESP Software Inc. under subsection 148.2(3) of The Securities Act, CCSM c S50 (the “Act”), having regard to the application of sections 146(1), 147, 148.2(3) and 148.2(7) of the Act, subject to the Applicant discontinuing Court of Queen’s Bench action no. CI 13-01-96495 (the “Action”), consenting to an adjournment dismissing the Action, staying the Action or otherwise abandoning the Action on terms acceptable to the Commission.”

The Kaufman affidavit sets out the following uncontested but not yet proven circumstances:

- a) Kaufman invested at least \$95,000. In ESP Software Inc. (“ESP”), based upon certain representations and promises made to him by Wayne Sokal (“Sokal”).
- b) Kaufman, on November 15, 2013, filed a Statement of Claim in the Manitoba Court of Queen’s Bench against Sokal, ESP and three other parties (collectively the “Defendants”) recorded in Action no. CI 13-01-86495. The Defendants filed a Statement of Defence and Counterclaim in the Action. Mr. Kaufman filed a Statement of Defence to Counterclaim on June 23, 2014.
- c) Kaufman, in late 2014, learned that MSC was contemplating the institution of certain proceedings against Sokal and ESP and that Kaufman might be able to obtain compensation through such proceedings.
- d) In fact, the MSC in a letter dated February 26, 2019 to Mr. Kaufman from Chris Besko, Director of the Commission indicated that he believed

“that the commission should be given the opportunity to consider whether s.

148.2(7) applies to your claims:

Kaufman states that he was invited by the Director of the MSC to put forth his claim for compensation during the course of such proceedings, the Director advising Kaufman of the provisions of Section 148.2(7) of The Securities Act, Manitoba, and advising Kaufman that such Section might well prevent him from being successful in pursuing his claim for compensation at such proceedings.

Section 148.2(7) reads as follows:

“the commission shall not make an order if the claimant has commenced a civil court proceeding for compensation for the same loss.” (Attached Schedule “A”: Sections 148.2(1) – 148.2(10) Securities Act CCSM c.S50).

Mr. Barnes Trickett correctly describes this matter before us in his Brief at page 2, para. 1.4, in part:

“There are therefore now two proceedings, both initiated by the Applicant, seeking the same results – one before the Court, the other before the Manitoba Securities Commission.”

MSC staff initially took the position that it would not present evidence to this Panel that Kaufman was a claimant for whom this Panel could make an order under Section 148.2(1) that compensation be paid to Kaufman for financial loss. Section 148.2(1) states in part that where a claimant applies to the Director, the Director:

“may, when the commission holds a hearing about a person or company, request it to make an order that the person or company pay the claimant compensation for financial loss.”

Mr. Stacey’s motion seeks a declaration from this MSC Panel before the hearing of the proceedings instituted by the MSC against ESP and Sokal. The MSC Director had advised Kaufman that the MSC has not ever decided any issues dealing with the effect of Section 148.2(7). Mr. Barnes Trickett, counsel for ESP and Sokal, and Mr. Gingera have both appeared at this hearing anticipating that we may make a decision on the effect of Section 148.2(7) without first hearing the issue and allegations contained in the Amended Statement of Allegations filed by the MSC against ESP and Sokal.

The Director has made the request for the Commission to consider making an order for compensation to Kaufman and this MSC Panel will consider that request as this hearing continues and MSC Staff presents evidence dealing with the allegations contained in the Amended Statement of Allegations.

This MSC Panel, in hindsight, is of the opinion that the motion is premature and that the issues set forth in the Kaufman matter should more correctly be considered after the hearing and in argument.

In our view, it would have been more appropriate to simply dismiss the Kaufman motion and then proceed with the MSC hearing at which time Mr. Barnes Trickett in argument would be free to raise, if he chose, the effect of Section 148.2(7) and whether we could order any compensation to Kaufman. Nevertheless, we shall consider the Kaufman motion at this time.

