THE MANITOBA SECURITIES COMMISSION

June 12, 2017

IN THE MATTER OF: **THE SECURITIES ACT**

- and -

IN THE MATTER OF: **JACK HIEBERT NEUFELD, GEOFFREY SCOTT EDGELOW AND THE JACK NEUFELD FAMILY CHARITABLE FOUNDATION**

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Panel:

Panel Chair:	Mr. R.D. Bell
Member:	Ms. D.L. Janovcik
Member:	Ms. A.M. Magnifico

Appearances:

S. Gingera	)	Counsel for Commission Staff
R.S. Literovich T.J. Kormylo	)	On behalf of Jack Hiebert Neufeld and The Jack Neufeld Family Charitable Foundation

DECISION

This motion was brought by Jack Hiebert Neufeld and the Jack Neufeld Charitable Foundation ("Respondents") for a Declaration and Order that the claims against the Respondents under the March 6, 2015 Notice of Hearing be dismissed on the basis that:

a) the limitation periods applicable to Subsections 148.1(1) and 148.2(3) of The Securities Act ("Act") have expired,

b) this Panel lacks jurisdiction to find that the Respondents contravened any of sections 6, 37 or 74.1 of the Act, as the applicable limitation periods have expired and/or the Manitoba Securities Commission ("Commission") has violated its duty of procedural fairness to the Respondent, and

c) Section 74.1 of the Act had not been enacted when the contraventions are alleged to have occurred.

Section 137 of the Act reads,

> "Notwithstanding any other Act of the Legislature, proceedings to prosecute a person or company for an offence under this Act may be commenced at any time within two years after the facts upon which the proceedings are based first come to the knowledge of the Commission; but the proceedings to prosecute a person or company for an offence under this Act shall not be commenced after eight years after the date on which the offence was committed."

No proceeding under this section was commenced by the Commission.

The pertinent part of section 148.1(1) of the Act reads,

> "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.... and
>
> (b) it considers the penalty to be in the public interest."

The pertinent part of subsection 148.2(3) reads,

> "When so requested by the Director, the commission may order the person or company to pay the claimant compensation of not more than $250,000 for the claimant's financial loss if after the hearing the commission
>
> (a) determines that the person or company has contravened or failed to comply with

(i) a provision of the Act or the regulations...and

(ii) is able to determine the amount of the financial loss on the evidence, and

(iii) finds that the person or company's contravention or failure caused the financial loss in whole or in part."

The Commission made its allegations in respect of the Respondents under the foregoing two provisions of the Act, neither of which prescribes a limitation period.

Respondent's counsel submitted that section 74.1 of the Act, which came into force in November, 2007, does not apply as there was no statutory provisions which would give it retroactive effect. That section reads,

> A person or company shall not make a statement about something that a reasonable investor would consider important in deciding whether to enter into or maintain a trading or advisory relationship with the person or company if the statement is untrue or omits information necessary to prevent the statement from being false or misleading in the circumstances in which it is made.

He argued that section 74.1 "is subject to the presumption against retroactivity due to it being a substantial offence section and not a remedies provision as was the case in Morrison and Brosseau", upon which Commission counsel relied. The Panel does not accept such limited interpretation of those cases to that section, the Commission's goal being protection of the public interest. The Panel makes a similar finding respecting application of section 148.1(1.1) of the Act, which Respondent's counsel described as coming into force on November 8, 2007, asserting that it was not in effect at the date of the alleged contraventions and its retroactive effect not having been contemplated on its introduction and eventual assent in the Legislature.

Neufeld's counsel relied upon section 2(1)(a) of the *Limitation of Actions Act* ("LAA") submitting that the time limit for Commission action referred to therein had expired, with the result that the motion should succeed. That section reads, in part,

> (2)(1) The following actions shall be commenced within and not after the times hereinafter mentioned:
>
> > (a) actions for penalties by any statute brought by an informer suing for himself alone or for the Crown as well as himself, or by any person authorized to sue for the same, not being the person aggrieved, within one year after the cause of action arose:

Counsel referred to the definition of "person" in the Act as including an "unincorporated association" and "unincorporated organization", thereupon submitting that the Commission is a person. He also stated that section 1 of the LAA defines "action" as any civil proceeding and said that "a proceeding, according to the Manitoba Court of Appeal, is an action and if it's an action, you are bound by the Limitation of Actions Act."

Following paragraph 2(1)(a) of the LAA are paragraphs (b) to (n) listing many types of actions (in excess of the number of those paragraphs) which are easily describable as actions which would only be commenced in a court of law on the basis of tortious or breach of contract acts. This indicates clearly that it is not in the purview of the LAA to provide relief to a body such as the Commission. The Commission's website states that the Manitoba Securities Commission, a division of The Manitoba Financial Services Agency, is an independent agency of the Government of Manitoba that protects investors and promotes fair and efficient capital markets throughout the province.

Section 15(3) of the LAA reads, in part, as follows,

> Where an application is made by a plaintiff under section 14 to continue an action already begun by him, the court shall not grant leave unless on the evidence adduced by the plaintiff...

The word "plaintiff" is defined in Volume XI of the Second Edition of English Oxford Dictionary as

> 1. Law. The party who brings a suit into a court of law, a complainant, prosecutor; opposed to defendant

The Commission is not a plaintiff that commences suits. It is, as described by Commission counsel, a statutorily created administrative agency responsible for administering Manitoba's security laws with a mandate to protect investors and foster a fair and efficient capital market in the province and public confidence in that market. The Commission, under sections 148.1 and 148.2(3) of the Act, "may order" a person or company "to pay" certain amounts. It cannot be said to be a plaintiff which commenced an action suing for itself or for the Crown within the meaning of section 2(1) of the LAA.

Further, it would not be in the "public interest" to apply the LAA to actions under the Act. It would be inappropriate for those who are proceeded against by the Commission under its special procedures to have LAA dismissal rights within the one year limitation prescribed by section 2(1)(a) of the LAA, or section 2(1)(b) of the LAA. The Commission could not function under such circumstances. Offences of this nature often do not become evident as an offence to an investor for some time, and therefore, many facts that could give rise to proceedings under the Act do not come to the attention of the Commission staff until well after the one year limitation period contained in the LAA. As a result, applying the LAA to non-prosecutorial proceedings under the Act would not protect the public interest.

The Respondents also allege the Commission has violated its duty of procedural fairness. They state the Commission is an administrative tribunal which must provide a high degree of procedural fairness and Commission hearings are supposed to be non-judicial in nature, the main interest of a hearing being to protect the public and not deciding guilt or innocence. Because the Commission seeks to impose significant judicial penalties, the Respondents argue that a hearing would be more like a judicial process. Respondents' counsel said that because the alleged actions occurred almost 10 years prior "a high degree of fairness, broader than it otherwise would

have been, is due to Neufeld." He also submitted that by letting the period in section 137 expire the Commission eliminated the venue in which it would have been put to a higher standard of proof.

From a review of the procedural actions taken by the Commission, the Panel finds no basis for determining that the Commission has violated its duty to provide a requisite level of procedural fairness to the Respondents during the pre-hearing stage.

For the above reasons the motion is dismissed.

Due to the Commission counsel's objection to agree to facts, all of which were in his possession, causing four hearings before the motion could be heard, no costs are awarded to the Commission.

Attached is a summary of the five hearings. Also attached is a copy of the Notice of Hearing and Statement of Allegations.

"R.D. Bell"
R.D. Bell
Hearing Chair

"D.L. Janovcik"
D.L. Janovcik
Member

"A.M. Magnifico"
A.M. Magnifico
Member

SUMMARY

Notice of Hearing and Statement of Allegations of staff of The Manitoba Securities Commission dated March 6, 2015, were sent to Jack Hiebert Neufeld, Geoffrey Scott Edgelow and The Jack Neufeld Family Charitable Foundation, described in the text of the documents but not in the style of cause, as "Respondents". A copy of those two documents is attached to and forms part of the Reasons for Decision.

By virtue of these documents, The Manitoba Securities Commission ("Commission") seeks an order pursuant to section 148.1 of *The Securities Act* (the "Act") that an administrative penalty be ordered against the Respondents, and that pursuant to section 148.2(3) of the Act, Neufeld and/or the Foundation pay B.P., H.P., Y4C, H.F., M.J. and D.L. compensation for financial losses. Their names were subsequently given to the Panel.

The Respondents filed a Notice of Motion dated February 8, 2016 for a Declaration and an Order:

1. That the claims for an administrative penalty pursuant to subsection 148.1(1) of the Act and compensation for financial loss pursuant to subsection 148.2(3) of the Act be dismissed as the applicable limitation periods have expired,

2. That the Commission Panel lacks jurisdiction to find that Jack Hiebert Neufeld and The Jack Neufeld Family Charitable Foundation contravened any of sections 6, 37 or 74.1 of the Act as the applicable limitation periods have expired and/or the Commission has violated its duty of procedural fairness to Neufeld,

3. That section 74.1 of the Act had no application as it had not been enacted when the alleged contraventions occurred and in any event that it applies only to registrants,

4. The costs of the Motion, and such further or other relief as counsel may advise and the Panel may seem just.

Unfortunately, the parties appeared on four different occasions without Neufeld's counsel having had the ability to commence presentation of argument of the Neufeld Motion. A summary of what occurred on each of those occasions follows:

FIRST HEARING

May 25, 2016 – Commission counsel took the extraordinary position that,

> "....after we've had a full hearing where we can have a fulsome review of the facts. It would be at that time, that staff's position is that we should be hearing this Motion."

This was emphasized often with words such as,

> ".....what I propose is that we just simply proceed to a hearing where we can have a hearing to determine what the facts are in this case."

Neufeld's counsel referred to an Affidavit that had been filed referring to the Commission's evidence, that it had not been challenged by cross-examination and that, accordingly,

> "....therefore the facts in the Affidavit stand."

