

## MSC NOTICE 2004-16

### THE MANITOBA SECURITIES COMMISSION

#### PRE-HEARING PROCEDURES POLICY

Dated February 20, 2004

#### INTRODUCTION

*This Policy describes the procedures for pre-hearing matters before the Commission excluding ex parte matters. Presently, the Commission administers The Securities Act, The Commodity Futures Act, The Real Estate Brokers Act, and The Mortgage Dealers Act. While these procedures are intended to apply as guidelines, the Commission has the discretion to adopt different procedures when appropriate.*

*Portions of this Policy may also be applied by the Commission in its discretion to pre-hearing matters, as may be applicable, under an Act other than one administered by the Commission or in relation to a Reference or to a Hearing and Review held under Section 29 of The Securities Act, with such modifications as may be applicable in the circumstances.*

#### **PART 1 – GENERAL**

##### **1.1 Application**

This Policy applies to pre-hearing matters for enforcement hearings held pursuant to any Act administered by the Commission.

##### **1.2 Computation of Time**

The computation of time under this Policy will be in accordance with the Court of Queen's Bench Rules.

#### **PART 2 – NOTICES OF HEARING**

##### **2.1 Commencement of Proceeding**

A proceeding is commenced with the issuance of a Notice of Hearing. The Notice of Hearing may contain allegations or may be supplemented by a separate document entitled Statement of Allegations. For the purposes of this Policy, the Commission does not consider the "commencement" of a "proceeding" under this Policy to be the "opening" of a "hearing" as referred to in section 148.2(9) of *The Securities Act*, the latter of which would disentitle a claimant from commencing a civil court proceeding for compensation.

##### **2.2 Public Documents**

The Notice of Hearing and the Statement of Allegations are public documents. It is the practice of the Commission to post these documents on its website.

### 2.3 Anonymity

The Statement of Allegations may be drafted so as to provide some degree of privacy to persons or to companies, other than a respondent, who would otherwise be fully named or identified in the allegations. This may be achieved with the use of initials, assignment of alphabetical or numerical characters, general description, or as may be otherwise appropriate in the circumstances. In such a case, the respondent will be provided with an Identification List, clearly identifying any such person or company.

### 2.4 Forwarding to Panel

In advance of a hearing, the Secretary to the Commission will forward to a Commission panel copies of the Notice of Hearing and the Statement of Allegations, if any, together with any amendments made, and any Identification List.

### 2.5 Notice of Response

If a Notice of Hearing and/or Statement of Allegations is posted on the Commission's website, a Notice of Response indicating that the respondent contests the allegations either in whole or in part and intends to defend the allegations at the hearing may also be placed on the website, if requested by the respondent, in such format as is determined by the Commission.

## PART 3 – DISCLOSURE

### 3.1 Disclosure - General

- (1) **General Principle** - A policy of full pre-hearing disclosure facilitates fairness and efficiency in any subsequent hearing. In general, disclosure should be made sufficiently in advance of a hearing to allow for reasonable time for both the respondent and staff to prepare.
- (2) **Motion** - Staff counsel or the respondent may seek an order of disclosure in advance of a hearing by bringing a motion before the Commission.

### 3.2 Disclosure of Documents

#### (1) Requirement to Disclose

- (a) Staff counsel will, as soon as is reasonably practicable after service of the Notice of Hearing, and, in any case, at least 15 days before the date on which a hearing is to commence, deliver to the respondent copies of all documents intended to be relied upon as evidence at the hearing;
- (b) The respondent is expected to, as soon as is reasonably practicable after service of the Notice of Hearing, and, in any case, at least 15 days before the date on which a hearing is to commence, deliver to staff counsel copies of all documents intended to be relied upon as evidence at the hearing;

- (c) In addition to subparagraph 3.2(1)(a), but subject to paragraph 3.6, staff counsel will, as soon as is reasonably practicable after service of the Notice of Hearing, and, in any case, at least 15 days before the date on which the hearing is to commence, provide copies, or make available for inspection by the respondent and permit the respondent to make copies at the respondent's expense, any additional material gathered in the investigation which is in the possession or control of staff that is relevant to the allegations to be proven at the hearing.
- (2) **Failure to Disclose Document** - A respondent or staff counsel who fails to make disclosure of a document in accordance with this Policy may not refer to the document or introduce it in evidence at a subsequent hearing without leave of the Commission panel hearing the matter.

