

May 23, 2001

IN THE MATTER OF: THE COMMODITY FUTURES ACT

- and -

IN THE MATTER OF: JAMES RICHARD HOESCHEN

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

Chairman: Mr. D. G. Murray
Board Members: Mr. E. O. E. Bergman
Mr. R. G. McEwen
Appearances:
Ms K. Laycock) Counsel for the Commission
Mr. C. Wright) Counsel for the Respondent

REASONS FOR DECISION

James Richard Hoeschen ("Hoeschen") was employed with CFG Futures Canada Inc. from October 1998 to September 29, 2000 when he was dismissed. He subsequently obtained employment with another firm trading on the Winnipeg Commodity Exchange and sought registration under The Commodity Futures Act. The Director of Capital Markets of the Manitoba Securities Commission refused to grant the registration. As is his right Hoeschen appealed this refusal to a panel of the Commission in what amounts to a fitness hearing.

A three-day hearing was set for April 10 through 12, 2001. On Tuesday, April 10, 2001, Mr. Wright, counsel for Hoeschen, requested an adjournment for one day. He advised the panel that he had been recently brought into the case and required the extra day for preparation. He also felt that the remaining two days scheduled for the hearing would be sufficient to complete the matter. Ms Laycock, counsel for the Commission, objected to the adjournment as the hearing had been scheduled for several months and witnesses attending that day would be inconvenienced.

The panel granted a one-day adjournment to Mr. Wright. On Wednesday, April 11, 2001 Mr. Wright advised the panel that as a result of his discussions with Hoeschen on the preceding day his client had instructed him to abandon his appeal. As a result of the withdrawal Hoeschen remains unregistered and unable to act in a sales or trading capacity.

On the subject of costs Ms Laycock argued that they should be set at \$4,084.00 being \$84.00 for the costs of issuing subpoenas, \$800.00 for her time for attendances on succeeding days,

\$1,200.00 for the attendances of the panel members for two half days and the balance related to the costs of investigation and preparation.

Mr. Wright argued that section 28 of The Securities Act dealing with costs of investigation applies only to registrants which does not include Mr. Hoeschen. He also contended that section 154(1) of the Act only applies in the event of a hearing and that no hearing was held due to the adjournment followed by the abandonment of the appeal. In the opinion of the panel the hearing in fact was convened on both mornings. The panel was also of the view that pursuant to section 154(1) and (2) of the Act they have authority to order costs against a non-registrant for any proceeding, which includes investigations or an attendance at a hearing.

Mr. Wright also argued that the panel should consider two additional things:

1) the costs (and time) being saved by the abandonment of the appeal prior to the giving of evidence; and

2) the fact that the appeal procedure is the only way for an individual to dispute the Director's exercise of discretion. If an applicant does not appeal he/she is prevented from earning a livelihood as a registrant. In addition he argued that there are no real additional costs to the Commission in reviewing a registration issue and to impose significant investigation or preparation costs against someone who takes advantage of this process is akin to making a discretionary decision by the Director virtually unappealable.

The panel members have some sympathy for Mr. Wright's position in that an applicant for registration should be allowed to seek that registration without being unduly penalized by costs. In the opinion of the panel, however, the applicant also has an obligation to act reasonably in pursuing registration. Allowing this matter to proceed to a hearing requiring two appearances, albeit brief ones, before abandoning his appeal does not represent reasonable conduct on the part of Mr. Hoeschen. There must come a point in the process where an applicant has to realistically assess his or her likelihood of success and decide whether to abandon the appeal. The panel is of the view that this consideration can and must occur prior to the actual attendance at hearing if no costs are to be incurred.

In this case the hearing was briefly convened on two successive days and the panel is of the view the costs applicable to these attendances must be assessed pursuant to section 1(2)(r) of Schedule A of the Regulation. Without determining the merit of Mr. Wright's submissions concerning the costs of investigation and preparation the panel has decided not to order costs in these categories in this instance.

Costs are ordered against Mr. Hoeschen in connection with the appearances as follows:

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| 1) For the Commission panels' attendance
on two mornings (at \$600.00 per half day) | \$1,200.00 |
| 2) For attendance of Commission counsel
on two mornings (at \$400.00 per day) | 400.00 |

3) For the cost of issuing subpoenas	84.00
4) Court reporter's attendance fee	<u>225.00</u>
Total	\$1,909.00

An order will issue setting out the terms of this decision.

May 23, 2001

"D. G. Murray"
Chairman

"E. O. E. Bergman"
Member

"R. G. McEwen"
Member