Following Commission counsel's repeated submission that a full hearing to determine facts should be held, the Panel directed an adjournment for the parties, with their accord, to meet and seek an agreement on the facts.

SECOND HEARING

June 15, 2016 – At the opening of the hearing Neufeld's counsel, Mr. Literovich stated,

> "We didn't agree on anything"

He then stated that his co-counsel, Mr. Kormylo,

> "....put certain facts to Mr. Gingera, and Mr. Gingera's position was that they were not in a position to agree with those facts. We spent, I don't know, an hour, and were not able to come to any conclusion with respect to agreed facts. So I'm here today to ask that my Motion be adjourned. I believe that I can put certain documents and facts before the Commission, documents and facts that had been provided to us by Commission counsel, so nothing that should be a surprise, documents that he has in his possession. And I believe ... I can put that package together, I can put it in front of you and I can show you that you have the documents and the facts necessary, already before you through the Commission counsel, to hear my Motion."

Commission counsel then referred to a pre-hearing conference (not before this Panel) from which a memorandum distributed on January 4 read, in part, as follows:

> "Staff counsel must provide disclosure of documents. Counsel for the Respondent will provide a list of documents and copies of documents not in staff's possession by the end of January, 2016." ... They have not done so .... "Our position is until they've done that, they should not be able to proceed with this Motion."

After some discussion, Neufeld's counsel Mr. Kormylo said,

> "...But with respect to my learned friend's request, all we are doing is providing documents that come from them, that indicate what they knew. It has nothing to do with our clients' documents. All we're saying is what they knew, based upon their documents, and documents they provided us. It doesn't matter what kind of documentation we have. It's not going to affect in any way what they knew. So, requiring our documents at this point is nothing more than a tactic to try to increase our client's costs and delay things."

After further exchange, the following portions of the transcript show that Commission counsel continued with his request, namely:

> **Mr. Gingera**: I have my documents, but what I'm asking for is the documents in the possession of the Respondent, Mr. Neufeld.
>
> **The Chair**: No, no. As I understood it, the documents that you will be relying upon are documents that exist and are in the possession of the Commission now.
>
> **Mr. Literovich**: That is correct. What Mr. Gingera is attempting to do is make Mr. Neufeld pay for an exercise that is not necessary or relevant to our Motion. ....He is trying to .... to stop this Motion from being heard.

Neufeld's counsel's position was cemented by the following:

> **The Chair:** ....You will not be relying on anything other than the documents that are in the possession of the Commission?
>
> **Mr. Literovich**: That's absolutely correct.

A date was then fixed for the third hearing.

THIRD HEARING

July 28, 2016 – Commission counsel tendered an Amended Notice of Hearing and Statement of Allegations as exhibits. Neufeld's counsel stated that the Motion materials were based on the original application and Notice and were not at all directed to an amended Notice. Commission counsel then said to the Panel,

> "Well, at the end of the day you may have to make a decision on this Motion and therefore you would have to refer to the pleadings, so it's to make sure that you have the updated pleading before you if you're called upon to make a decision .... the pleadings identify the issues and if

> the original pleading was amended you need that before you in order, you need that before you."

Mr. Literovich replied that,

> " These pleadings that are now being filed have nothing to do with what we originally came here to deal with a number of weeks ago, and what Commission counsel is now trying to do is spread the net even wider than the original Notice."

Commission counsel referred to a document entitled The Manitoba Securities Commission Pre-Hearing Procedures Policy (of which Panel members were not aware), Section 8.1 of which reads, in part, as follows,

> "Staff may amend a Notice of Hearing or Statement of Allegations at any time after issuance."

Mr. Literovich's position was that the hearing had already started and that this was not a pre-hearing amendment but "an amendment during the hearing, which is inappropriate." The Pre-Hearing Procedures Policy was made by virtue of section 149.5(1) of *The Securities Act* which reads as follows:

> "The commission may issue policy statements, and other instruments the commission considers advisable, to facilitate the exercise of its powers and the performance of its duties under this Act, the regulations and the rules of the commission made under subsection 149.1(1)."

After some discussion the Panel admitted the amended documents as exhibits. The admission which was objected to by Neufeld's counsel is not at issue in the hearing of this Motion.

Shortly before this hearing Neufeld's counsel provided the Panel with copies of 39 documents as the factual base for the Motion argument. Commission counsel said that this was supplemental to the initial evidence upon which the Respondents were relying,

> " ... out of 2,700 pages of disclosure without telling me how they are going to rely on it."

He then said that he wanted,

> " ... the Panel not to hear this matter, or alternatively, to adjourn it so I can – I'm not even in a position .... to consider what my response would be until I hear Mr. Kormylo stand up, provide an argument, provide how all these 38, 39 documents are related to this argument and then you're going to look to me and say, Mr. Gingera, respond. I'm not even in a position to consider how to respond until I hear that."

Mr. Literovich's response was,

> "Mr. Gingera has indicated that we are relying on new evidence. I hope the Panel understands that these documents were sent to us by Mr. Gingera. The documents that we are going to rely on come from his file, and with permission of the Panel, let me file exactly what it is that we sent to Mr. Gingera on the 6th. ....you will see that we've identified 38 documents. We've referred to them by exhibit number or .... by the date. The exhibit number is the exhibit number generated by Commission counsel, it's their document. The dates are only with respect to investigation reports that are Commission documents. We assumed that it would be easy enough for him to look at the exhibit number or the date of the investigation order and find the document, and there are only 38."

He then referred to the first hearing with Mr. Gingera's objection that he needed to know what facts "we're relying upon". He also spoke of the Panel direction for an adjournment for the preparation of an agreement of facts and that Mr. Gingera would not enter into a discussion with Mr. Kormylo to look at the documents and state whether he agreed. He then added that Mr. Gingera said no and they didn't get past the first document. He added the fact that Mr. Kormylo wanted to go through the documents explaining the timelines which were important for the Respondents' limitation of time argument.

Mr. Gingera said that he was entitled to respond to the Motion, to contest it and that he may wish to file evidence in response to what the Respondents "are saying".

Mr. Literovich replied as follows,

> "Just to be clear and clarify this .... I cannot understand Mr. Gingera's position. All we're here to do today is provide you with the facts that are set out in those 38 documents and then it will be up to you, the Panel, to decide whether or not those 38 documents substantiate what the Commission knew ... That's all we are trying to do."

Mr. Kormylo said that the Motion was that these proceedings should be dismissed because the proceedings were commenced after the expiry of the applicable limitation period. He devoted substantial time to achieve his objective of "just putting it in perspective" by describing events and referring to documents and dates respecting the commencement of a limitation period. He added that there is no specific limitation in the Manitoba Securities Act dealing with the proceedings unlike the Securities Acts of every other province in Canada.

After a lengthy description of the 38 documents by Mr. Kormylo, Mr. Literovich stated that the description of those facts was the basis of his Motion argument on the application of the *Limitation of Actions Act*. This ended the third hearing.

FOURTH HEARING

September 8, 2016 – The Panel Chairman made substantial reference to the past three hearings in an effort to focus attention on the actual hearing of the Motion.

Commission counsel began by making reference to certain statements of Mr. Kormylo. The Panel Chairman stated,

> "the sole matter is the determination of fact, that nothing said was in argument of the Motion, that being exclusively reserved for the hearing of the Motion."

After more discussion irrelevant to the point of this hearing the Panel Chairman stated,

> "All I want to know is do you accept their documents as evidence or not? .... That's all we are here for. ... we do not want today to hear argument on this matter. That is what the Motion is for and that's going to be heard on September 28th. ... I want to know if you accept the evidence."

After other continued comments by Commission counsel, not related to the purpose of this fourth hearing, the Panel Chairman said,

> "Well, you're talking again about an argument, not fact. .... There are facts and there is law. They are two much different things."

After other interjections by this Panel to the same effect the Panel chair said,

> "Today deals with facts, F - A - C - T - S, facts. These are the facts submitted by the Respondent.

After yet more similar exchange, counsel sought a brief adjournment to discuss the matter with other Commission officials and returned with the statement that,

> "...the 38 documents that they have tendered is we acknowledge that is evidence, that Mr. Terlinski received those documents".

However, he then recommenced with submissions of argument until he was advised that argument would be heard at the Motion hearing.

Commission counsel then, in response to a Panel query, said that he was relying upon the Affidavits of Mr. Terlinski dated March 23, 2016 and August 19, 2016.

Mr. Kormylo challenged the relevance of documents referred to in one of the Affidavits which had, in his words,

> "..... nothing to do with a trade in Manitoba. It has nothing to do with the allegations, no Manitoba companies, no Manitoba investors. Why do we have this document before us?"

Finally, Mr. Literovich said,

> "We have now produced for you, on behalf of Mr. Neufeld, 38 documents that appear now to be accepted as evidence and those facts are what I will be relying on when I make my argument with respect to the *Limitation of Actions Act.*

With that, the fourth hearing preceding hearing of the Motion ended.

MOTION HEARING

Finally, hearing of Neufeld's motion commenced on October 27, 2016. Mr. Literovich opened his submissions with reference to "alleged breaches" and referred to the offering of promissory notes from April 14, 2005 to June 30, 2005 and an exchange offer of September, 2008. He stated that these dates were based upon a review of Commission documents. He referred to a letter from Len Terlinski, Investigator with The Manitoba Securities Commission to Mr. Jack Neufeld dated October 18, 2010, which included the statement that,

> "A check of our records has failed to disclose any registration status or exemption filings for your organization ....you are being asked to cease your activities within the Province of Manitoba and provide us with a list of all Manitoba investors, containing full names, contact information, amounts invested, and the dates invested."