### 3.3 Witness List And Statements

- (1) **Provision of Witness List** - Staff counsel and the respondent are to provide to each other and to the Secretary to the Commission, at least 15 days before the date on which a hearing is to commence, a list of the witnesses each intends to call to testify on their behalf at the hearing.
- (2) **Content of Witness List** - The witness list is expected to contain the address of any proposed witness, or alternatively the name and address of a person through whom the witness can be contacted.
- (3) **Provision of Witness Statements** - Staff counsel and the respondent to a hearing are to provide to each other, at least 15 days before the date on which the hearing is to commence:
- (a) the text of written statements made by witnesses intended to be called; or
  - (b) in the case of staff counsel's intended witnesses, in the absence of a written statement, a copy of the tape recording or transcription of the interview conducted by an investigator of the Commission;
  - (c) in the absence of a written statement, tape, or transcription of an interview, a summary of the anticipated testimony of the witness.
- (4) **Failure to Provide** - A respondent or staff counsel who fails to include a witness in the witness list or to provide disclosure in accordance with this Policy may not call the witness at a hearing without leave of the Commission panel.

### 3.4 Respondent's Case

The respondent is expected to provide to staff counsel as soon as is reasonably practicable after service of the Notice of Hearing, and, in any case, at least 15 days before the date on which a hearing is to commence, an outline of the proposed case of the respondent.

### 3.5 Expert Witnesses

- (1) **Notice of Intent to Call Expert and Provision of Expert's Report** – Where either a respondent or staff counsel intends to call an expert to give evidence at a hearing, notice should be given to the other, at least 45 days before the date on which the hearing is to commence, informing the other of the intent to call the expert and the

issue upon which the expert will be giving evidence, as well as providing the other with a copy of a report prepared and signed by the expert containing the information listed below at least 45 days before the date on which the hearing is to commence:

- (a) the name, address and qualifications of the expert;
- (b) the substance of the expert's evidence; and
- (c) a list of the documents, if any, which the expert considered.

**(2) Failure to Advise of Intent to Call Expert or to Provide Expert's Report** – In the event of a failure to comply with subparagraph 3.5(1), the expert may not be called as a witness at the hearing without leave of the Commission panel.

### **3.6 Exclusions**

In spite of any guideline in this Policy, no disclosure is required to be made:

- (a) which would contravene section 24 of *The Securities Act*;
- (b) of information which is protected by privilege;
- (c) of a fact or matter which is inadmissible by virtue of the statute under which the proceeding arises or any other statute; or
- (d) which would not otherwise be disclosable by law.

## **PART 4 - PRE-HEARING CONFERENCES**

**4.1** Either staff counsel or the respondent to a hearing may request a pre-hearing conference to consider:

- (a) identification of issues;
- (b) admission of facts and authenticity and contents of documents;
- (c) completion and extent of disclosure;
- (d) identification of any preliminary objections or motions;
- (e) determination of the date by which any steps towards the hearing are to be taken or completed;
- (f) any other matter that will promote a fair and expeditious hearing.

**4.2** The Commission encourages the use of pre-hearing conferences to resolve issues and to enable hearings to focus on the issues which cannot be resolved. Accordingly, the Commission presumes that negotiations and pre-hearing conference discussions are without prejudice to the right of a party to later contest issues which were under discussion and negotiation but which were not resolved by agreement at the pre-hearing conference or otherwise. A pre-hearing conference is not open to the public.

**4.3** All agreements and undertakings made or given at a pre-hearing conference will be recorded in a memorandum prepared under the direction of the pre-hearing Commissioner(s). A draft of the memorandum will be circulated to staff counsel and the respondent who will then be given 48 hours within which to review the draft and to request of the pre-hearing Commissioner(s) any corrections or amendments as may be required to the memorandum. Upon the passing of the 48 hour review period or upon the Commissioner(s) having made any corrections or amendments as necessitated by a request from staff counsel or the respondent, whichever is later, the Commissioner(s) will finalize the

pre-hearing conference memorandum and forward a copy to staff counsel and to the respondent. Every finalized pre-hearing conference memorandum will be provided to the hearing panel in advance of a subsequent hearing.

