THE MANITOBA
SECURITIES
COMMISSION

October 11, 2022

IN THE MATTER OF: THE SECURITIES ACT

- and -

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

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Panel:

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

Appearances:

Mr. A. Poushangi	)	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	)	Kaufmann

We delivered Reasons for Decision on the issues in this matter dated July 11, 2022; copies were delivered to Counsel on that same date.

In our Reasons we noted, after delivering our Reasons on the major issues set forth in the Amended Notice of Hearing, the parties would be entitled to present argument as to whether we should:

a) order payment of an administrative penalty;
b) order payment of costs of the investigation and this Hearing;
c) identify the parties and the amounts to be paid by any such parties;
d) resolve any other matters arising out of this Hearing.

We also stated that:

> In addition, Counsel was to address the question of costs on the Kaufmann Notice of Motion (the "Kaufmann Motion") the subject matter of which we dealt with in our decision of June 10, 2020.

Unable to settle upon an early date to hear argument on the above-noted matters, we set a schedule for delivery of Briefs from all Counsel. All Counsel have submitted Briefs in accordance with the schedule.

Please note that Mr. Kaufmann's name is sometimes misspelled in papers and Briefs filed with us. Mr. Kaufmann's name is spelled with double "n". The cover page of our Reasons for Decision, dated July 11, 2022 spells his name correctly as it is shown in

various exhibits filed, including cheques and bank documents with double "n" where his business name reference is "G. Kaufmann Truckyn & Equipment Rentals".

We are aware that ESP Software Inc. (ESP) has been dissolved. As stated we are to name the parties whom we have ordered to pay any administrative penalty and costs. Accordingly our orders herein may apply to Sokal and ESP as ESP could technically be reinstated at any time although such action appears unlikely.

Kaufmann Brief

The submission contained in the Brief filed by Mr. Stacey, Counsel to Kaufmann, argues:

> that we (our Panel) made an arithmetic error ---- on page 5 (subparagraphs a, d and e) of our decision in that we referred to investments made by Kaufmann as being $77,500.00 CAD when in fact the evidence proved that Kaufmann made a further and final payment on June 10, 2008 of $8,000.00 which payment was overlooked by us and that the correct amount of compensation in Canadian dollars to which Kaufmann is entitled should be $85,500.00 CAD and $10,000.00 USD.

We note:

1. Staff Counsel, in its Brief, confirms that our order for compensation should include Kaufmann's June 10, 2008 payment of $8,000.00. Staff Counsel makes no comment on the conversion of $10,000.00 USD to the currency of

Canada nor the payment of interest on any sums which Sokal should be required to pay to Kaufmann, both of which are raised by Kaufmann's Counsel.

2. Respondent's Counsel, in its Brief, makes little comment on the suggested amendment to our compensation order, Sokal to Kaufmann, nor on the conversion of $10,000.00 USD to currency of Canada nor on the payment of interest on any sums ordered to be paid to Kaufmann.

Compensation Order Amendment

We acknowledge that the evidence at the hearing proved that Kaufmann made the additional and final payment of $8,000.00 on June 10, 2008 and hereby correct our decision and order Sokal to pay Kaufmann compensation in the total sum of $85,500.00 CAD and $10,000.00 USD.

Dollars and Interest

Kaufmann's counsel then refers to our Order of compensation in which we also ordered Sokal to pay the sum of $10,000.00 USD and suggests that this amount should be expressed in Canadian dollars in order that such Order may be recorded as a judgment in our Canadian Courts.

Counsel states as set forth in "Enforcement of Judgments and Arbitral Awards in Canada by Frank Walyn and Kayla Theeuwen, Thomson Reuters Practical Law in Canada" (Tab A of Counsel submission):

"Canadian courts are not typically permitted to award judgments in foreign currencies"

While one might argue that section 12 of the Federal Currency Act, makes reference to "legal proceeding" and on a strict interpretation relates solely to court "legal proceedings" we accept that our Panel and other MSC members on many panel issues are guided by legislation and court decisions in arriving at decisions in their proceedings.

We acknowledge that the Manitoba legislature, in enacting the Reciprocal Enforcement of Judgments Act and specifically section 5, recognized that judgments expressed, as payable in a currency other than the currency of Canada shall be converted to Canadian Dollars, stating:

> "Where a judgment sought to be registered under this Act makes payable a sum of money expressed in a currency other than the currency of Canada, the master of the registering court, shall determine the equivalent of that sum in the currency of Canada on the basis of the rate of exchange prevailing at the date of the judgment in the original court; --- shall certify on the order for registration the sum so determined, expressed in the currency of Canada; and, upon its registration, the judgment shall be deemed to be a judgment for the sum so certified."

