

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Madam Justice Holly C. Beard  
Madam Justice Diana M. Cameron  
Mr. Justice James G. Edmond

***BETWEEN:***

	)	<b><i>B. Barnes Trickett,</i></b>
	)	<b><i>D. A. Thiessen and</i></b>
<b><i>WAYNE SOKAL and ESP SOFTWARE INC.</i></b>	)	<b><i>R. Lamba</i></b>
	)	<i>for the Appellants</i>
<i>Appellants</i>	)	
	)	<b><i>D. A. Johnston,</i></b>
	)	<b><i>A. Poushangi and</i></b>
<i>- and -</i>	)	<b><i>S. Zagozewski</i></b>
	)	<i>for the Respondent</i>
	)	
<b><i>THE MANITOBA SECURITIES</i></b>	)	<i>Appeals heard:</i>
<b><i>COMMISSION</i></b>	)	<b><i>April 16, 2024</i></b>
	)	
<i>Respondent</i>	)	<i>Judgment delivered:</i>
	)	<b><i>November 29, 2024</i></b>

**CAMERON JA**

Introduction

[1] These appeals relate to proceedings before the respondent (the commission) arising from a complaint by Grant Kaufmann (Kaufmann) regarding an investment that he made in the appellant, ESP Software Inc. (ESP), and promises made to him by its principal, the appellant, Wayne Sokal (Sokal), (together, the appellants). The appellants are appealing a declaration of a panel of the commission (the panel) that Kaufmann was not barred by

section 148.2(7) of *The Securities Act*, CCSM c S50 [the *SA*], from obtaining a compensation order for financial loss subject to him consenting to a judgment dismissing, discontinuing, staying or otherwise abandoning an action that he had commenced in the Court of King's Bench against the appellants and others regarding the same matter.

[2] For the reasons that follow, I am of the view that the panel erred in law in its interpretation of section 148.2(7) of the *SA*. Properly interpreted, that section operates to bar a claimant, such as Kaufmann, from requesting a compensation order pursuant to section 148.2(1) of the *SA* where the claimant has already commenced or started a civil court proceeding for compensation for the same loss. Given that Kaufmann had commenced a civil court proceeding regarding the same matter, the panel was barred by section 148.2(7) from making any order under section 148.2.

[3] At the hearing before the commission, the appellants also argued that *The Limitation of Actions Act*, RSM 1987, c L150 [the *LAA*], as repealed by *The Limitations Act*, SM 2021, c 44, s 53, applied to bar proceedings directed at obtaining a compensation order pursuant to section 148.2 of the *SA*. These appeals were heard concurrently with the appeals in *Neufeld v Manitoba (Securities Commission)*, 2024 MBCA 97. In that case, this Court held that the *LAA* does not apply to proceedings taken pursuant to section 148.2 of the *SA*. Alternatively, it held that the commission was part of the Crown and that section 49 of *The Interpretation Act*, CCSM c I80 [the *IA*], applied, thereby providing the commission with immunity from the application of the *LAA*. While Kaufmann's request for a compensation order under the *SA* was not barred by the *LAA*, the commission was barred by section 148.2(7) of the *SA* from granting any order.

### Background and Proceedings

[4] Kaufmann and Sokal met in 2006. After socializing with each other several times, Sokal solicited and received funds from Kaufmann for investment in shares of ESP, which owned a website domain named “www.PokerCity.com”. Between August and November 2007, Kaufmann invested significant funds in ESP. He did not receive any returns on his investment and it was never repaid. On November 15, 2013, he filed a statement of claim in the Court of King’s Bench against the appellants and others, claiming \$100,000 in general damages. The appellants filed a statement of defence and counterclaim on May 2, 2014. Kaufmann subsequently filed a defence to the counterclaim in June 2014.

[5] In late 2014, Kaufmann learned that the commission was contemplating initiating proceedings against the appellants. On February 26, 2019, the director of the commission (the director) sent a letter to Kaufmann, advising him that section 148.2(7) of the *SA* might bar a claim for compensation but inviting him to put a claim forward on the basis that the director believed “that the commission should be given the opportunity to consider whether s.148.2(7) [applied] to [his] claims”. Accordingly, Kaufmann made a claim for compensation and the director made a request for such pursuant to section 148.2(1) of the *SA*.

[6] During an adjournment of the hearing before the commission, Kaufmann filed a notice of motion seeking a declaration that section 148.2(7) did not operate to bar him from obtaining an order of compensation. The panel agreed and issued the declaration.