Counsel submitted that, as of October 18, 2010, the Commission knew of the alleged trades that took place in 2005. He then referred to an Investigation Report dated October 18, 2010 signed by Len Terlinski and including the following,

> "On October 07, 2010, Jim RITSKES attended the MSC and dropped off a large binder of documents. I spoke briefly with him and later reviewed the documents:
>
> The binder starts with a Promissory Note dated June 28, 2005 between "Youth For Christ Portage Inc." and "The Jack Neufeld Family Charitable Foundation" .... The term is 36 months. The interest payable is a simple rate of 10% annually. .... There is a copy of the Youth For Christ board minutes dated June 23, 2005 stating that Harry Funk, a member of Youth For Christ had recommended the investment as a guaranteed way to earn both interest and "shares/stock options".

Counsel said that as of October 18, 2010, Commission counsel had knowledge of Mr. Neufeld's activities such that they issued a cease and desist order. He then stated that under the *Limitations of Actions Act*, Commission counsel "had one year to start

the hearing", which hearing had not been commenced until March 6, 2015. He then pointed out that a letter from the Neufeld Foundation to Len Terlinski of November 4, 2010 set out that,

> "... YFC sought to support the Foundation's good works in providing compassionate and cost-effective assistance around the world, regardless of religion, race, gender or socio-economic standing ..."

and added that the Foundation was trying to raise money to support investments in Bolivia for people that needed housing.

Mr. Literovich then submitted,

> "So we take the position that Commission had knowledge such that they could have laid an offence on or about or at October 18, 2010. If I'm wrong about that, I would like to take you to .... the Investigation Report dated March 16, 2011, prepared by Len Terlinski in reply to someone who had informed him that he was a lawyer (MOSER), in Alberta, in which report Terlinski said,
>
> > "I advised him that from the paperwork I had seen, the deal with Youth For Christ was an investment contract. NEUFELD either had to be registered or relying on an exemption. To my knowledge, no exemption had been claimed nor had anything been filed. I also told MOSER that the incident very much did occur in Manitoba as Youth For Christ is in Manitoba, funds came from Manitoba, and the money was solicited in Manitoba."

Counsel said if he was wrong about Commission knowledge on October 18, 2010, then clearly Mr. Terlinski had knowledge of the alleged offenses on March 16, 2011. He added that if he's right about that, then the charge should have been laid one year after March 16, 2011, and it wasn't laid until 2015.

He referred to a Manitoba Securities Commission document dated June 10, 2011 ordering an investigation to enquire into circumstances surrounding the apparent trading in securities by the Respondent. He referred to section 22(1) of *The Securities Act*, the pertinent parts which read as follows,

> "Where it appears probable to the commission that any person or company
>
> > (a) has contravened any of the provisions of this Act or the regulations .... the commission may make, or by order appoint a person to make, such investigation as it deems expedient in the circumstances ...."

Counsel submitted June 10, 2011 as a third date within which the one year limitation for laying a charge would run referring to section 2(1)(a) of the *Limitation of Actions Act* which reads as follows,

> 2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> (a) actions for penalties imposed by any statute brought by an informer suing for himself alone or for the Crown as well as himself, or by any person authorized to sue for the same, not being the person aggrieved, within one year after the cause of action arose.

He stated that this is the section of the *Limitation of Actions Act* upon which he would rely.

He said that Commission counsel has taken the position that there is no limitation in the Manitoba Securities Act for a non-prosecutorial administrative hearing and that the word "non-prosecutorial" is important. He then referred to section 137 of *The Securities Act*, reading as follows,

> "Notwithstanding any other Act of the Legislature, proceedings to prosecute a person or a company for an offense under this Act may be commenced at any time within two years after the facts upon which the proceedings are based first come to the knowledge of the Commission .... "

He added that Commission counsel chose not to prosecute but to proceed by way of an administrative hearing where there is no limitation. He then reiterated that if he was not correct about the two prior dates,

> "Certainly the date that the .... Investigation Order was issued, is the date that you should apply, June 10, 2011."

He stated that the Commission chose proceeding for an administrative penalty and that as he understood it, the compensation award would be paid to the investors who themselves never started a law suit and whose rights expired under the *Limitation of Actions Act*. He submitted that a prosecution under section 137(1) of *The Securities Act* would have required the Commission to prove contraventions of the Act "beyond a reasonable doubt" but proceeding as it did, would bear a lesser burden, namely the "balance of probabilities".

Mr. Literovich said,

> "We simply say that that can't be the intent of the legislation. It can't be the intent of the legislation to protect people who have sat on their rights, who have not pursued their rights, and somehow sit back and say, well, we can take our time and we'll decide when we want to prosecute. That just can't be right. ....It can't be right because the Supreme Court of Canada says you just can't do that."

He referred to M. (K.) v. M. (H.), 1992 3 SCR 6 at paragraphs 22 to 24, reading in part, as follows,

> "Statutes of limitations have long been said to be statutes of repose ... The reasoning is straight forward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations .... The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim .... Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion."

Counsel stated that the Supreme Court reaffirmed that passage in the context of administrative proceedings in the case of McLean v. British Columbia (Securities Commission) [2013] 3SCR 895 at paragraph 63 providing,

> Limitation periods exist for good reasons, two of which deserve mention here. First, "[t]here comes a time.... when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (reference to the above 1992 case) .... Second, at some point "[i]t is better that the negligent [plaintiff], who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation"...Common sense suggests that the authorities will always want more time to go after law-breakers, but fairness demands their chase eventually come to an end."

PERSON? CROWN?

Mr. Literovich then turned to some of the technical arguments that are raised with respect to the *Limitation of Actions Act*. He said that Commission counsel is taking issue with whether the *Limitation of Actions Act* applies by challenging whether the Commission is a person and whether it is the Crown. He referred to *The Securities Act* and quoted the definition of "person".

> "person" is defined in *The Securities Act* to mean "an individual, partnership, unincorporated trust, unincorporated association, unincorporated organization, unincorporated syndicate, trustee, executor, administrator or other legal personal representative".

He submitted that the Commission is an unincorporated association, an unincorporated organization or a legal personal representative, being the legal representative of the investors.

ACTION?

Counsel then made submissions about whether a proceeding under section 148.1 and 148.2(3) of *The Securities Act* is an "action" under the *Limitation of Actions Act*. He said that section 1 of the LAA defines "action", as ".... any civil proceeding". He then said,

> "So the question now is, is this a civil proceeding? Is something that happens in the Securities Commission a civil proceeding?"

The Panel now sets forth a number of paragraphs prepared by counsel and included in a supplementary document filed with the Panel that, in his words, "deal with that very question.", which paragraphs read as follows,

> "The case of *Hupe v. Manitoba*, 2009 MBCA 27 ("*Hupe*") provides guidance on the meaning of "action" and "civil proceeding" in the LAA in relation to another statute, the *Residential Tenancies Act*. In reaching its decision the court relied on two decisions of the Supreme Court; *Markevich v. Canada,* 2003 SCC 9, [2003] 1 S.C.R. 94 ("*Markevich*"), and *Winters v. Legal Services Society*, [1993] 3 3 S.C.R. 160 ("*Winters*")." Specifically, the court in *Hupe* relied on and applied *Markevich's* adoption of the definition of "proceeding" from the Manitoba Court of Appeal decision of *Royce v. MacDonald (Municipality)* 1909 CarswellMan 126:
>
> 'proceeding' has a very wide meaning, and includes steps or measures which are not in any way connected with actions or suits (Emphasis Added).
>
> The court in *Hupe* also relied on the approach in *Winters* that found that the definition of "civil action" in *Black's Law Dictionary* (6th ed. 1990) to be a satisfactory definition of "civil proceeding" as well. *Black's* defines "civil action" as:
>
> An '[a]ction brought to enforce, redress, or protect private rights. In general all types of actions other than criminal proceedings (Emphasis Added).
>
> The court in *Hupe* went on to make the finding that the inquiry in question was a "civil proceeding" and thus an "action" under the LAA. In making this finding the court gave effect to the governing principle of statutory interpretation, namely:
>
> > [t]he words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed.)
> >
> > Additionally, in interpreting the relevant phrases, "action" and "civil proceeding" the court was alive to section 6 of *The Interpretation Act*, C.C.S.M., c. 180 which reads:
> >
> > Every Act and regulation must be interpreted as being remedial and must be given the fair, large

> and liberal interpretation that best ensures the attainment of its objects.

Counsel then stated that Commission counsel raised a number of arguments and referred the Panel to his Reply Brief in this case. Firstly, he dealt with a quote by Commission counsel from Blake's Administrative Law in Canada as follows,

> Where no time limit is prescribed by statute, a proceeding will not usually be dismissed for delay, no matter how tardy the complainant was in bringing the matter to the tribunal's attention. Likewise, failure of the tribunal to investigate and commence proceeding with dispatch after receipt of the complaint is not grounds to stay the proceedings, unless the respondent can demonstrate prejudice of such a kind and degree as to significantly impair the right to a fair hearing.

Mr. Literovich then submitted that this quote is not helpful, because it doesn't apply in this case and that there was a time limit prescribed by statute saying,

> "It's section (2)(1)(a) of the *Limitation of Actions Act*."

He then referred to the Brief of the Staff of The Manitoba Securities Commission part of which stated that in *Blencoe v. British Columbia Securities Commission* 2000 SCC 44 the Supreme Court of Canada noted at page 101,

> However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period ...

Mr. Literovich then pointed out that in the completed quote from Blencoe the last sentence above reads,

> "Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period <u>for a criminal offence</u>" (underlining added by Panel).

He submitted that Blencoe, being a criminal case had no application to the Respondents. He followed by saying,

> "So Blencoe is used for two purposes. One, Blencoe is used to say that I'm trying to create judicially a limitation period. Well, I'm not. The *Limitation of Actions Act* is what I'm trying to direct you to. And, secondly, it's a criminal case. It has nothing to do with this process that's happening here today."

He said further,

> "Commission counsel also relies on a decision called Tabar and Scott and again Tabar and Scott is a human rights case. It has never been relied on by any commission or securities commission in Canada. It's a human rights case and I respectfully suggest again it has no applicability to these proceedings."

