July 18, 2007

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: PROMITTERE S & P 500 LIMITED, PROMITTERE RETIREMENT TRUST and ROBERT JAMES THIESSEN

REASONS FOR DECISION OF THE MANITOBA SECURITIES COMMISSION

Panel:

Chair	Mr. D.G. Murray
Commission Members:	Mr. J.W. Hedley

Appearances:

Ms. K.G.R. Laycock	)	Counsel for the Commission
D.M. Wright	)	On behalf of all Respondents

Background

PS&P 500 Ltd. ("PS&P") is a corporation registered under the laws of Ontario with its head office in Toronto. Promittere Retirement Trust ("PRT") is an unincorporated investment trust sitused in Ontario with its office located at the same address as PS&P. The trustee and administrator of PRT is Promittere Limited. At all material times, Robert James Thiessen (Thiessen) was a director and president of both PS&P and Promittere Limited.

None of Thiessen, PS&P nor PRT has ever been registered to trade in securities in the Province of Manitoba. During the period of approximately February 2004 to and including October 2005, PS&P traded in its securities to Manitoba residents. Sometime thereafter, PS&P ceased trading in its securities. On or about October 10, 2006. PS&P initiated a lawsuit claiming misappropriation of funds and seeking recovery against a third party or parties.

During the months of May through September 2006, PRT traded in its securities to Manitoba residents. Both PS&P and PRT claimed reliance on the "accredited investor" exemption in National Instrument 45-106 ("NI 45-106") (or its predecessor 45-103) in making the trades. The definition of "accredited investor" in NI 45-106 (as with 45-103) contains qualifying assets and income tests which must be met in order for the exemption to be available.

The sales were made for these issuers by Manitoba residents each of whom was registered in some capacity to trade in securities in Manitoba.

Commission staff has alleged that many of the Manitoba resident investors were not accredited investors and as such PS&P, PRT and Thiessen cannot rely on the exemption. If the allegation is proved, the result would be that they will have been trading without registration and without filing a prospectus in contravention of the Act and contrary to the public interest.

This matter first came on for hearing in an ex parte proceeding on September 14, 2006. On the basis of the Statement of Allegations filed the panel members determined that the public interest required an interim order pending the presentation of evidence. The order cease traded the securities of PS&P and PRT in Manitoba and denied access to the exemptions available under the Act to Thiessen. The order was dated September 15th and was set to expire September 29th, 2006.

The matter continued on September 29th, 2006. At that time the Cease Trade Orders (pursuant to Section s.148) were extended by consent to February 15, 2007. The order in each case did allow for redemptions. The interim order denying access to the exemptions in the Act to Thiessen was extended by consent to October 13, 2006.

On October 13, 2006 Thiessen consented to the extension of the order against him until February 15, 2007.

On February 15, 2007 the orders against all three respondents were extended until the hearing of a motion to vacate them to be brought by the Respondents and set for March 19, 2007.

On March 19th the issues for consideration were whether the interim orders cease trading the securities of PS&P and PRT in Manitoba and denying Thiessen access to the exemptions would continue.

Evidence

Jason Roy, an investigator with The Manitoba Securities Commission (MSC) presented the evidence for M.S.C. staff. He was involved from the outset in the investigation conducted by the MSC into the activities of the respondents. He testified that as of the initial hearing of September 15, 2006 the investigation indicated that of the Manitoba investors in PS&P, 19 who were noted on the subscription documents as being accredited did not qualify for that status either through the asset or income tests set forth in NI 45-106. The number of PRT investors incorrectly noted as accredited at that time was 8. He further testified that by the date of the hearing of March 19, 2007 the ongoing investigation revealed that the number of incorrectly identified investors had grown to 30 with respect to PS&P and 15 with respect to PRT. Mr. Roy further testified that he

is not aware of all possible instances of improper categorization of investors as accredited as time had not allowed, by the date of the hearing, for investigative staff to make contact with all of the identified investors in PS&P and PRT.

The 45 investors determined to be improperly identified as accredited are listed on Exhibit 3. Exhibit 8 contains the reports of exempt distribution under NI 45-106 for PRT, while Exhibit 9 contains this information for PS&P (under NI 45-103). In all instances the reports were signed by Thiessen.

These reports show 109 sales to Manitoba investors of PRT securities and 74 sales of PS&P securities. Mr. Roy testified that, in 45 out of 183 instances, investors were incorrectly identified on subscription forms as being accredited when they were not. This represents approximately 25% of all Manitoba transactions. In Mr. Roy's testimony, he recounted contact he had with these investors. He testified that he conducted interviews with these individuals in the course of his duties either by telephone or in person or received information from them, in some cases through questionnaires, forwarded to and completed by investors. It was through these contacts that he ascertained that the 45 investors were incorrectly identified as being accredited.

