May 21, 1999

IN THE MATTER OF: THE SECURITIES ACT

- and –

IN THE MATTER OF: ROLAND EMILE TETRAULT

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

CHAIRMAN:	Mr. D. G. Murray
BOARD MEMBERS:	Ms L. M. McCarthy Mr. K. S. Kristjanson

APPEARANCES:

Ms K.G.R. Laycock	)	Counsel for the Commission
Mr. Campbell G. Wright	)	Counsel for the respondent
Mr. Thomas J. D. Kormylo	)	Roland Emile Tetrault

1. Proceedings

By Notice of Hearing dated February 24th, 1999, this matter was set for hearing on April 13, 1999. The primary issue set out in the Notice of Hearing and Statement of Allegations is whether it is in the public interest that the Commission suspend or cancel the registration of Roland Emile Tetrault (the "respondent") as a salesman.

The date of hearing was brought forward to March 17, 1999 at which time Mr. Wright, appearing for the respondent, sought an adjournment of the scheduled date to allow for proper preparation. The panel advised that they were willing to grant an adjournment to an agreed date. Ms Laycock, counsel for the Manitoba Securities Commission ("staff counsel") was unable to commit to a fixed date without first contacting out of town witnesses as to their availability. At the same time, staff counsel advised the panel that while Commission staff had provided a witness list and disclosure and production of documents to the respondent, no such disclosure was forthcoming on the respondent's behalf. Staff counsel requested an order requiring such disclosure.

The panel declined to issue an order on March 17, 1999 and adjourned the matter for two weeks to March 31st, 1999 on the understanding that appearances would only be required on the return date in the event counsel had been unable to agree upon firm hearings dates and on the issue of disclosure.

Counsel in fact did appear on March 31st, 1999, Ms Laycock again appearing as staff counsel and Mr. Tom Kormylo a member of Mr. Wright's firm appearing for the respondent. The panel was advised that counsel had not reached agreement on either hearing dates or disclosure of documents and witness lists.

Mr. Kormylo was in possession of dates for Mr. Wright's availability and a three-day hearing was set for August 24th through August 26th, 1999. On the issue of providing a list of witness names and addresses and production of documents, staff counsel argued that the panel has authority to require such disclosure while Mr. Kormylo took an opposing point of view. During his submission, Mr. Kormylo made references to the "Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions" (1993) prepared for the Government of Ontario The Advisory Committee was chaired by The Honourable G. Arthur Martin, O.C., O.Ont, Q.C. and LL.D. and the resulting report was referred to by Mr. Kormylo in argument and in these reasons as the "Martin Report". At the close of arguments, Mr. Kormylo agreed to subsequently provide the panel with a copy of the Martin Report.

The panel adjourned the matter to await receipt of the Martin Report and consider its decision. The Martin Report was forwarded from Mr. Wright's office under date April 14, 1999. On April 21st, 1999 after some deliberation the panel requested that counsel provide any additional authorities on the issue of disclosure, such authorities to be provided by April 30th, 1999. On April 30th, 1999 both Ms Laycock and Mr. Wright provided the panel (and each other) with copies of additional authorities and letters summarizing the arguments made March 30th, 1999.

2. Issue

The issue before the panel is whether the Commission has jurisdiction to order disclosure of potential witnesses and production of documents from a respondent who is the subject of proceedings under *The Securities Act*, prior to the hearing.

3. Position of Staff Counsel

The positions of both staff counsel and counsel for the respondent were set out in their oral submissions of March 31st, 1999 and in the April 30th, 1999 letters and attachments.

Staff counsel argued that a general principle of administrative law is that quasi-judicial tribunals control their own procedures in the absence of specific rules of procedure laid down in statute or regulations, with the underlying proviso that the tribunal in exercising its procedural discretion must comply with the rules of fairness and natural justice. (Prassad v Minister of Employment and Immigration (1989) 57D.L.R.4th p663).

Staff counsel further argued that *The Securities Act* indeed does provide statutory authority for the Commission to require pre-hearing disclosure. Section 5(1)(b) of *The Securities Act* was quoted as follows:

> "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:
>
> > (b) the commission has the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise, and to produce documents, records and things, as is vested in the Court of Queen's Bench for the trial of civil actions, and the failure or refusal of a person to attend, to answer questions or to produce documents, records or things in his custody or possession makes him liable to be committed for contempt by a judge of the Court of Queen's Bench as if in breach of an order or judgment of that court;"

It was argued that the clear intent of the wording of section 5(1)(b) in vesting the commission with the same power to require production of "documents, records and things" as is vested in the Court of Queen's Bench for the trial of civil actions includes the right to order pre-hearing disclosure of documents and an exchange of witness lists.

