December 14, 2009

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

Background

On June 22, 2009 a Notice of Hearing was issued by the Manitoba Securities Commission (the "Commission") that a hearing pursuant to section 148.4 of The Securities Act (the "Act") would be held on August 19, 2009.

Commission Staff seek to reciprocate portions of an Ontario Securities Commission (OSC) order issued against Patricia McLean.

On August 19, 2009, the matter was adjourned to September 9, 2009. At that time the respondent, through counsel, gave notice in oral submissions of her intention to contest the MSC hearing on two grounds:

- The hearing matter is out of time, based upon section 137 of the Act, and

- The Settlement Agreement reached between the respondent and staff of the OSC is confidential.

The panel heard argument from MSC counsel and from counsel for the respondent on October 16, 2009 regarding the issuance of a Reciprocal Order. At that time, respondent's counsel raised an additional issue with respect to the applicability of Section 148.4(1) of the Act to the settlement agreement reached between McLean and the OSC.

Section 148.4(1) is reproduced below:

148.4(1) After providing an opportunity to be heard, the commission may make one or more orders under subsections 8(1),19(5),31.3(1),139(2),148(1) and148.3(1) against a person or company that has

(a) been convicted of a criminal offence arising from a transaction, business or course of action related to securities;

(b) been found by a court inside or outside Manitoba to have contravened this Act, the regulations or a decision of the commission or the Director, or the securities laws of another jurisdiction; or

(c) been found to have contravened the securities laws of another province or territory of Canada, by a securities commission or other person or body empowered by statute to regulate trading in securities in, or to administer, regulate or enforce the securities laws of, that other province or territory.

Basis for Decision
As noted above, counsel for the respondent raised three issues in contesting the reciprocal order proposed by Commission Staff. It is our view that if the panel accepts any one of these issues, or for any other reason decides that the reciprocal order should not be issued, we will not decide the remaining issues raised with respect to this matter.

Section 148.4(1) of the Act
The relevant part of Section 148.4(1) is paragraph (c), where an order may be made against a person or company that has *"been found to have contravened the securities laws of another province or territory of Canada, by a securities commission or other person or body empowered by statute to regulate trading in securities in, or to administer, regulate or enforce the securities laws of, that other province or territory."*

Respondent's counsel argued that the Act, with respect to reciprocal orders, is not broad enough to apply to McLean's settlement agreement with the OSC. The panel was provided with information about the relevant sections from the securities legislation of other Canadian jurisdictions.

In Manitoba, the conditions for a reciprocal order in the Act do not specifically deal with settlement agreements reached in other jurisdictions; Commission counsel noted that the Act

does not specifically exclude settlement agreements. On the other hand, in eleven other jurisdictions in Canada the fact that a person is subject to an order or has agreed to an order by a securities regulatory authority in Canada is specifically set out as sufficient to make an order against that person.

Settlement Agreement and Proceedings

The panel was provided with a copy of the settlement agreement between Patricia McLean and the OSC by both parties.

Counsel for the respondent also provided the panel with the transcript of the hearing that took place on September 8, 2008 in Ontario to consider the settlement agreement between the OSC and Patricia McLean.

The fundamental question before the panel is whether or not the respondent has "been found to have contravened the securities laws of another province". In reviewing the settlement agreement and the hearing transcript, the panel found that neither document identified the specific contravention, if any, of the Ontario Securities Act (the "Ontario Act"). Further, the settlement agreement, approved by the OSC, includes the following Acknowledgement in paragraph 3:

"McLean agrees with the facts and conclusions set out in Part IV of this agreement solely for the purposes on this proceeding. McLean expressly denies that the terms of this agreement are intended to be an admission of liability, misconduct, or wrongdoing by her in any other context to any person or company or other entity."

Decision

Commission Staff argued that a finding of contravention of the Ontario Act can be inferred from both the OSC's approval of the settlement agreement and by reviewing the sequence of transactions and events in the settlement agreement itself.

The panel's opinion, however, is that neither the transcript of the OSC's proceedings nor the settlement agreement in question specify that the Ontario Act was breached. Accordingly, this panel is left with having to infer that such a breach actually occurred, which is not its responsibility. Since there is nothing in the Ontario decision that reflects a contravention of the Ontario Act, should this panel in Manitoba be required to make that inference? We think not. Moreover, the denial of misconduct specified in the settlement agreement, which was accepted by both parties, simply adds to the ambiguity of the matter.

Thus, the application for a reciprocal order sought by Commission Staff in the McLean matter is not accepted.

> *"L.M. McCarthy"*
> L.M. McCarthy
> Chair
>
> *"D.H. Smith*

D.H. Smith
Member

"G.S. Posner
G.S. Posner
Member