Mr. Roy testified that, in some cases, the investors contacted stated they were not accredited according to the asset or income tests and were not advised by the seller they dealt with that they were being categorized as accredited for the purposes of the transaction.

He specifically referred to two interviews he conducted with Linda Kohut and Karl Zibell, both of whom were Manitoba investors in PRT. Documentation outlining the contents of the interviews with Mrs. Kohut and Mr. Zibell were entered as Exhibits 32 and 33 respectively.

Mrs. Kohut clearly stated that neither she nor her husband were accredited investors and that, had the concept been properly explained to her, she would not have initialed the section of the subscription materials that suggested they were.

As with Mrs. Kohut, Mr. Zibell stated he was not an accredited investor despite an indication to the contrary on the form completed at sale.

The evidence detailing the statements of Mrs. Kohut and Mr. Zibell was presented as being representative of the interviews conducted with those who were determined not to be accredited, despite an indication on the subscription documentation that they were.

Mr. Roy also testified that there were instances where the schedule required to be completed by an investor claiming to be accredited had not been fully completed or even attached by the selling representative. In these cases PRT/PS&P returned them to the salespeople with instructions to complete. The testimony of Mr. Roy suggests that these deficient documents were tended to be completed by the selling agents without further referral to the investors. In at least one instance, according to Mr. Roy, an investor, when interviewed, denied that the initials on the applicable form were made by him.

Argument

The arguments presented by counsel for Securities Commission staff and for the respondents focused on three areas:

A) the nature of the evidence, particularly in light of the fact that much of Mr. Roy's testimony consisted of hearsay evidence;
B) the appropriate onus, particularly where the order sought is a temporary one; and
C) whether PRT and/or PS&P should be penalized for the alleged actions of their representatives.

A) Hearsay evidence

Mr. Wright, counsel for the respondents, argued that Mr. Roy's evidence was inadequate. He stated that Mr. Roy's evidence was hearsay and that it is not enough for a witness in Mr. Roy's position to merely recount activities and conversations forming part of his investigation even for the purpose of extending a temporary cease trade order. He stated that direct evidence from the investors was required. There was none.

Mr. Roy's evidence was obtained during an investigation largely conducted by him. His testimony, and the documents he presented as Exhibits, were all clear and specific to certain individuals and activities in question. He was present and gave his testimony under oath. He was available for cross examination and was, in fact, cross examined by Mr. Wright.

This panel has decided to admit Mr. Roy's evidence. We are not bound by the strict rules of evidence and can accept hearsay on the understanding that it will be attributed less or more weight depending upon the gravity of the order sought and the onus borne by the party presenting the evidence.

B)(i) Onus or standard of proof where the order sought is temporary

Staff counsel, Ms. Laycock, argued that, in the case of temporary orders, the panel need only be satisfied that the evidence received supports a prima facie case. On the other hand, Mr. Wright relied on the principal enunciated in the Fairtide decision of the British Columbia Securities Commission that temporary orders should not be extended on the basis of affidavit evidence that "amounts to a little more than unsubstantiated suspicion". He argued that Mr. Roy's testimony, when direct evidence of investors could have been presented, was not any better than unsubstantiated affidavit evidence and certainly not sufficient to support a conclusion that would have the effect of extending cease trading orders against PRT and PS&P.

The Fairtide case also describes and applies a two-pronged test for extension orders such as the one sought in this instance: is the order "necessary and in the public interest?" The onus on staff would be to "demonstrate a reasonable basis for apprehending a future threat (emphasis added) to the public interest."

The Commission in Fairtide further noted that the issuances of orders such as those sought here, even though temporary, "have an intrusive and disruptive effect on those affected by them." The

resulting power on the part of this Commission is, as stated in Fairtide, “a significant one and must be justified”. We agree with those comments.

Having made the foregoing observations as to the relevant standard of proof, we turn to MSC staff’s case. This panel finds that Mr. Roy’s evidence was credible and persuasive. We have attributed sufficient weight to his testimony so as to be satisfied that the prima facie case posed by Ms. Laycock has been made. When this matter is finally heard and presumably, permanent CTO’s are requested, we expect that we will hear more detailed evidence and some evidence from investors. We may also hear direct evidence from the respondents, which they opted not to provide at the hearing on the motion. The panel will then draw final conclusions based on all evidence before it. For our present purposes, however, in considering the extension of temporary cease trade orders we are satisfied that the evidence we have received from MSC staff is sufficient to conclude that 45 Manitoba resident investors, 30 in the case of PS&P and 15 in the case of PRT were incorrectly identified as accredited investors.