Converting US Dollars to Canadian Dollars and Interest Claim

The hearing in this matter took place over a number of days, commencing in January, 2019 and was completed with 4 days in January, 2022. The question of converting any sum of money owing to any party and in particular any money that might be paid in a currency other than currency of Canada was never raised by any party to these

proceedings. The question of award of interest payable on any funds ordered to be paid, Sokal to Kaufmann, was raised for the first time in the Kaufmann Brief. No evidence was presented to this Panel on the currency issue nor the interest issue until raised in the Kaufmann Brief. Accordingly, the request to express the sum of $10,000.00 USD in Canadian dollars is denied. Mr. Kaufmann is entitled to apply to the Master of the Court of Kings Bench, Manitoba, (as above noted) should he choose to do so. Similarly the request that interest be paid on compensation ordered to be paid by Sokal to Kaufmann is denied.

Costs/Administrative Penalties

We now turn to the question of costs and administrative penalties.

Costs on Kaufmann Motion

In our June 10, 2020 decision dealing with the Kaufmann Motion we stated that costs in connection therewith "shall be considered upon completion of the hearing."

Respondent's Counsel submits that the matter of costs should be adjourned sine die. Staff Counsel submits that costs in the amount of $7,317.19 be payable immediately by the Respondents as such a decision would be "consistent with the general principle that the unsuccessful party should bear costs of the proceedings." At the same time Staff Counsel stated:

> "As noted in the Respondent's Brief, Staff did not take a position" --- on the Kaufmann Motion.

In our view, the MSC, by its Panel, on receiving the request from the Director, may make a compensation order and staff counsel has the obligation to present the claimant's evidence in support of granting such an order. In this case where the Director has requested that consideration be given by this Panel for an order of compensation in favour of Kaufmann, staff counsel has the obligation of presenting Kaufmann's claim. It is not sufficient to simply: "not take a position".

It is the decision of this Panel that all parties bear their own costs in regard to the Kaufmann Motion.

Administrative Penalties

Is it in the public interest to order pursuant to subsection 148.1(1) and/or 148.1(1.1) of the Securities Act that Wayne Sokal ("Sokal") and ESP Software Inc. ("ESP") pay an administrative penalty?

Section 148.1(1) and 148.1(1.1) of the Act states:

> **Administrative penalties**
>
> 148.1(1)
>
> The commission may order a person or company to pay an administrative penalty of not more than $100,000. in the case of an individual, or not more than $500,000. in the case of any other person or company, if after a hearing
>
> (a) it 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; and
>
> (b) it considers the penalty to be in the public interest.

Administrative penalties against others

148.1(1.1)

If after a hearing the commission

(a) determines that

(i) a company or a person other than an individual has committed a contravention or failure referred to in clause (1)(a), and

(ii) a director or officer of the person or company, or another person other than an individual, authorized, permitted or acquiesced in the contravention or failure; and

(b) considers that the order is in the public interest;

the commission may order the director or officer or the other person to pay an administrative penalty of not more than $100,000. in the case of an individual, or not more than $500,000. in any other case.

may – underlining added

We note that the Supreme Court of Canada ("SCC") in Committee for the Equal Treatment of Asbestos Minority Shareholders in Ontario (Securities Commission) 2001 SCC 37 stated:

> "the purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventative, intended to be exercised to prevent likely future harm to Ontario's capital markets". (underlining added)

> "The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults and that sanction provisions
>
> > "cannot be used merely to remedy Securities Act misconduct alleged to have caused harm to private parties or individuals"

and as the SCC stated in Cartaway Resources Corp. Re 2004 SCC 26, at para 58:

> "Because s. 127 is regulatory, its sanctions are not remedial or punitive, but rather are preventive in nature and prospective in application."

In essence then sanctions may but should not necessarily be used to redress misconduct of Sokal and ESP alleged to have caused harm to private parties or individuals, such as in this case, harm to Kaufmann. In effect we also are to determine whether an administrative penalty will protect the public from, likely future harm.

Will it be a deterrent to possibility of likely future harm?

In this case we find that deterrence by way of administrative penalty could largely be ineffective but at least the message is sent to others that penalties may be assessed where that "other" may be in breach of the provisions of the Act. We have made this decision after considering the factors and the extent of such factors in this case in detail:

a) Sokal's conduct, while serious, was minor in nature compared to conduct of parties in the cases cited for our consideration;

b) that no apparent evidence detrimental to Sokal character and history was presented;

c) that there is little evidence that Sokal would have realized major benefits from his actions; and

d) there is no evidence of mitigating or appreciation consideration.