Staff counsel argued that the interest of fairness and natural justice will be served if disclosure and production by the respondent is ordered by the panel. In order to interpret legislation the context of the purpose of the legislation must be considered. Staff counsel argued that it is accepted in Canada that the prime purpose of securities legislation according to the Supreme Court is the protection of the investing public. (Pezim v BC Superintendent of Brokers (1994) 2.S.C.R.557 @ 592).

With a view to protection of the public the issue for the ultimate hearing is whether the respondent is fit to continue to in fact deal with the investing public. It was argued that full disclosure both by the Commission and by the respondent is necessary for the proper determination of that issue both in the interests of the respondent and the investing public.

While it is undisputed that the respondent in a case such as this is entitled to full disclosure from Commission staff, staff counsel argued that it is also true that fairness and natural justice allow for the administrative body to also receive disclosure in order to allow it to fulfill its mandate. Reference was made to Macaulay, "Practice and Procedure Before Administrative Tribunals", p12-19:

"While most of the judicial decisions approach the question from the perspective of the protection of individual rights (i.e. being able to protect one's interests) an agency also has an interest in the provision of adequate notice. The agency needs information in order to best perform its mandate. The giving of adequate notice ensures that those who are likely to possess the best information regarding a matter are in the best position to produce it. Thus the

requirement for notice is both a protection for individual interests and for the proper accomplishment of an agency's mandate."

4. Position of Counsel for the Respondent

While staff counsel argued that administrative tribunals are masters in their own houses and absent specific rules laid down by statute or regulation they control their own procedure, including the issue of disclosure, counsel for the respondent took the opposing point of view. The position argued on behalf of the respondent is that unless there is a specific statute or regulatory authority to compel disclosure, the tribunal has no power to make such an order. Counsel for the respondent further argued that while *The Securities Act* provides the Commission with investigative power it does not contain any provision authorizing pre-hearing disclosure and as such the panel cannot make the order requested.

Respondent's counsel made reference in argument to a Supreme Court of Canada decision Re Canadian Pacific Air Lines et al and Canadian Air Line Pilots Association et al and two other appeals (1993) 108 D.L.R. 4th p1. In that case the Canada Labour Relations Board ordered pre-hearing production of documents by the affected parties on the basis of s.118(a) of the Canada Labour Code which states:

> "118. The Board has, in relation to any proceeding before it, power
>
> > (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things a she Board deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;"

The majority of the Supreme Court of Canada panel held that the wording of s.118(1)(a) only allowed the Board to compel the production of documents at the time of the formal hearing and not prior to or outside of that proceeding.

In addition, counsel for the respondent provided a copy of the 1998/99 Administrative Advocacy bar admission course materials and referred the panel to s.1.4-5 on Retaining Experts and Advisors and s.1.4-6 on Pre-hearing Conferences. These materials were put forth apparently as standing for the proposition that in the absence of legislative requirements or a procedural rule adopted by the tribunal for disclosure, such disclosure and production of documents is not required and cannot be mandated by the tribunal.

Counsel for the respondent also referred to the Martin Report and provided a copy of same. In the recommendations made by the Committee as contained in the Report concerning disclosure by crown counsel, an acknowledgement was made that defense counsel currently have no obligation of disclosure prior to trial. (Recommendations and Opinions p.5) Counsel for the respondent further argued that in an article by Mr. Rod McLeod,Q.C. (appearing in McLeod, Securities Prosecutions: Criminal Code and Securities Act [Insight Conference December 6, 1995; Article VI]), the said Mr. McLeod wrote in paragraph 6.1 that the Martin Report findings

and recommendations extend to the regulatory context. Counsel for the respondent argued that the extension of this is that in proceedings under *The Securities Act* the respondent has no duty or obligation to disclose any part of his case prior to the hearing.

5. Findings

> a) The panel finds that the Martin Report has no bearing on these proceedings. To begin with it is only a report and the recommendations of a committee and while the panel considers the findings of the committee to be interesting, they are not binding on an administrative tribunal such as the Commission.

In addition, the mandate section of the Martin Report notes the following:

> "1. The mandate of the Committee is to inquire into, and make recommendations on, the practices of the Criminal Law Division relating to disclosure, the vetting of cases, and the conduct of resolution discussions."