**4.4** For the purposes of this Policy, the Commission does not consider a pre-hearing conference under this Policy to be a hearing as referred to in section 148.2(9) of *The Securities Act*, the opening of the latter of which would disentitle a claimant from commencing a civil court proceeding for compensation.

## **PART 5 – SETTLEMENTS**

### **5.1 Application**

- (1) Staff counsel may enter into and carry on settlement discussions with a respondent in respect of a hearing, where staff counsel is of the view that in the circumstances a result which is appropriate and in the public interest may be achieved.
- (2) Staff will not settle a hearing where the respondent does not admit any wrongdoing.
- (3) Settlement discussions may occur at any time, including prior to the issuance of a Notice of Hearing.

### **5.2 Settlement Agreement**

- (1) A settlement is evidenced by a written Settlement Agreement between staff and the respondent in a format determined by staff.
- (2) The Settlement Agreement should clearly identify the hearing, or portion of the hearing, the Settlement Agreement is intended to resolve.
- (3) A Settlement Agreement should contain:
  - (a) a statement of agreed facts;
  - (b) a statement of the allegations acknowledged and admitted to by the respondent;
  - (c) the terms of settlement agreed to by staff and the respondent, including the provisions of any order requested of the Commission and the respondent's consent to the order;
  - (d) an agreed procedure for the approval of the Settlement Agreement;
  - (e) an agreement concerning the confidentiality of the agreement;
  - (f) staff's recommendation that the hearing, or such portion as is covered by the Settlement Agreement, be resolved and disposed of in accordance with the Settlement Agreement;

and, subject to approval of the Settlement Agreement and granting of the Consent Order by a panel of the Commission,

- (g) a waiver by the respondent of a full hearing and judicial review and appeal rights;

- (h) an agreement by staff counsel and the respondent that the Settlement Agreement will constitute the entirety of evidence to be submitted to the Commission regarding the matter which is the subject of the Settlement Agreement;
- (i) an agreement that the Settlement Agreement will be a public document;
- (j) an agreement by staff and the respondent that no subsequent statements will be made which are inconsistent with the terms of the Settlement Agreement.

### **5.3 Commission Review and Approval of Settlement Agreement**

- (1) **Settlement Panel** – A Settlement Agreement completed between Commission staff and a respondent is subject to review and approval by a panel of the Commission.
- (2) **Settlement Hearing** - Approval by the Settlement Panel is sought at a Settlement Hearing.
- (3) **Forwarding of Agreement to Panel** - Copies of the Settlement Agreement will be forwarded to and distributed by the Secretary to the Commission to the members of the Settlement Panel in advance of the date set for the Settlement Hearing.
- (4) **Approval of Settlement Agreement** - Based upon the Settlement Agreement and any submissions of staff counsel and the respondent, the Settlement Panel will determine whether in the opinion of the panel members the proposed settlement is appropriate and in the public interest, and, if so, approve the Settlement Agreement and pronounce any related order.
- (5) **Constitution of Panel** - In the event that a Settlement Agreement is not approved, no member of the Settlement Panel will sit on a hearing panel at a subsequent hearing of the issues, except with the consent of both the respondent and staff counsel.
- (6) **In Camera** – Such portion of the Settlement Hearing during which the Settlement Agreement is under review by the Settlement Panel, including any submissions or documents received by the Settlement Panel in conjunction with its review, is not public. The Settlement Agreement itself is not made public unless and until it has been approved by the Settlement Panel and an order confirming the approval has been pronounced.