CROWN

He then discussed one other matter raised by Commission counsel that the *Limitation of Actions Act* does not apply because the Manitoba Securities Commission is "Crown". He stated that Commission counsel, in its Reply Brief, took the position that if this Panel finds that the proceedings are civil proceedings, section 49 of *The Interpretation Act* applies to the Commission and it is, therefore, not bound by the *Limitations of Actions Act*. Section 49 of *The Interpretation Act* reads,

> "An Act does not bind Her Majesty or affect Her Majesty's rights or prerogatives unless it expressly states that Her Majesty is bound."

He said that the Manitoba Securities Commission website describes itself as follows,

> "The Manitoba Securities Commission, a division of the Manitoba Financial Services Agency, is an independent agency of the Government of Manitoba ...."

He said that Commission counsel had sent him the decision of the Manitoba Court of Appeal in Lucas v. Taxicab Board, saying that the case stands more for the proposition that the Commission is not the Crown than it does that it is the Crown, a quote from the decision being,

> "Manitoba is liable for the torts of its officers or agents, but I am of the view that the board is not the agent of Manitoba. Whether or not an entity is an agent of the Crown depends, in the main, upon the nature and degree of control exercisable ... by the Crown."

He submitted that if there is any control exercisable by the Crown, the Manitoba Securities Commission could not describe itself as an independent agency. He also referred to a decision of the B.C. Securities Commission in Bennett v. British Columbia (Securities Commission) 1991 Carswell BC 791, which held that the Commission was not even an agent or delegate of the Crown, much less the Crown itself, quoting paragraphs 67 – 68,

> "I reject the submission that the Commission and Superintendent of Brokers are, in essence, delegates or agents of the Crown, the same party or privy of the party which brought the proceeding before Judge Craig. To my mind, this overlooks the very fabric of *The Securities Act*, namely, the establishment of an independent knowledgeable Commission ...."

And further that the,

> "Commission is not one and the same with the Crown. The legislature has chosen to set up a regulatory scheme under *The Securities Act* whereby the Securities Commission, acting in an independent sense ... overseeing the regulation of securities trading in the Province."

Counsel then summarized his position by saying that the Commission is not the Crown. He added that section 149 of *The Interpretation Act* does not apply and that the *Limitation of Actions Act* does apply.

He submitted that the Commission chose not to prosecute and let the one year limit in section 137 expire and submitted that it proceeded by way of an administrative penalty under section 148.1(1) and compensation request by virtue of section 148.2(3) of *The Securities Act*. The pertinent parts of those sections read as follows,

> "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 ....and
>
> (b) it considers the penalty to be made in the public interest."
>
> "148.2(3) "When so requested by the Director, the commission may order the person or company to pay the claimant compensation of not more than $250,000. for the claimant's financial loss, if after the hearing the commission
>
> (a) determines that the person or company has contravened or failed to comply with
>
> (i) a provision of this Act or the regulations ...."

Counsel concluded this portion of his submission by saying that the Limitation of Actions Act applies and the limitation period had expired and that "these proceedings should end."

Counsel then turned to the matter of retroactivity. He referred to paragraph D of the Statement of Allegations in which the Commission alleged that the Respondents,

> "... made misrepresentations to investors that were, in material aspects, misleading or untrue, or did not state facts that required to be stated or were necessary to make the statements not misleading, in contravention of section 74.1 of the Act, and "acted contrary to public interest, and that pursuant to section 148.1 of the Act, an administrative penalty be ordered against the Respondents, and that pursuant to section 148.2(3) of the Act,

> NEUFELD and/or the FOUNDATION pay B.P., H.P., Y4C, H.F., M.J. and D.L. compensation for financial loss".

His submission was simply that sections 74.1 and 148.1 did not exist when the alleged contraventions occurred. He said that if his submissions respecting the Limitation of Actions Act were accepted this allegation of retroactivity had no application. He said that section 74.1 was enacted by *The Securities Amendment Act* which was assented to and came into force on November 8, 2007. He quoted from page 125 of The Interpretation of Legislation in Canada, 3d ed., 2000 reading as follows:

> "Retroactive operation must be the exception rather than the rule. The need for predictability in the legal system is incompatible with the application of provisions to events that precede their enactment."

He also referred to pages 669 – 670 of "*Sullivan on the Construction of Statutes*, 5th ed., 2008 setting out the following,

> 1) It is presumed that the legislature does not intend legislation to be applied retroactively – that is, to be applied so as to change the past legal effect of a past situation.
>
> This presumption is strong. Normally it can be rebutted only if the statute or regulation in question contains language clearly indicating that it or some part of it, is meant to apply retroactively.
>
> 2) It is presumed that the legislature does not intend to interfere with vested rights.
>
> The weight of this presumption varies depending on factors such as the nature of the protected right and how unfair or arbitrary it would be to abolish or curtail the right. Often the presumption is rebutted without reference to express legislative language.
>
> 3) It is presumed that the legislature does not intend legislation to be applied retrospectively unless the legislation confers a benefit or was enacted to protect the public.
>
> 4) It is presumed that the legislature intends procedural legislation to apply immediately.
>
> 5) It is presumed that the legislature does not intend to confer a power on subordinate authorities to make regulations or orders that are retroactive or interfere with vested rights."

He then referred to Royal Canadian Mounted Police Act (Canada) re [1990] FCJ No. 113 (Federal Court of Appeal) where MacGuigan J. wrote

> "Whether there is a general category broader than the sub-category, it must at least be recognized that there cannot be any public-interest or public-protection exception, writ large, to the presumption against retrospectivity, for the simple reason that every statute, whatever its content, can be said to be in the public interest or for the public protection. No Parliament ever deliberately legislates against the public interest but always visualizes its legislative innovations as being for the public good."

Counsel referred to the Commission's proposal that where legislation is intended to protect the public, as opposed to be being penal in nature, then the presumption against at retroactivity no longer applies. He stated that Commission counsel cited Morrison Williams Investment Management Ltd., re: 2000 Carswell Alta. 2098 and Brosseau v. Alta. Securities Com. 1989 Carswell Alta. 1989. He then submitted that Morrison and Brosseau are distinguishable from the present circumstances. He said that in Morrison the section imposing administrative penalties was a new remedies section and, as such, the inclusion was deemed to be for the protection of the public. He stated that in the Manitoba Act there was already an administrative penalty remedy before it was amended to broaden its application. He submitted therefore that the inclusion of section 148.1(1.1) should be characterized as not in the public interest as the public interest was already protected by the existing 148.1(1) because it was already protected and that this was simply an addition.

With respect to Brosseau, Counsel said that the Alberta equivalent of section 74.1 was considered and that section 136 of The Alberta Securities Act was already the law at the time the alleged violating events occurred and it was only the remedies provisions that were enacted later and sought to be applied retroactively. He said that the inclusion of a new substantive law provision such as section 74.1 was not considered in Brosseau.

Respondent's counsel's final submission related to the jurisdiction of this Panel to hear a motion that has been filed. Commission counsel had advanced an Ontario Securities Commission decision of November 30, 2015 as his authority for this unusual proposition. Mr. Literovich submitted that that case essentially says that a preliminary determination of a matter should be conducted in circumstances when a matter raised on a preliminary motion would conclude the whole matter expeditiously on relatively narrow ground, if the argument raised is a legal one and disposing of it would conclude the matter ... saving all parties time and expense and if all counsel agree the evidentiary basis for the determination is clear, or there are no facts relevant to the motion that are in dispute.

COMMISSION COUNSEL SUBMISSIONS

Commission counsel's opening submission was that:

> ".... there is no limitation date set out in The Securities Act for administrative proceedings, and our position is none applies."

He referred to Blake's Administrative Law in Canada, quoting from page 34 as follows:

> "Where no time limit is prescribed by statute, a proceeding will not usually be dismissed for delay, no matter how tardy the complainant was in bringing the matter to the tribunal's attention. Likewise, failure of the tribunal to investigate and commence proceedings with dispatch after receipt of the complaint is not grounds to stay the proceeding, unless the Respondent can demonstrate prejudice of such a kind and degree as to significantly impair the right to a fair hearing."

Counsel then referred to the following quote from the Blencoe (cited above) in which the Supreme Court of Canada said at paragraph 101,

> " .... However, delay without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period .... In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay."

He made no mention of Neufeld counsel's submission respecting omission of the four words following "limitation period", namely "for a criminal prosecution".

He then referred to Neufeld counsel's suggestion that Staff deliberately allowed that limitation date for prosecution in Court to pass so that the Commission could avail itself of a lower standard of proof, saying

> Well, two responses to that .... One, there is no evidence before you that Staff deliberately did not pursue a prosecution in Provincial Court so as to avail themselves on the lower standard. There is no evidence of that. The second point ... is that the Staff has power .... In how we deal with our cases.

He said that the Commission can prosecute an individual under section 137, can commence administrative proceedings, "as we've done here" and can also seek an order under section 152 of The Securities Act to seek an order from the Court of Queen's Bench to the effect that a person comply with the Act or refrain from not complying with the Act. He referred to the Hennig case, 2005 ABASC 745, an Alberta Securities Commission case, quoting from paragraph 105,

> "As Staff suggest, it is their task to determine, in the exercise of prosecutorial discretion what case to bring to a hearing, how to prepare that case ... and how to present that case to the hearing Panel ... "

and from paragraph 111,

> "We believe it is important that Staff be allowed a fair degree of discretion in conducting investigations and presenting enforcement cases to the Commission."

He also referred to similar quotes from an Alberta Securities decision in Re: Ironside [2002] A.S.C.D. 158 and an Alberta Securities case of Arbour Energy Inc. [2010] ABASC 11, both of similar import. He then said that ..."the point ... I'm making is all that case law supports the view that we have a power akin to prosecutorial discretion. It's within our discretion what enforcement we can take."