The Committee had no mandate to make recommendations concerning the operation of administrative tribunals and the panel can find nothing in the body of the report that suggests that the recommendations are intended for other than criminal or quasi-criminal proceedings. There are quasi-criminal charges which may be laid under specific sections pursuant to *The Securities Act* and these are dealt with in Provincial Judges Court, sometimes by staff counsel and sometimes by Crown Counsel. The case at hand, however, is neither criminal nor quasi-criminal in nature, the outcome can bear no penal consequences and the hearing is not held in Provincial Judges Court but before a panel of the Commission. In addition, the article by Mr. McLeod, to which the panel was referred by counsel for the respondent, limits any application the Report may have in the regulatory environment to penal matters.

b) The panel accepts the position set out in Prassad that this tribunal is master in its own house and in the absence of specific rules laid down by statute or regulation, the panel controls its own procedures subject to the rules of fairness and natural justice.

Fairness and natural justice obviously require the position of the respondent to be protected. He must receive adequate notice of the case he has to meet and be provided with a full and fair hearing on the issues. The panel has been advised that in fact counsel for the respondent has received full disclosure to date and will continue so to do for any additional evidence or witness identifications that may arise pending the scheduled hearing dates.

The panel is of the opinion that the position of the Manitoba Securities Commission and the ability of Commission staff to fulfill its' legislative mandate must also be considered. The Supreme Court of Canada has held that the prime function of securities legislation (which obviously includes *The Securities Act* of this province) is to protect public investors. The right of the public to adequate protection must be considered at the same time as the right of the respondent to adequate notice and a full and fair hearing. Just as the respondent's right is protected by full disclosure prior to hearing, the Commission's ability to protect the public's rights, as intended by the legislation, is served by obtaining timely disclosure including the

identity of the respondent's witnesses and production of documents upon which the respondent intends to rely at the hearing. Requiring the respondent to provide such disclosure while receiving similar disclosure from Commission staff does not, in the opinion of the panel, offend either the interests of fairness or the rules of natural justice. The panel finds that the type of disclosure/production requested by staff counsel is reasonable provided there is no legislative prohibition preventing same as in the Re Canadian Pacific case.

c) While the panel members found the sections of the Bar Admission course materials to which they were referred by counsel for the respondent to be uninstructive for the issue at hand, they did note the following in section 1.4-4:

> "Usually the statute is **enabling** rather than exhaustive of the agency's duties and powers."

In considering the wording of *The Securities Act* dealing with procedure and specifically disclosure, the panel accepts this position. Section 5(1)(b) is reproduced earlier in these reasons but for ease of reference is again set out below:

> "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:
>
> > (b) the commission has the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise, and to produce documents, records and things, as is vested in the Court of Queen's Bench for the trial of civil actions, and the failure or refusal of a person to attend, to answer questions or to produce documents, records or things in his custody or possession makes him liable to be committed for contempt by a judge of the Court of Queen's Bench as if in breach of an order or judgment of that court;"

Judges of the Court of Queen's Bench, as set out in the Queen's Bench Rules, have the authority to require the production at any time during the proceedings of relevant documents that are not privileged, in the control or power of any party [Rule 30.04(5)].

Also pursuant to the Queen's Bench Rules [Rule 31.06(2)] parties have a right to receive names and addresses of potential witnesses. The Court may order that compliance is not required. Obviously, on an application the Court may order that there must indeed be compliance.

The position for counsel for the respondent is that Re Canadian Pacific applies and that the wording of Rule 5(1)(b) as in the legislation in that case, is intended to limit the Commission's right to compel production of documents to the context of a formal hearing and not prior thereto.

To begin with, the panel is of the opinion that the facts in the Re Canadian Pacific matter do not match the facts in the case at hand, as the reasons for decision in the former suggest that the

documents being sought were going to be used in the preparation of a report by the Canada Labour Relations Board outside of a hearing to be held at a later date. In the case at hand, Commission staff are seeking documents solely for use at the scheduled hearing.