### **5.4 Where approval not granted**

- (1) **Reasons** - If the Settlement Panel does not approve the Settlement Agreement, reasons will be provided at the request of either staff counsel or the respondent, in oral or written form at the discretion of the Settlement Panel. Reasons for not approving the Settlement Agreement are not made public.
- (2) **Subsequent Settlement** – Failure to obtain approval of a Settlement Agreement does not preclude Commission staff and the respondent from completing a subsequent Settlement Agreement. In such event, the subsequent Settlement Agreement will generally be reviewed by the original Settlement Panel.
- (3) **Full Hearing** – Where the Commission does not approve a Settlement Agreement, staff will be entitled to proceed to a full hearing of the proceeding commenced by the

Notice of Hearing, including any request by the Director that the Commission make an order of compensation for financial loss under section 148.2 of *The Securities Act*, unaffected by settlement discussions or the Settlement Agreement. The terms of the Settlement Agreement for which approval was not granted will not be raised by either staff or the respondent in the full hearing or in any other proceeding.

## **5.5 Where approval granted**

- (1) Where a Settlement Agreement is approved by a Settlement Panel, the Settlement Agreement and any related order are public documents.
- (2) For the purposes of this Policy, the Commission does not consider a Settlement Hearing under this Policy to be a hearing as referred to in section 148.2(9) of *The Securities Act*, the opening of the latter of which would disentitle a claimant from commencing a civil court proceeding for compensation, unless and until the Settlement Agreement under review has received approval by the Settlement Panel the result of which will include an order of compensation.

## **PART 6 – MOTIONS**

### **6.1 Notice**

Where a respondent or staff counsel intend to bring a motion before the Commission, the one bringing the motion is expected to serve on the other and file with the Secretary to the Commission, at least 5 days before the day on which the motion is to be heard, written notice of the motion setting out the relief sought, the grounds for the motion, and any evidence and authority including case law relied upon.

### **6.2 Abridgement of Notice Period**

A Commission panel on a motion may abridge the notice period if in the discretion of the panel members they feel it appropriate.

### **6.3 Filing Motion Materials**

- (1) Time frames for filing arguments and other materials relating to a motion may be set by a Commission panel or the pre-hearing conference Commissioner(s), as may be deemed appropriate in the circumstances.
- (2) Failure to comply with these filing or notice requirements may result in a refusal to hear a motion.

### **6.4 Motion not a Hearing**

For the purposes of this Policy, the Commission does not consider the hearing of a motion under this Policy to be a hearing as referred to in section 148.2(9) of *The Securities Act*, the opening of the latter of which would disentitle a claimant from commencing a civil court proceeding for compensation.

## **6.5 Orders**

Upon the hearing of a motion, a Commission panel may make an order on any issue properly brought before the panel, including but not limited to an order for disclosure.

## **PART 7 – ADJOURNMENTS**

### **7.1 Adjournments**

- (1) Any matter referred to in this Policy requiring an appearance before a Commission panel, Settlement Panel or Commissioner(s) may be adjourned.
- (2) In advance of the scheduled appearance, whoever is seeking an adjournment should advise the other of the intended request for an adjournment and provide the other with the reason for and the anticipated length of the adjournment required, in order to determine if the request will be opposed. A consent adjournment can be dealt with by the Secretary to the Commission without attendances required.
- (3) In a case where the requested adjournment is opposed, the Commission panel, Settlement Panel, or Commissioner(s) presiding at the scheduled appearance will grant or deny the adjournment which may be subject to conditions including an order of costs.
- (4) Where the adjournment requested is of a scheduled hearing, the Commission panel may be convened in advance of the scheduled hearing to hear and rule upon the contested adjournment request. For the purposes of this Policy, the Commission does not consider such appearance on a contested adjournment under this Policy to be a hearing as referred to in section 148.2(9) of *The Securities Act*, the opening of the latter of which would disentitle a claimant from commencing a civil court proceeding for compensation.

## **PART 8 – AMENDMENTS**

### **8.1 Amendments**

Staff may amend a Notice of Hearing or Statement of Allegations at any time after issuance. An Amended Notice of Hearing or Amended Statement of Allegations as the case may be is generally prepared by staff.

## **PART 9 – Counsel**

### **9.1 Notification of Counsel**

Counsel retained by a respondent or a witness must file with the Secretary to the Commission written Notice identifying the specific respondent or witness represented, the hearing in respect of which counsel has been retained, and counsel's name, address, telephone and facsimile numbers, and, if applicable, e-mail address.