We conclude that there is no evidence which would lead us to suspect Sokal was or is a risk of future misconduct and whether any sanctions would have any influence on Sokal and others. Finally, we accept the question of Sokal's ability or inability to pay as being of some relevance, but minor, in nature.

Accordingly then, as we have found Sokal and ESP have contravened and failed to comply with the provisions of the Act and as we consider the penalty to be in the public interest, we order Sokal and ESP to pay an administrative penalty in the sum of $10,000.00. In our view this would convey a message to others that MSC will protect the public from future harm by parties unknown at this time.

Costs

Is it in the public interest to order that Sokal pay costs and incidentals to the Hearing?

In giving consideration to the question of costs we note that Staff Counsel, in its Brief, claims costs of $25,541.67 as detailed in Staff's Cost Materials – Tab 1.

Delay Considered

Respondent Counsel submits that

> "the issue of delay is and should be a significant mitigating factor"
>
> and noted:
>
> a) "Mr. Roy's investigation of this matter began over seven years ago on or about December 12, 2014"
>
> and

> "the transactions that form the subject matter of this case occurred in 2007 over fifteen years ago."

This Panel is of the view that it must also consider Delay as one of the many factors in determining whether administrative penalty and costs should apply and, if so, the extent thereof.

The SCC, in Law Society of Saskatchewan v. Abrametz, 2022 SCC (Abrametz) in its majority decision released on July 8, 2022:

> "addresses once again the doctrine of abuse of process at it related to inordinate delay in the administrative context".

The question of delay has long been a concern of Panel members. Delay can itself be an abuse of process in administrative proceedings.

Delay should be considered in every hearing. Even where delay may not be sufficient to the extent of being an abuse of process, we believe delay should be considered as a factor in determining whether there should be an order of administrative penalty and/or costs and if so, the amounts thereof.

MSC Panel members have expressed their concern with regard to delays which have occurred in various matters brought to Panels over the recent years. This Panel shares those concerns as expressed most recently in the case of Thoroski and Calvert, 2021, Carswell Man 415 in which that Panel stated:

> "Under Canadian law, individuals and companies who are charged by administrative tribunals, including provincial securities commissions, are entitled to be treated fairly. It is fundamentally unfair for investigations and hearings to take years to be completed. Individuals suffer significant stress. Outstanding allegations may negatively impact job opportunities or job promotions. Memories fade and tangible evidence becomes difficult or impossible to locate. Legal costs increase with lengthy delays, and for most individuals, legal advice is already extremely expensive. And, even if the respondents are found not to have committed the offences there is no ability for them, under the legislation, to recover any costs."

The decision of the SCC in Abrametz clearly stated that administrative tribunals have an obligation to speak out on the issue of Delay at any hearing particularly if none of the parties to such hearings bring forth Delay to be considered as amounting to abuse of process and dismissal.

The SCC set forth a 3 step process/test to determine if Delay amounts to abuse of process:

1. Delay must be inordinate;
2. The delay must have directly caused significant prejudice;
3. Once #1 and #2 Test are found by the tribunal then whether the delay amounts to an abuse of abuse must be determined by the tribunal.

There has been substantial delay in this matter but is not sufficient to describe delay as inordinate. As well we have not received evidence of significant prejudice.

We have assessed all the evidence submitted and taken into consideration all of those factors identified herein as being considered in determining questions of administrative penalties and costs and have determined the delay herein is unfair. However it does not amount to an abuse of process.

We have not abandoned nor ignored the responsibilities directed as belonging to the MSC, this Panel, nor any other tribunal of the MSC. We fully recognize that the MSC is to protect the public interest. However, in determining that, in this case, there is a delay, we have decided that the delay shall be somewhat remedied and considered in the calculation of the dollar amounts ordered to be paid for administrative penalty and costs.

Accordingly, it is in the public interest to order and we so order:

a) that the order of compensation, Sokal to Kaufmann, is amended to direct that Sokal pay the sum of $85,500.00 CDN and $10,000.00 USD;
b) that Sokal and ESP pay an administrative penalty in the sum of $10,000.00;
c) that Sokal and ESP pay costs in the sum of $10,000.00.

Observation

We also want to emphasize that in our view the rules of Court, while providing guidance, do not apply in the conduct of hearings by any MSC Panel. We particularly reference Section 5(1)(c) of the Act which reads as follows:

Rules as to hearings

5(1) For the purposes of a hearing required or permitted under this Act or any other Act of the Legislature to be held before the commission, the following rules apply:

(c) at the hearing, the commission shall receive such evidence as is submitted that is relevant to the hearing, but it is not bound by the legal or technical rules of evidence and, in particular, it may accept and act upon evidence by affidavit or written affirmation or by the report of an expert appointed by it under this Act; (underlining added)

"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