At any rate the panel rejects the position put forward by counsel for the respondent on the application of the Re Canadian Pacific case and notes the following:

> a) In conferring on the Commission the same power to require production of documents as is vested in the Court of Queen's Bench, the panel is of the view that the exercise of power cannot reasonably be restricted to the actual hearing. The panel understands the regime set out in the Rules is to allow for timely disclosure to all parties and effectively to do away with "trial by ambush". The proceedings at hand are not criminal or quasi-criminal proceedings and the Manitoba Securities Commission as a party to these proceedings is entitled to fair disclosure as, of course, is the respondent. The panel is of the view that in specifically providing the Commission with the powers vested in the Court of Queen's Bench, *The Securities Act* contemplates that pre-hearing disclosure may be mandated as in Queen's Bench civil proceedings.
>
> b) The panel distinguishes the wording in section 5(1)(b) from that of section 118(a) of the Canada Labour Code. The opening words in the preamble of section 5(1) of *The Securities Act* state that the specifics of subparagraphs a) through i) are applied "For the purposes of a hearing…" which should be more broadly construed than restricting the application simply to the hearing itself. In fact each of the subparagraphs by their wording stand on their own. Subparagraph a) clearly deals with pre-hearing requirements and activities while subparagraphs e) and f) deal with post hearing activities and requirements. Subparagraphs c), d) and g) through i) all are to be applied at the hearing itself and generally include the phrase "at the hearing". Section 5(1)(b) by its wording does not restrict the exercise of the Commission's powers to the hearing. This suggests to the panel that the Commission's powers to require production of documents under section 5(1)(b) of *The Securities Act* are not restricted in their exercise to the hearing alone but as with the Court of Queen's Bench the power may be exercised prior to the hearing.

The panel also finds that the phrase "produce documents, records and things" as contained in section 5(1)(b) allows for an order that the parties provide each other with the names and addresses of persons who might have knowledge of transactions or occurrences in issue in the matter.

6. Decision

The panel makes the following orders:

a) The respondent shall produce to staff counsel for inspection and copying all documents in the respondent's control or power upon which the respondent will rely at the hearing.

b) The respondent shall produce to staff counsel the names and addresses of witnesses the respondent anticipates calling at the hearing.

c) The production contemplated in subparagraphs a) and b) shall occur no later than July 26th, 1999 being thirty days prior to the commencement of the scheduled hearing.

d) Any documents which may come under the control or power of the respondent after July 26th, 1999 and upon which the respondent will rely at the hearing shall be immediately produced to staff counsel and in any case at least ten days before the commencement of the scheduled hearing.

e) The name and address of any witness the identity of which comes to the respondent's knowledge after July 26th, 1999 and who the respondent intends to call at the hearing shall be immediately produced to staff counsel and in any case at least ten days before the scheduled hearing.

f) Any documents which the respondent fails to produce in compliance with paragraphs a), c) and d) shall not be referred to or introduced at the hearing without leave of the presiding Commission panel which may be given on such conditions as the panel considers just.

g) Any witness whose name and address has not been produced in compliance with paragraphs b), c) and e) shall not be called by the respondent as a witness at the hearing without leave of the presiding Commission panel which may be given on such conditions as the panel considers just.

h) Subparagraphs a) through g) shall apply equally to staff counsel.

In addition, reference was made at one of the appearances by counsel for the respondent about the possibility that expert evidence may be led at the hearing. In this respect, the panel will also require reasonable disclosure and makes the following additional order:

i) If either staff counsel or the respondent intends to call an expert witness at the hearing, a copy of a report signed by the expert and setting out the expert's name, address and qualifications and the substance of the proposed testimony shall be provided to staff counsel or counsel for the respondent as the case may be no later than July 26th, 1999.

In making the above order, the panel notes that in the Queen's Bench Rules disclosure of documents is not strictly limited to documents a party intends to use at the hearing but includes all relevant documents. Similarly, disclosure of identities of witnesses is not strictly limited to

the names of those witnesses a party intends to call. The order of the panel is limited in its scope due to the specific request of staff counsel for disclosure only of documents to be relied on by the respondent and witnesses to be called by the respondent.

Draft Rules of Procedure

The Commission for some time has turned its attention on occasion to the preparation and publication of well-defined Rules of Procedure. A final draft has not been settled upon and continues to be in the preparatory stages. Apparently more than one draft has been prepared for consideration and not formally adopted. This explains why staff counsel and counsel for the respondent at one appearance made reference to two different drafts of Rules for Procedure with two difference requirements as to disclosure.

As both counsel were advised by the panel, the draft Rules of Procedure, until formalized, approved and published by the Commission are not intended to be disseminated or applied in any manner and have no force or effect at a hearing.

May 21, 1999

D. G. Murray
Chairman

L. M. McCarthy
Member

K. S. Kristjanson
Member