Does the *Limitation of Actions Act* apply?

Counsel, with regard to whether the *Limitations of Actions Act* applies said that three questions arise,

1) You have to ask the question, "does the Limitation of Actions Act, can it apply at all to our proceedings. If no, that's the end of the matter."

2) If the answer to that is yes, you have to ask the question, does section 49 of The Interpretation Act apply to us as it did to the Residential Tenancy Director in the Hupe case.

3) If we're not covered by section 49, can the Respondent bring our proceedings within a specific section of the *Limitation of Actions Act*, in particular 2(1)(a), which is the one Mr. Literovich is relying on and are they able to identify what the cause of action is and when it occurred for the purposes of that Act.

Commission counsel submitted that their enforcement proceedings are not civil proceedings for the purposes of the *Limitation of Actions Act*. He added that the Commission's mission and mandate is to act in the public interest to protect investors and promote confidence and integrity in the capital markets. He referred to a case that was before the Alberta Securities Commission, Arbour Energy 2010 ABASC 11, and quoted therefrom as follows,

> 41 "An enforcement proceeding before a Commission Panel is a regulatory hearing for the purpose of determining whether it would be in the public interest to make protective and deterrent orders against a respondent under [their enforcement provisions] based on findings of capital market misconduct. It is not a criminal trial in which a finding of guilt may have punitive consequences
>
> 42 .... A Commission Panel struck to hear and decide on enforcement proceeding under sections 198 and 199 of the Act is carrying out that role as an administrative tribunal, with quasi-judicial powers limited to making the protective and preventive orders prescribed in sections 198 and 199 of the Act. Commission enforcement proceedings are public interest hearings characterized as regulatory, protective or deterrent, not quasi-criminal or punitive in nature. .... the Commission is not a court of

> law and Commission enforcement proceedings are neither civil actions nor criminal proceedings. Rather, the Commission is a statutorily-created administrative agency responsible for administering the Alberta securities laws, with the mandate to protect investors and foster a fair and efficient capital market in the province and public confidence in that market."

He also referred to Morrison Williams Investment Management Ltd. 2000 Carswell Alta. 2098, 9 A.S.C. 2888 from paragraph 54, a reference from In the Matter James F. Matheson (Alberta Securities Commission, June 20, 1091??), quoting as follows,

> "It is clear that these sections are not punitive in nature, but are intended to allow the Board to protect the public interest, and the appropriate order is accordingly the one that best meets that end."

And from paragraph 58,

> "In imposing sanctions, the Commission's mandate is to remediate misconduct and protect the investing public. To this end, we should impose sanctions that have the effect of preventing and discouraging future misconduct by a respondent, deterring others from engaging in similar misconduct, and improving overall compliance by securities industry participants."

He then referred to Brosseau v. Alta. Securities Com., [1989] S.C.R. 301, paragraph 35 of which quoted from the Supreme Court of Canada decision in Gregory & Co. Inc. v. Que. Securities Comm. as follows,

> "The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business."

The Brosseau decision also said,

> "This protective role, common to all securities commissions gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts."

Commission counsel then took issue with the Respondent's reliance upon the Hupe and Winters case in their reliance upon the definition of "civil action" in Black's Law Dictionary. For ease of reference the term, *civil action* is defined in that edition as,

> "An action brought to enforce, redress, or protect a private or a civil right, cynical and non-criminal litigation."

Counsel said,

> "... if we look at the Limitation of Actions Act and look at the type of sections that are referred to in that, I would suggest that all relate to types of actions that involve protecting, redressing or enforcing private rights. ... that's not what we do here at the Securities Commission. What we do is regulate an activity and that activity is trading in securities. ... For example, we have, as being sought in this case and set out in the Amended Notice of Hearing and Statement of Allegations, we are seeking a removal of exemptions, a prohibition that Mr. Neufeld not be able to act as a director or officer, administrative penalty and compensation for financial loss. All these remedies ... are designed to ensure compliance with the Act and to fulfill our mandate of acting in the public interest, which would include protecting investors, ensuring confidence in the fairness of the capital markets."

He referred to Arbour (above cited), an Alberta Securities Commission decision, referring to a quote therefrom in paragraph 42, namely:

> "However, we must be mindful of the fact that the Commission is not a court of law and Commission enforcement proceedings are neither civil actions nor criminal proceedings. Rather, the Commission is a statutorily created administrative agency responsible for administering Alberta securities laws, with the mandate to protect investors and foster a fair and efficient capital market in the province and public confidence in that market."

Counsel also referred to a British Columbia Court of Appeal case, British Columbia (Securities Commission) v. Pacific International Securities Inc. 2002 BCCA 421, 2002, paragraphs 8 and 9 reading, in part, as follows,

> "It has been said that the more the administrative process resembles a judicial hearing, the more important it is to apply the rules of natural justice strictly ... However, the Act is regulatory in nature and its essential goal is to serve the public interest by protecting investors and secondarily, by ensuring capital market efficiency and public confidence in the securities system ... What is important for present purposes is that the orders made, if any, must be in the public interest. The essential object of the hearing is, therefore, not to decide rights of or between parties; rather, it is to arrive at a decision that will protect the public and serve its interests."

Counsel completed his submission on this point by saying that,

> "in essence, there's a third type of proceedings that exists, a regulatory administrative, and in our particular case, one which our mandate is to protect the public interest."

Finally, he referred to The Corporations Act (determined by the Panel to be section 119(1) and (2)) submitting that they recognized, by virtue of indemnification provisions,

> "... any civil, criminal or administrative action or proceeding"

to support the Commission's position that there is a proceeding other than a criminal and other than a civil proceeding.

Counsel having dealt with different matters on several pages of transcript, Panel decided to set forth his remarks, thus avoiding a summary which could possibly not present his submissions as intended. That transcript, with Panel queries as to location of references, follows,

> So we don't act as their representative as suggested by my learned friend. We act in the public interest and that's our mandate. So we don't act as a representative.
>
> I want to respond a bit to the case law my learned friend tendered in support of his argument that our proceedings are a civil proceeding for the purposes of the *Limitation of Actions Act*.
>
> Firstly, the Hupe case, the Manitoba Court of Appeal case. My learned friend said it stood for the proposition that administrative proceedings are civil proceedings for the purposes of the *Limitation of Actions Act*.
>
> With respect, the case didn't say that. What it limited its decision to, to section 140, inquiries made under the *Residential Tenancies Act*, and that section 140 inquiry involved a collection proceeding by the director under the *Residential Tenancies Act* where they were able to see if tenants pay excess rents that weren't allowed under the Act, and the director in that case could institute a collection proceeding and actually collect money for the tenants.
>
> That's not the case here. If we make it to a hearing and we are able to argue that orders for financial loss be issued, we don't collect on behalf of the claimants. We don't even register and have no authority to register that order in the court as a judgment.
>
> So we certainly don't have the powers that the director did to collect and hold money as the director did in that Hupe case. So that's a significant distinction, I would suggest.
>
> They also, Panel members, referred to the Markevich case, Supreme Court of Canada case. That as well, Panel members, involved a statutory collection procedure under the *Income Tax Act*, where the court noted that the statutory collection procedure closely resembled various proceedings at court.

Again ours is not a collection proceeding. Our job here is to issue orders that are to protect and deter and facilitate our mandate.

Also I just wanted to comment on the Winters case briefly. That was an interesting case that involved a prison disciplinary matter and basically the issue was the person in question - - the issue is whether or not they could be put in solitary confinement and he applied, or the person applied for Legal Aid assistance and the way the *Legal Aid Act* worked there, whether or not coverage could be provided for if you could be imprisoned or detained in civil proceeding.

So what the Legal Aid people argued was the prison disciplinary proceeding was not a civil proceeding.

The court in that case ruled it was, but I want to just review with you why it made that ruling, because I admit it made sense in that case.

So I would like to direct you to the Hupe case, which is at tab, the book of documents, tab 17.

I would like to refer you to paragraph 32 and at the bottom of the page, where we start off with the words "I believe". So they're talking about whether or not these prison disciplinary proceedings were - - and whether or not a person being in prison confined was through civil proceedings, whether civil proceedings includes that disciplinary proceeding.

The court notes,

> "I believe it is clear that the use of the word 'civil' in s. 3(2)(b) must have a meaning beyond the adjudication of rights between two persons. To interpret 'civil' in such a way is in effect to render s. 3(2)(b) meaningless because imprisonment or confinement would rarely result from an adjudication of rights between individuals. To reach such a conclusion would run counter to the principles of statutory interpretation ... ",

which is that - -

> " ... since the term must be given a meaning that accords with the statute as a whole."

And then it goes on to adopt again, refer to Black's Law Dictionary and reference to civil proceedings and enforcement and protection of private rights.

So the court in that case said civil proceedings includes prison disciplinary proceedings, but that makes absolutely utter sense for that case, because otherwise, as the court noted, that would

render section 3(2)(b) of their *Legal Aid Act* meaningless. And as well, of course, whether you're imprisoned or solitary confinement, I thing the point is moot, that would involve a private right.

So I just wanted to distinguish those cases on that basis.

I would like now to just briefly refer to the case Tabar, which is located at tab 9 of Staff's book of documents. I'm not going to review the whole case with you. You have had an opportunity to read it and you'll no doubt have an opportunity and will review it again in light of my comments.

I only included the Tabar case because it had some similar or some interesting similarities between that case and the case before you.

Now as my learned friend I think noted, that Tabar involved a human rights case, but there were some interesting similarities to the situation we find before us.

So I mean there's some - - the similarities in that case to ours are that it involved an administrative tribunal, in that case a human rights board. It involved their ability to make a compensation order on behalf of, I don't know if this is the proper term, but the victim in the human rights complaint.

The court noted in that case that human rights legislation is in a unique category, and I would suggest that's a similar observation to what the Supreme Court said about securities commissions when they said they have a special character about them.