Mr. Stacey, Mr. Barnes Trickett and Mr. Gingera have each filed detailed Briefs, with supporting authorities on the subject of the Kaufman motion. Mr. Gingera, counsel for the MSC, in his Brief, has been most helpful and while he takes the position “that the MSC is precluded from ordering compensation for financial loss given the strict wording of the statute” he does state that “staff is simply seeking the Commission’s guidance on whether it can make an order of compensation for financial loss in this circumstance without endorsing either position.”

We have read with interest the Briefs filed by Mr. Stacey and Mr. Barnes Trickett.

We certainly accept Section 6 of the Interpretation Act, CCSM c180 as it applies to The Securities Act (MB), which states:

“Every Act and Regulation must be interpreted as being remedial and must be given the fair, larger and liberal interpretation that best ensures the attainment of its objects.”

Both Mr. Stacey and Mr. Barnes Trickett refer us to Section 6 of the Interpretation Act (MB) as applicable to our deliberations in interpreting Section 148.2(7) of the Securities Act (MB).

In addition, Mr. Stacey (para. 13 of his Brief) and Mr. Barnes Trickett (para. 10.0 of his Brief) both refer us to and rely upon the Supreme Court of Canada decision in *Rizzo v. Rizzo Shoes Ltd.* [1998 15 CR 27] as the leading authority in Canada upon interpretation of statutes. Both quote with approval from the decision of Iacobucci J, in paragraph 21 wherein Iacobucci J relies on the statement of Elmer Driedger in *Construction of Statutes* (2<sup>nd</sup> ed. 1983) stating:

“He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At page 87 he states:

“Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

Mr. Barnes Trickett refers to the Manitoba Court of Appeal Decision in *Boles v. Director, River East Transcona*, 2019 MBCA 65 as authority for the fact that the Court of

Manitoba read Section 6 of the Manitoba Interpretation Act and the Rizzo cases as being

“one and the same idea”

Mr. Barnes Trickett then quotes at paragraph 23 of the Boles case by reference to Elmer Driedger, Q.C. in *Construction of Statutes* on:

“the modern approach to statutory interpretation requires that “the words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament” *Rizzo & Rizzo Shoes Ltd. Re*, (1998) SCR.27 (S.C.C.)

So we readily accept the “modern approach” as Elmer Driedger, Q.C. describes reference to *Interpretation of Statutes* and we acknowledge the approval of the Supreme Court and the Manitoba Court of Appeal to such “modern approach” in addressing the question before us.

We acknowledge and accept that the purpose of the Securities Act (MB) is similar in all respects to those set forth in section 1.1 of the Ontario Securities Act RSO 1990, cS5 where it states the purpose of this Act (the Ontario Securities Act) is:



- a) to provide protection to investors from unfair, improper or fraudulent practises;
- b) to foster fair and efficient capital markets and confidence in capital markets; and
- c) to contribute to the stability of the financial system and the reduction of systemic risk.

We are of the opinion that the Manitoba Legislature enacted Section 148 to assist investors and to provide a route of recovery to investors by allowing the MSC to order compensation in favor of investors who have suffered losses from unfair, improper or fraudulent practices, while at the same time, the inclusion of Section 148.2(7) does provide some protection to promoters in avoiding duplication of legal proceedings i.e. to avoid both a compensation order by the MSC and a decision/judgment of the Court of Queen's Bench.

Mr. Barnes Trickett proposes that our interpretation of Section 148.2(7) must give serious consideration to the "ordinary meanings of the words". If we limit our interpretation of Section 148.2(7) to their ordinary meaning we find that such a decision would require that we ignore the other conditions which the authorities require that we consider in reaching our decision. Specifically, if we determine that Section 148.2(7) shall be read with "ordinary meaning" of the words we find that we are placing little or no importance whatsoever on the other conditions which the

authorities specify that we are to consider in our deliberations. Accordingly, we reject a total literal approach to statutory interpretation in order to examine “the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself and the legislative interest both in enacting the Act as a whole and in enacting the particular provisions at issue.” (Observations of Iacobucci J. in *Chieu v. Canada* (Minister of Citizenship & Immigration 2002 SCC 3, 2002 1 SCR 84 @ para 34.