(B)(ii) and C) Is the Order sought “necessary” and are PRT and/or PS&P accountable for the acts of third party registrants?

Mr. Wright argued that the test to be used is more stringent than the one proposed by Ms. Laycock. He, citing the Fairtide case, urges that there must be a future threat to the public interest in order for a temporary order to be extended. We will deal with that argument.

Another of Mr. Wright’s arguments can also be considered here. He argued that, even if the 45 investors in question were not of accredited status, PS&P and PRT, having used the services of third party registrants to sell the securities, could rely on the documentation generated by them without attracting any fault of their own. That is, PS&P and PRT merely relied on the subscription documents put together by independent selling representatives and they should not accordingly be held responsible for the fact that many of them are incorrect.

As to the latter issue, Ms. Laycock referred the panel to cases such as Chemalloy Minerals Limited (OSC) and R v. Kelly (1997) (BC Provincial Court) for the principles that an issuer has some responsibility to ensure that the buyer satisfies the requirements of an exemption and that the wording of a subscription agreement alone is not determinative of whether an exemption applies.

Dealing first with that issue, (the “agency issue”) it is acknowledged that PS&P and PRT were one step removed from the investors and relied on registered agents for sales of their securities. The issuers were not the sellers. At the same time, the evidence suggests that there were numerous instances where the subscription forms and schedules verifying accredited status were incompletely filled out or not filled out at all. In each case these were sent back to the agents for correction. These should have raised a question with the issuers as to whether the agents were dealing properly with the accredited investor criteria. Simply relying on subscription documents when there appear to be a considerable number of errors on the face of many of them was no longer open to the issuers at that point. We would have doubted whether any issuer could escape liability over the actions of its agents or representatives, except in extraordinary circumstances. On the facts before us, in any event, it is clear to us that fault on the part of the

issuer is not derived merely through its status as principal to the agent sellers. The issuers had direct roles to play as well.

In fact both issuers did make direct contact with some of their Manitoba securities holders over the accredited investor issue. PS&P sent out letters dated August 3, 2006 headed "Dear Investor" which stated:

"The sale of shares of Promittere S&P 500 Limited was limited to accredited investors. We failed to collect written confirmation of this fact at the time of your purchase. Although shareholders have made gains on their holdings, we must notify all individuals that your initial capital purchase, and any accumulated growth, will be returned to shareholders early in October, 2006. The price per unit is set on the first business day of the month (October 2, 2006) and cheques will be in the mail to individuals on or about October 15, 2006.

If you **DO NOT WISH** *TO HAVE YOUR INVESTMENT CASHED OUT*, the attached accredited investor certificate must be properly executed and returned to Promittere S&P 500 Limited, prior to September 27th. No extension can be granted, therefore, if a shareholder does not qualify as an accredited investor, or does not return the enclosed certificate completely executed, then shareholdings will be liquidated and US funds will be mailed out by mid-October.

To summarize:
Every shareholder who is a resident of Manitoba, will be redeemed out and receive a cheque in the middle of October;

Except

For those who return the completed signed Certificate.

No action on your part will result in your investment and its growth being returned to you.

If you have any questions, do not hesitate to contact our office."

This form letter was filed as Exhibit 24 in these proceedings. Obviously the issuer had realized that there were deficiencies in many cases in the documents supporting the investments for which exemptions were claimed. This would have been an opportune and appropriate time for PS&P to take steps to ensure that there was no doubt about the qualification of these investors. There appears, on the face of it, to have been no effort to do so. It is at least clear that PS&P was fully aware that there was a serious question in some cases about the availability of the exemption that had been relied upon.

Documentary evidence presented at the March 19th, 2007 hearing suggested that there was some misunderstanding by at least some of the investors contacted concerning this August 3, 2006 letter and enclosed Certificate. A letter addressed to "Promittere Capital Group" from a Manitoba investor in PS&P, a Mr. Guy Whitehall, made it clear that despite completing and returning the

Certificate verifying that he was an accredited investor he did not understand the document and the verification was untrue. The letter, filed as Exhibit 25, states:

“In August, I completed the certificate sent by Promittere Capital with respect to my eligibility as an accredited investor. In that certificate I indicated that I was an accredited investor on the basis that my financial assets had a net realizable value exceeding $1.0 million. Having reviewed the criterion more carefully, I now realize that I misunderstood this to include all assets when in fact the test is “financial assets” only.