In the West End, Tabar case, the compensation order could be registered as a judgment. We can't do that in our case. It would have to be up to the claimant.

And they noted in that particular case, West End, Tabar, that human rights legislation is not punitive in nature, similar to our own.

They also noted that in the conduct of their hearings, the staff is the one who has conduct of the human rights cases before the tribunal. A complainant has no status except as conferred upon him by the human rights commission or their act. So that's similar to ours. We, Staff here have conduct of the cases.

Where - - the gist of why I wanted to refer to this case is, was what they said at the end. There was an application saying certain sections of the Ontario limitation statute applied to this ability of them to issue a compensation order and, at the end of the day, the court said, no, it does not apply to our proceedings.

> And the point that I wanted to take out of that case was human rights legislation is a special type of legislation and, as I suggest, so is ours. And what the court said in that particular case, you can't force feed a human rights proceeding into a statute of limitations.
>
> And what I'm arguing before you is, given the nature of our proceedings, given our mandate and so forth and the court's comments, you can't neatly force an administrative hearing before you into *Limitations of Actions Act*.
>
> So that deals with my comments on whether or not our proceedings are a civil proceeding for the purpose of the *Limitation of Actions Act.*

Section 49 – *The Interpretation Act*

Counsel's submission was that section 49 of The Interpretation Act would apply in this case. The wording of that section was not presented but it reads as follows,

> "An Act does not bind Her Majesty or affect Her Majesty's rights or prerogatives unless it expressly states that Her Majesty is bound."

He said that the Limitation of Actions Act doesn't say it applies to the Crown. He then stated,

> "So are we part of the Crown? We say we are. We are simply, as the Court noted in Hupe, officials administering a legislative scheme. And on that basis, they said the director, under the *Residential Tenancies Act*, was afforded the protection of section 49 and, therefore, the *Limitation of Actions Act* didn't apply to his inquiry proceedings."

It being difficult to summarize, the following portions of the transcript are reproduced,

> "Now the Respondent has made a number of points to advance the argument that we are not delegates or agents of the Crown. If we look at the Respondent's Reply Brief, they are arguing at page - -, they are arguing the section at tab 4, that is a part of the *Residential Tenancies Act,* that the court in Hupe, when they were saying that the director was entitled to the protection of section 49, that the court was mindful of this provision. Well, with respect, when I read the Hupe case, that section was not at all mentioned in their decision, 141(2).
>
> So our position is you cannot insert words or thoughts into the court's mouth or mind, and it's incorrect to say that the Court was mindful of that provision. And that provision, it's the preamble of that provision, that's the key because I think it refers to under the care, the control of the Minister. So my point is 141(2) of the *Residential Tenancies Act* doesn't show up in the Hupe decision and you can't insert thoughts or words into the court's mouth.

The second point I would like to make in response to my learned friend's argument is the website, what was on our website, which describes us as independent. Well, yes, we are able to exercise our duties or powers on a day to day basis. We don't have to go to the Leg everyday to get permission for what we do, but that doesn't mean we are independent for the purposes of determining whether or not we are part of the Crown. And on that point I would also like to note that Staff here can act as Crown Attorneys in prosecutions in Provincial Court. If we weren't the – I mean, well, I think you understand what I'm saying on that point and it's something which –

Chairperson: No, I don't. No, I don't.

Mr. Gingera: We act as Crown Attorneys in Provincial Court prosecutions.

Ms. Magnifico: You, in fact, could be one, is that what you're saying?

Mr. Gingera: In fact, I have.

Chairperson: What's the point there?

Mr. Gingera: Well they're saying we are not members of the Crown. Well, we can act as Crown Attorneys.

Mr. Literovich: In a different hearing.

Ms. Magnifico: In a different hearing, yes.

Mr. Gingera: So anyways, I've made that point.

I want to talk about the Bennett case, Panel members, which my learned friend is relying on to say we're not a member of the Crown. Now they provided an excerpt from that case, quoting, and quoted the Court, which talked about the Securities Commission in B.C., and this is B.C., so it's not binding on us here, is not part of the Crown. The problem sometimes with only getting a piece of the case is you don't get the whole flavour of how they arrived at their decision, so I want to delve into that for a moment.

The Bennett case, part of the Bennett case in that Court decision involved an issue of res judicata. What had happened was there were, I think, two Bennetts and another person who were prosecuted in Provincial Court. They were acquitted and then the B.C. Securities Commission instituted proceedings against them on the same facts after that acquittal. So what the Bennetts did, and another person, was they made an application which, in part, said that res judicata applied and the Securities Commission in B.C. could not proceed with their administrative process because they've already dealt with it in the Provincial Court. They were

allowed to proceed with the administrative hearing, in part on the basis that prosecutions in Provincial Court are penal and proceedings before the Commission are not punitive.

But it's interesting, this is the interesting part I find of the case and that's this. In arguing that the B.C. Securities Commission was the Crown, the Bennett and the other person argued that the Commission was the same as the Crown, therefore can't proceed with us, they already proceeded against us in Provincial Court. But what the Court noted in that case was this, that the prosecution in Provincial Court was done by the Attorney General's office. The B.C. Securities Commission staff could not act as the Crown prosecuting that case and they drew that distinction that B.C. Securities Commission did not and could not have conduct of the case in Provincial Court because they were not the Crown, and they couldn't, they did not have the ability to lay an information, have conduct of the case. They were just merely participants at the -- to assist the Crown.

So the reason I bring that to your attention is this. That would not be the situation here in Manitoba. We would have conduct of the case. We would decide if charges are laid. We would see the case through from beginning to end. So there's a -- that's a distinction in that case. At the end, I will leave these excerpts with the Panel so you can -- I brought excerpts just so you can see that point. My learned friend, I'll provide to my learned friend, but it's their authority, so I presume they read it.

Mr. Literovich: I've already got it. I'm good.

Mr. Gingera: Yes, okay. So anyways, so I think Bennett can be distinguished on that basis. It's a significant distinction.

So let's now deal with this business of Lucas, which my -- which we submitted as an authority why we're part of the Crown for the purposes of section 49. ... I would like to refer you to the excerpt from the Lucas case which is located at tab A. And if I could refer you to paragraph 40 of that excerpt and the section where it starts off with "Manitoba is liable". So there's some discussion about Manitoba being liable for the torts of its officers or agents. And then the Court enunciates a test to determine whether agents, we are agents or delegates of the Crown. And so that ... I just want to refer back to the test because I found it interesting that my learned friend kind of omitted certain words from the test when he referred to it so there's a quote that's referred to,

> "It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the

> functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted ..."

And this is the key thing.

> "It depends mainly upon the nature and degree of control exercisable or ... retained by the Crown. ... Is there a control retained by our, by the Crown in terms of the operations of The Manitoba Securities Commission? My answer to you would be an overwhelming yes. ... First of all, we know, unlike the Lucas case, there's a Minister involved in our operations. In fact, at tab B of my Reply Brief, following Lucas, there's a definition of "Minister".
>
> "minister means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act."

So we have a Minister involved with us ... the Minister actually has some powers under our Act. 2(9) simply notes you can add, for the purpose of a hearing, you may add members, but that has to be approval, with the approval of the Minister ... section 23 of the Act, the Minister, notwithstanding section 22, the Minister may order an investigation and for the purpose -- and appoint someone to investigate that would have the same power, authorities and rights and privileges as a person appointed to make an investigation under 22, in other words, our staff. So the Minister can make an investigation on their own. .... where a Minister does do that under section 23, a person making the investigation shall report the result thereof. So the Minister can actually conduct their own investigation on matters that, under *The Securities Act* jurisdiction. So those are examples where the Minister retains control and exercises power under our Act.

I want to spend a little time dealing now in support of this argument with section 149, ... So section 149 ...

> "Lieutenant Governor in Council may make regulations." ...

The seven pages of matters the Lieutenant Governor can make regulations about ... what I'm saying to you is everything insofar as covers what we do and how we do it.

The Lieutenant Governor can make regulations, everything from the trading in securities to registration matters, prospectus matters, in fact, there even is one section where they can make regulations concerning hearings, investigations. So basically they are able to make a regulation which governs pretty well everything that we do under *The Securities Act*. ... Where the control issue arises is

this ... section 149.1(3) - - or, I'm sorry, the document following your rule making authority reads as follows,

> "Where the provisions of a regulation made under section 149 and a rule made under this section ... "

your rule making authority,

> "... conflict, the regulation prevails."

The Lieutenant Governor in Council regulation would prevail, so if there's a conflict between the two. But what's interesting on the control issue and the significant section when considering the Lucas test is this. Section 149.1(3) ...

> "The Lieutenant Governor in Council may amend or repeal any rule made by the Commission under this section."

So if Lieutenant Governor in Council don't like what, a rule that you adopt, they may amend it or repeal it, say we don't like it, it's gone. I'm going to suggest to you, so at the end of the day, a Crown essentially has veto power over what you do in terms of rule making authority. They can amend or repeal any rule. So at the end of the day they exercise control. That control is retained by them, would be the appropriate words I would use. And I would submit to Panel members, that's the type of control that is contemplated by, in the Lucas case, that control that's retained by the Crown.

I would also simply, to close off this, my argument on the control test is noted at tab G of this document that the Manitoba Securities Commission is a special operating agency designated by Lieutenant Governor in Council under the *Special Operating Agencies Financing Authority Act* ... section 11 of that Act which notes,

> "The Lieutenant Governor in Council may, by regulation, designate (a department) ... as a special operating agency."

Section 12,

> "For each agency, the Minister of Finance must establish an operating charter that will govern the operations of the agency."

So the Minister of Finance has to establish that operating charter. And paragraph 12(2) - - or section 12(2),

> "The Minister of Finance may amend or replace an operating charter from time to time."

> ... I don't even think you have to consider Lucas test if you consider what the court said in Hupe about the director there being an official administering a legislative scheme and, therefore, entitled to the protection of section 49. We fit in that exactly, I would say.