We again refer to the specific wording of Section 6 of the Interpretation Act (MB) which contains the words:

“that every Act and regulation must be interpreted --- and must be given the fair, larger and liberal interpretation that best ensures the attainment of its objects” (underlining added)

which, in our opinion, means we are to interpret Section 148.2(7) -- fairly, largely and liberally to ensure the objects of the Securities Act. (underlining added)

And in doing so we conclude that those words set forth in Section 148.2(7) namely:

“has commenced”

shall be interpreted such that any action shall not be considered as being commenced where such action has been discontinued, dismissed, stayed or otherwise abandoned.

This interpretation in our opinion achieves the purpose intended by the legislature:

to provide a route to the general public i.e. any investor to obtain compensation through proceedings of the MSC while at the same time avoiding the duplicity of actions based upon the same loss.

Finally, we refer to section 146(1) of the Securities Act (Manitoba) which states:

“The commission may direct, in any order, that the order or any portion or provision thereof comes into force

(a) at a future fixed time; or

(b) upon the happening of any contingency, event or condition specified in the order; or

(c) upon the performance to the satisfaction of the commission, or a person named in the order for the purpose, of any terms that the commission may impose upon any party interested;

and may direct that the whole or any portion of the order shall have force for a limited time only, or until the happening of a specified event.”

We conclude that section 146(1) authorizes the commission to make an order which directs that the order or any provision thereof may come into force ---

“upon the happening of any contingency, event or condition specified in the order.”

and upon a fair, large and liberal interpretation of the wording of Section 148.2(7) we declare:

That Kaufman shall not be barred from obtaining an order of the MSC of compensation for financial loss against Sokal and ESP subject to Kaufman discontinuing the Action, consenting to a judgment dismissing the Action, staying the Action or otherwise abandoning the Action on terms acceptable to the MSC.

Costs shall be considered upon completion of the hearing.

"J.T. McJannet, Q.C."  
J.T. McJannet, Q.C.  
Panel Chair

"C.D. Burns"  
C.D. Burns  
Member

"D.A. Huberdeau-Reid"  
D.A. Huberdeau-Reid  
Member

## Schedule "A"

### **Compensation for financial losses**

#### 148.2(1)

On the application of a claimant, the Director may, when the commission holds a hearing about a person or company, request it to make an order that the person or company pay the claimant compensation for financial loss.

### **Director's decision not reviewable**

#### 148.2(2)

Despite subsection 29(1), the Director's decision whether to make a request is not reviewable.

### **Order by commission**

#### 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 \$250,000. 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.

### **Compensation orders against employers and others**

#### 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).

### **Meaning of "employment"**

#### 148.2(5)

For the purposes of subsection (4), a person or company is employed by another person or company when

- (a) an employer–employee relationship exists; or

- (b) the first person or company is registered under this Act through the second person or company.

**Compensation order is in addition to other sanctions**

148.2(6)

The commission may make an order despite the imposition of any other penalty or sanction on the person or company, or the making of any other order by the commission, related to the same matter.

**Court proceedings take precedence**

148.2(7)

The commission shall not make an order if the claimant has commenced a civil court proceeding for compensation for the same loss.

**Claimant to inform commission about action**

148.2(8)

A claimant shall inform the commission without delay after commencing a civil court proceeding for the same loss.

**No right of action after hearing begins**

148.2(9)

Once the commission opens a hearing where a claim for compensation for financial loss is one of the matters before it, the claimant is not entitled to commence a civil court proceeding for compensation for the same loss or any unclaimed loss arising out of the same transaction.

**Enforcement of order**

148.2(10)

Despite subsection (9), a claimant in whose favour the commission makes an order may file a certified copy in the Court of Queen's Bench. The filed order is enforceable as a judgment of the court in favour of the claimant and against the person or company the commission ordered to pay the compensation.