The net realizable value of my financial assets at the date that of purchase and the date of completion of the certificate was far less than $1.0 million and indeed I was not eligible to represent or warrant myself to be an “accredited investor”. Therefore, by way of this letter I hereby retract my representation as an accredited investor.”
The panel received no evidence as to whether any other investor subsequently “retracted” the completion of their Certificate, however, evidence shows that under date February 12, 2007, PRT sent a letter to investors which has an ominous tone. Exhibit 23 is a copy of the letter sent to a Manitoba investor by the name of Ms. Julia Hunnie. Mr. Roy’s testimony confirmed that a copy of this letter went to every Manitoba resident PRT investor. The letter states that PRT has relied on the investor’s completed Subscription Agreement that, among other things, indicated that the investor represented that she qualified for the exemption claimed. Exhibit 8 shows that in Ms. Hunnie’s case her subscription form showed she was an accredited investor. Exhibit 23 concluded with the following paragraphs:

“Promittere Retirement Trust (the “Trust”) and its Administrator, Promittere Limited, relied on your representations, warranties and covenants in accepting your subscription.

Please be advised that should any unitholder recant their representations, warranties or covenants made to the Promittere Retirement Trust and or its Administrator, and such recanting causes harm to the Promittere Retirement Trust and/or its Administrators, Promittere Limited in accepting said subscription and warranties, the Mutual Fund Trust will seek all available remedies permitted by law, to compensate the Fund from any financial hardships or harm to reputation.

Again we thank you for your support.”

It was argued by Ms. Laycock that this was intended as a threat to PRT investors. Whether or not this could be considered a “threat” the letter does suggest any investor whose subscription document states he/she is an accredited investor could face legal action if they subsequently indicate that they are not so qualified. At the time of this letter PRT was well aware that Commission staff were alleging that several PRT investors in Manitoba in fact had been incorrectly identified as accredited without even knowing it.

Perhaps this letter will be explained to the satisfaction of the panel at the eventual hearing of this matter,. There has been no explanation at this time and the letter, on the face of it, suggests that it could have been intended to make PRT investors think twice about cooperating with the Commission in its investigation.

The incidents described in the foregoing paragraphs go beyond refuting the submission on behalf of PRT and PS&P on the agency issue. They also are determinative, in our view, of the tests proposed to us by Mr. Wright on the subject of the standard of proof for temporary orders. The order sought is necessary in the circumstances. The evidence establishes the real possibility of a future threat to the public interest and we find that the two-pronged test enunciated in Fairtide has been met.

P.S.& P.

It should be noted that PS&P had voluntarily ceased trading in Canada sometime ago, arising from an alleged defalcation by a third party or parties that is currently the subject of litigation. Until the panel has been informed the litigation is completed or settled and while there remains a question of missing investor money we consider that the public interest requires a continuation of the cease traded status for PS&P at any rate and would have extended the cease trade order against that issuer even if there had not been a finding of fault against it in these proceedings.

Denial of access to exemptions

The last issue the panel has to deal with is whether the denial of access to the exemptions under the Act in respect to Thiessen should be extended. Again, Mr. Wright has argued that there is no evidence to support the continuation of this order (initially extended by consent) against Thiessen in his personal capacity. He also argued that the existence of the order has been an unnecessary embarrassment to his client. The panel agrees with Mr. Wright that the order should lapse.

There is no evidence before the panel that Mr. Thiessen has traded personally in Manitoba. In fact while he is connected by his corporate position to the activities of both PS&P and PRT there is no evidence before the panel concerning actions in his personal capacity.

Staff counsel, through the evidence of Mr. Roy, attempted at some length to suggest that Thiessen made a misrepresentation to the panel at an earlier appearance about whether he conducted any business in Manitoba outside of his activities with PS&P and PRT. The evidence that was presented on this point does tend to indicate that Thiessen is involved with other enterprises doing business here, but if a representation was made by Thiessen, it was not under oath, nor was it representation that the panel was seeking or upon which it placed reliance. The panel did not find the evidence presented at length concerning Thiessen's activities in Manitoba in connection with other corporate entities probative of any personal wrong doing on his part. It seems to the panel that if an order is sought, or in this case, sought to be extended, against someone in his personal capacity evidence should be available to show that he exhibited some type of conduct in this personal capacity that could be considered a possible future detriment to the market or Manitoba investors. While the panel has accepted such evidence concerning PS&P and PRT we do not find it present with respect to Thiessen..

Decision

The cease trade orders against PS&P and PRT will be extended until a hearing of the allegations has been concluded and a decision rendered by the panel. The order against Mr. Thiessen shall

lapse. Costs of the motion were not spoken to and will be considered at the conclusion of the final hearing.

"D.G. Murray"
D.G. Murray
Chair

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