> I had forgotten about this is as a government employee, a condition of employment is we do have to take an oath of allegiance to Her Majesty the Queen. I mean my comment would be if we weren't part of the Crown, why would we have to do that?

Commission counsel stated that the proceedings initiated under the Notice of Hearing and Statement of Allegations involve four sets of investors and that the Commission was not in a position to lay charges on October 7 saying that it had not received information on Youth For Christ, the Back to the Bible involvement, the Penner involvement or details about the Funk involvement and said the Commission couldn't possibly have known in October what it knew when the Statement of Allegations was issued. He referred the Panel to the two affidavits containing the facts for his argument of this Motion.

Before a short intermission Counsel said,

> ".. you have the affidavits. I'm just going to point you to sections and say ... Well, I want to delve into the comment you (addressing the Chairperson) ... when you said ... what is a cause of action and where our proceedings, if our proceedings even fit in."

After the adjournment Counsel questioned whether the Respondents could bring proceedings within any section of the *Limitation of Actions Act*. He submitted that Respondents premise was that,

> "the clock starts ticking when staff had knowledge of the necessary averments of the offence. The problem is with that particular analysis is that they've provided no authority which says that is the case for administrative proceedings in Manitoba and that's when the cause of action, the clock starts ticking for the purposes of a *Limitation of Actions Act*. ... You have to be able to identify the starting point and they're not able to do that and the reason why they're not able to do it goes back to ... comments I made earlier that securities legislation does not fit in nicely with *Limitation of Actions Act*. It's not designed to fit in and you can't force feed it in."

He stated that in the *Limitation of Actions Act* there are sections which refer to knowledge of the event, as opposed to the actual event itself and that very harmful results could arise from the application of that Act to Commission proceedings. He added that often staff does not become aware of an event until long after it has occurred and

> "we'll be missing limitation dates on events we don't even know about. If you -- if the limitation date occurs one year, say for example, from a date of contravention, if we don't find out about that event until over a year later, we're stuck. We can't institute enforcement proceedings."

Mr. Literovich then intervened by stating that part 2 of the *Limitation of Actions Act* allows the commencement of a proceeding even after the time limit had passed.

Commission counsel said that Respondent's counsel described the Commission as a person within the meaning of the *Limitation of Actions Act*. He reiterated that the Commission is not a person but is

> "an agency appointed as -- a government department appointed as a special operating agency in the, under the SOA Act, and we are not a person as they suggest."

He then referred to the following words from section 2(1)(a) of the *Limitation of Actions Act*,

> "... by any person authorized to sue for the same, not being the person aggrieved... "

For ease of reference section 2(1)(a) of that Act reads as follows,

> "2(1) the following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> (a) actions for penalties imposed by any statute brought by an informer suing for himself alone or for the Crown as well as himself or by any person authorized to sue for the same, not being the person aggrieved, within one year after the cause of action arose;

Counsel then said that the Commission does not sue anyone but simply takes proceedings in the public interest to fulfill a mandate of investor protection, facilitating raising of capital, the capital markets and ensuring confidence in those markets.

He also submitted that administrative penalties are not penal in nature "and should not be covered by this section either."

Counsel then turned to when Commission staff had knowledge of the events or the necessary averments of the offence. He referred to Respondent's submission that "October 7th and 18th, 2010, when they're saying again we know everything." He referred to the Belteco Case. This is Belteco Holdings Inc. 1998 Carswell Ont. 491 Ontario Securities Commission, quoting from paragraph 9,

> "We have concluded on all of the evidence before us in this hearing that time began to run when Staff has sufficient "knowledge" after diligent and reasonable attempts at verification

> of the facts which, if accepted as true by the tryer of fact, would make out material elements upon which these proceedings could have been based..."

He then said,

> "Just because we receive a complaint and information doesn't make that information in those documents. It doesn't mean there has been an offence or even anything to take action on. We have to investigate. ... They're saying as of October 7th and October 18th, 2010 that we knew all the necessary averments. ... what we did not know as of October 7th and October 18th, we did not know the involvement of Back to the Bible. ... We did not know about the Penners. ... We did not know the details involving the Funk investment. We knew Mr. Funk's name was included in ... the initial documents received, but the details concerning his investment, they were not known to all of us."

He then, at some length, referred to a number of facts which were not known on those dates. He referred to Mr. Terlinski's affidavits and said that he wrote a letter of October 18th asking for an explanation from Mr. Neufeld ... so he has not made any final conclusions. He added that if he had, he could have just laid an information. He then, after giving yet more details surrounding the various parties, referred to section 22 of *The Securities Act* respecting the obtaining of an order for investigation and said,

> "They say we knew everything and we need to know everything in order to get the order. Well, if there wasn't further investigation to do, if we were in a position to lay a charge, there's no need for the order.

He stated further that,

> "So by June 10th we did not have knowledge of all the necessary averments of the offence and certainly not knowledge of all the matters which were in evidence that supported or that went into the Statement of Allegations."

There followed discussion about the Amended Statement of Allegations filed after the hearing of the Motion commenced. Mr. Literovich said that if there is going to be a hearing this will be a contentious issue. He added that,

> "Today, as far as I'm concerned, the argument that I'm advancing with respect to the Limitation of Actions Act applies even to these charges."

Commission Counsel, referring to whether sections 148.1(1.1) and 74.1 could be applied retroactively, cited paragraph 35 of Respondent's Brief which sets out the words of Sullivan on the Construction of Statutes, 3rd edition at page 670, namely,

> "It is presumed that the legislature does not intend legislation to be applied retrospectively unless the legislation confers a benefit or was enacted to protect the public."

He referred to the Morrison case where the Alberta Securities Commission decision ruled that their administrative penalties sections could be applied retroactively, emphasizing that it was not a penal section. He referred also to paragraph 55, stating,

> "We conclude ... we can make an order under section 165.1 of the Act because, although it permits the imposition of a penalty, the goal of the penalty is not to punish but rather protect the public interest."

Counsel added that the Brosseau case allowed retroactive application of a remedy. He ended this matter by saying,

> "As long as the sections are designed to protect the public, and both clearly are, our position is they should be able to be applied retroactively."

He concluded his submissions by referring to procedural fairness, stating that it was not raised by Neufeld's counsel but was included in his brief. He then simply referred to the Panel to his brief, saying,

> "My brief clearly indicates certainly in this hearing, everything from providing of notice to getting particulars to having a right to make submissions, there's a high degree of procedural fairness that has been given to him within these proceedings."

Neufeld's Counsel Rebuttal

Mr. Neufeld's counsel commenced with the matter of what the Commission knew. He referred to Commission counsel's statement that the Commission did not know enough and the statement that "all we did was issue an investigation order". He then referred to the Statement of Allegations of staff of the Manitoba Securities Commission and pointed out that it stated that the respondents raised $1,000,000. USD through a promissory note issued to a private investment company in Alberta and property owned by Neufeld used as collateral for the promissory note. He then referred to the section describing Y4C as a registered charity in Portage la Prairie, Manitoba. In June, 2005 invested $100,000. USD and received a promissory note by the Foundation and signed by Edgelow, the Foundation. He continued quoting from the Statement,

> "Y4C understood the investment was to be used to buy a bank in Bolivia and that the Note was guaranteed by the Foundation. B.R. was also advised by Edgelow and Neufeld that Y4C would receive shares and that Y4C received $30,054. (USD) in interest before payments stopped."

He then stated that paragraphs 23, 24, 25 and 26 state that the Commission knew about the Funk investment and all of the details and further that all the details of the investment of B2B, the last of the four investors, are set out. He then said,

> "We concede that once you give or set out an investigation order that, yes, you should be conducting further investigation but the fact of the matter remains that, based on what is said in this statement, in this Notice of Hearing, the Commission was fully aware of everything they needed to know about the investments of Y4C, Funk, Penner and B2B."

He then stated that there was one year under the *Limitation of Actions Act* to conduct an investigation and lay charges and that nothing happened within a year. He referred to Mr. Terlinski's last Investigation Report of January 12, 2012, when the investigation stopped, saying that the Notice of Hearing was not issued until March 6, 2015.

Mr. Literovich then referred to the Commission submission that it was just regulating an activity and did not sue people. He then said a compensation order, if given, could be used by the investor, registered in Queen's Bench as a judgment and collected on, saying,

> "If that's not suing somebody by way of a different route then I don't know what is. If that's not a cause of action that's governed by the *Limitation of Actions Act*, I don't know what is. This is clearly characterized or should be characterized as a collection proceeding, a proceeding and an action as defined within the *Limitation of Actions Act*."

He referred to the Hupe case citing the following,

> "The proper interpretation ... of the word 'action' and the phrase 'civil proceeding' is informed by the decisions in *Markevich* and *Winters*."

He submitted that Hupe stands for the proposition that if you are an inquiry process, and this has got to be an inquiry process, you're looking for money, you're trying to collect money for a compensation order, this is an action, ... it has got to be governed by the *Limitation of Actions Act*, subject to a time limit.

He referred to the Supreme Court of Canada's very clear decision that limitation periods "are sacred, they have to be followed". He referred also to Commission Counsel's contention that the Commission was a "special category of proceedings". He says you have to be mindful of limitations and it did not refer to a civil proceeding. He added, speaking of the LAA, "I don't care what you call yourself, you are bound by the legislations."

He then dealt with Commission Counsel's reference to pages of what the Lieutenant Governor of Manitoba can do and how that can impact securities legislation. He said, respecting the Crown argument, that surely the Lieutenant Governor of British Columbia had the same rights, and that the Bennett case, a British Columbia

decision is a securities case that says it is not the Crown. He emphasized that the Bennett decision had already discussed the issue of Crown vs. not Crown. He urged the Panel to adopt the rules found in Bennett, that the MSC is not the Crown.

This concluded all submissions at the hearing of the motion.

IN THE MATTER OF: **THE SECURITIES ACT**

-and-

IN THE MATTER OF: **JACK HIEBERT NEUFELD, GEOFFREY SCOTT EDGELOW AND THE JACK NEUFELD FAMILY CHARITABLE FOUNDATION**

NOTICE OF HEARING

TAKE NOTICE that The Manitoba Securities Commission ("Commission") will hold a public hearing ("Hearing") at its offices at 500 – 400 St. Mary Avenue, Winnipeg, Manitoba, on Wednesday, the 29th day of April, 2015, commencing at 9:00 o'clock in the forenoon or so soon thereafter as the Hearing can be held, and from day to day thereafter until the Hearing is concluded, to consider:

1. whether or not it is in the public interest to order, pursuant to subsection 148.1(1) of the Act, that Jack Neufeld ("NEUFELD"), Scott Edgelow ("EDGELOW"), and/or the Neufeld Family Charitable Foundation ("FOUNDATION") pay an administrative penalty;

2. whether or not to section 148.2(3) of the Act, that the FOUNDATION and/or NEUFELD be ordered to pay compensation for financial loss;

3. whether or not it is in the public interest to order that any or all of the Respondents pay the costs of and incidental to the hearing;

4. such further and other matters and the making of such further and other orders as the Commission may deem appropriate.

BY REASON OF THE FOLLOWING ALLEGATIONS:

By reason of allegations set out in the Statement of Allegations of Staff of the Commission dated the 6th day of March, 2015.

AND FURTHER TAKE NOTICE that a person or company attending or submitting evidence at the Hearing may be represented by counsel of its choice.

AND FURTHER TAKE NOTICE that any party to the proceedings may, at

the Hearing, call witnesses and submit such evidence relevant to the Hearing as it may wish and, for that purpose, it may obtain from the Director of the Commission at 500 – 400 St. Mary Avenue, Winnipeg, Manitoba, R3C 4K5, a form or forms of summons to compel the attendance of witnesses.

AND FURTHER TAKE NOTICE that upon failure of any party to attend at the time and place aforesaid, the Hearing may proceed in that party's absence and the Commission may make or give any decision or order as though that party were present.

DATED at Winnipeg, Manitoba this 6th day of March, 2015.

"Chris Besko"
Director

TO: **JACK HIEBERT NEUFELD**

AND TO: **GEOFFREY SCOTT EDGELOW**

AND TO: **THE JACK NEUFELD FAMILY CHARITABLE FOUNDATION**

IN THE MATTER OF: THE SECURITIES ACT

-and-

IN THE MATTER OF: JACK HIEBERT NEUFELD, GEOFFREY SCOTT EDGELOW AND THE JACK NEUFELD FAMILY FOUNDATION

STATEMENT OF ALLEGATIONS OF STAFF OF THE MANITOBA SECURITIES COMMISSION

STAFF OF THE MANITOBA SECURITIES COMMISSION ALLEGE, INTER ALIA THAT:

A. REGISTRATION

1. At all material times, Jack Hiebert Neufeld ("NEUFELD") and Geoffrey Scott Edgelow ("EDGELOW") were residents of Calgary, Alberta.

2. The Jack Neufeld Family Charitable Foundation (the "FOUNDATION") is a registered charity based in Calgary, Alberta.

3. None of the Respondents have ever been registered in any capacity under The Securities Act (the "Act").

4. At all material times, NEUFELD was the founder of the FOUNDATION.

5. At all material times, EDGELOW was the managing director and CEO of the FOUNDATION.

B. DETAILS

GENERAL

6. On May 26, 2005, the Respondents raised $1,000,000 USD through a promissory note issued to a private investment company in Alberta, JSI Holdings Ltd ("JSI").Property owned by Neufeld was used as collateral for the promissory note to JSI.

7. From April 2005 to January 2006, the Respondents issued promissory

notes to Manitoba residents (the "Investors"), raising a total of $1,412,087 (Canadian Funds).

8. The Respondents told some of the Investors that their money would be used to fund construction for a low-income housing development in Bolivia (the "Project").

9. Some of the Investor's money was used to purchase a bank in Bolivia, The Mutual Guapay ("MG").

10. None of the Investors knew how profit would be generated from the Project.

11. Some of the Investors were told that their money would remain in Canada and be used to secure a line of credit for the Project and the purchase of MG.

12. The purchase of MG collapsed over legal issues and the Bolivian government dissolved it in January 2008. All the invested money disappeared.

13. In July 2008, EDGELOW left the FOUNDATION under unclear circumstances.

14. The Investors primarily dealt with EDGELOW during the material time. All the Investors were certain that EDGELOW and NEUFELD were working together.

15. In 2009, NEUFELD proposed to the Investors that they re-assign their promissory notes to a numbered Alberta company. This was apparently necessary to pursue legal action in Bolivia, according to NEUFELD.

16. All the Investors refused to re-assign their promissory notes. NEUFELD unilaterally transferred the promissory notes to 1443896 Alberta Ltd ("144896").

17. Some of the Investors' monies were used to repay the promissory note between NEUFELD and JSI.

THE INVESTORS

Y4C

18. Y4C, is a registered charity in Portage la Prairie, Manitoba. B.R. was the Acting Executive Director of Y4C during the relevant times.

19. On June 28, 2005, Y4C invested $100,000 USD and received a promissory note issued by the Foundation and signed by EDGELOW. The FOUNDATION was to pay a 10% return per annum on the Note. The Note was for a term of 3 years.

20. Y4C understood the investment was to be used to buy a Bank in Bolivia and that the Note was guaranteed by the Foundation. B.R. was also advised by EDGELOW and Neufeld that Y4C would receive shares in the businesses that profited off the housing development.

21. Y4C received $30,054.00 (USD) in interest before payments stopped in 2008.

22. To date, Y4C has not received the remaining interest or payment of the principal owing under the Note.

H.F.

23. On April 14, 2005, H.F. invested approximately $250,000.00 (USD) with the Foundation consisting of two payments of $69,000 (CDN) and two payments of $45,000.00 (USD). H.F. received four promissory notes issued by the Foundation and signed by EDGELOW. The Foundation was to pay a 10% return per annum on the Notes. The Notes were for a term of 3 years. The investments by H.F. were made through two companies, M.J. and D. L.

24. H.F. was told his money was to be used to build housing for the poor in Bolivia, that his money was to remain in Canada and was to be used for collateral for a line of credit in Bolivia, there was very little risk, and the investment was secure.

25. On December 22, 2008, H.F. went to Bolivia and discovered that the housing development had gone bankrupt.

26. To date, H.F. has not received any interest payments or any of the principal amounts owing under the Notes.

B.P. and H.P.

27. On June 27, 2005, B.P. and H.P. invested $550,000 USD (and received a promissory note issued by the Foundation and signed by EDGELOW. Under the Note the FOUNDATION was to pay a 10% return per annum for a term of 3 years.

28. On January 9, 2006, B.P, after a request for additional funds by Neufeld, invested an additional $95,000 (USD) the on the same terms as the Note above.

29. B.P. received a thank you letter that explained the housing project. This was the first time B.P. learned what his investments would be used for.

30. To date, B.P and H.P. have not received any interest payments or any of the principal amounts owing under the Notes.

B to B

31. B to B is a registered charity and it was headquartered in Winnipeg, Manitoba during the relevant time. B.R. was the CFO for B to B during the relevant time.

32. On June 30, 2005, B to B invested $200,284 USD with the Foundation and received two promissory notes signed by EDGELOW. One Note F was for $100,000 USD with a term of 10 years and a return rate of 5% to 7% depending on the performance of MG. The second note was for $100,284 USD with a 10% return per annum for a term of 3 years.

33. B to B was told that the money invested would remain in Canada and be used to secure a line of credit in Bolivia to buy a bank. The bank was to fund a low income housing development.

34. B to B received $48,963 (CND) in interest before payments stopped in 2008.

35. To date, B to B has not received the remaining interest or their principal. Amounts owing under the notes.

INVESTOR FUNDS

36. Investor funds raised by the Respondents were not all used for purposes related to developing the Project. Instead, a portion of the Investors' funds were diverted to other purposes, including:

    (a) payment of Foundation expenses;

    (b) partial repayment of the JSI promissory note;

    (c) transfers to Avanti Polymers, a company partially owned by NEUFELD.

The Respondents engaged in these transactions without informing or seeking the approval of the Investors.

C. COMPENSATION FOR FINANCIAL LOSS

The Director, Legal and Enforcement ("Director") of The Manitoba Securities Commission (the "Commission") received an application for a claim against the FOUNDATION and/or NEUFELD for compensation for financial loss in favour of B.P., H.P., H.F., M.J., D.L. and Y4C. The Director requests that the Commission order financial loss compensation to the claimant in an amount to be determined at or prior to the hearing.

D. ALLEGATIONS

1. Staff of the Commission allege the Respondents:

   (a) traded and distributed securities by issuing promissory notes without having been registered and without prospectus in contravention of sections 6 and 37 of the Act;

   (b) made misrepresentations to investors that were, in material aspects, misleading or untrue, or did not state facts that required to be stated or were necessary to make the statements not misleading, in contravention of section 74.1 of the Act;

and due to any or all of the foregoing allegations, the Respondents acted contrary to public interest, and that pursuant to section 148.1 of the Act, an administrative penalty be ordered against the Respondents, and that pursuant to section 148.2(3) of the Act, NEUFELD and/or the FOUNDATION pay B.P., H.P., Y4C, H.F., M.J. and D.L. compensation for financial loss.

DATED at the City of Winnipeg, in Manitoba this 6th day of March, 2015.

"*Chris Besko*"
Director

TO: **JACK HIEBERT NEUFELD**

AND TO: **GEOFFREY SCOTT EDGELOW**

AND TO: **THE JACK NEUFELD FAMILY CHARITABLE FOUNDATION**