[7] At the conclusion of the hearings, the panel found that the appellants had traded and distributed securities without being registered under the *SA* (see s 6(1)) and without distributing a prospectus (see s 37(1)). Among other sanctions, it made a compensation order in favour of Kaufmann in the amount of \$85,500 CAD and \$10,000 USD (the compensation order) pursuant to section 148.2(3) of the *SA*. The panel further ordered that the compensation order would come into effect upon Kaufmann satisfying the director that the action that he had commenced in the Court of King’s Bench had been discontinued and that he had consented to an order “dismissing the action, staying the action or otherwise abandoning the action on terms acceptable to the [commission]” by June 1, 2023.

### The Legislation

[8] Section 148.2 of the *SA* provides for the making of compensation orders to claimants. The relevant provisions state:

**Compensation for financial losses**

**148.2(1)** On the application of a claimant, the Director may, when the commission holds a hearing about a person or company, request it to make an order that the person or company pay the claimant compensation for financial loss.

**Indemnisation en cas de perte financière**

**148.2(1)** Si l’auteur d’une demande d’indemnisation lui en fait la demande, le directeur peut demander à la Commission, si celle-ci tient une audience au sujet d’une personne ou d’une compagnie, d’ordonner à cette personne ou à cette compagnie d’indemniser l’auteur de la demande pour la perte financière qu’il a subie.

**Director's decision not reviewable**

**148.2(2)** Despite subsection 29(1), the Director's decision whether to make a request is not reviewable.

**Order by commission**

**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,

...

(b) is able to determine the amount of the financial loss on the evidence; and

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

...

**Recours en révision**

**148.2(2)** Malgré le paragraphe 29(1), la décision du directeur de présenter ou non une demande à la Commission ne peut faire l'objet d'aucun recours en révision.

**Ordonnance de la Commission**

**148.2(3)** Lorsque le directeur le lui demande, la Commission peut ordonner à la personne ou à la compagnie de verser à l'auteur de la demande d'indemnisation une indemnité maximale de 250 000 \$ pour la perte financière qu'il a subie si, après l'audience:

a) elle détermine que la personne ou la compagnie a contrevenu ou a omis de se conformer:

(i) à la présente loi ou aux règlements,

...

b) elle peut déterminer le montant de la perte financière en se fondant sur la preuve;

c) elle conclut que la contravention ou l'omission a entraîné tout ou partie de la perte financière.

...

**Court proceedings take precedence**

**148.2(7)** The commission shall not make an order if the claimant has commenced a civil court proceeding for compensation for the same loss.

**Claimant to inform commission about action**

**148.2(8)** A claimant shall inform the commission without delay after commencing a civil court proceeding for the same loss.

**No right of action after hearing begins**

**148.2(9)** Once the commission opens a hearing where a claim for compensation for financial loss is one of the matters before it, the claimant is not entitled to commence a civil court proceeding for compensation for the same loss or any unclaimed loss arising out of the same transaction.

**Poursuite civile**

**148.2(7)** La Commission ne peut rendre une ordonnance d'indemnisation si l'auteur de la demande d'indemnisation a introduit une instance civile en vue d'être indemnisé pour la même perte.

**Obligation d'informer la Commission**

**148.2(8)** L'auteur d'une demande d'indemnisation qui introduit une instance civile à l'égard de la même perte est tenu d'en informer la Commission sans tarder.

**Interdiction d'introduire une instance civile après le début de l'audience**

**148.2(9)** Dès que débute l'audience de la Commission au cours de laquelle doit notamment être examinée sa demande d'indemnisation pour la perte financière qu'il a subie, l'auteur de la demande ne peut introduire une instance civile en vue d'obtenir une indemnité pour la même perte ni pour toute autre perte découlant de la même transaction.

The Decision of the Panel

[9] The issue in this case involves the interpretation of section 148.2(7) of the *SA*. In determining the scope of that section, the panel considered section 6 of the *IA*, which provides:

**Rule of liberal interpretation**

**6** 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.

**Solution de droit**

**6** Les lois et les règlements sont censés apporter une solution de droit et s'interprètent de la manière la plus équitable et la plus large qui soit, compatible avec la réalisation de leur objet.

[10] As well, it considered the statutory interpretation principle enunciated by Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) and endorsed in *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC) [*Rizzo*]. Namely, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*ibid* at para 21) (the purposive approach).

[11] The panel said that the purpose of the *SA* “is similar in all respects” to that set out in the Ontario *Securities Act*, RSO 1990, c S5, s 1.1. That is:

- (a) to provide protection to investors from unfair, improper or fraudulent practices;
- (b) to foster fair, efficient and competitive capital markets and confidence in capital markets;
- (b.1) to foster capital formation; and
- (c) to contribute to the stability of the financial system and the reduction of systemic risk.

[12] Regarding section 148.2 of the *SA*, the panel stated that it was of the opinion that it was enacted

to assist investors and to provide a route of recovery to investors by allowing the [commission] to order compensation in favour of investors who have suffered losses from unfair, improper or fraudulent practices, while at the same time, the inclusion of

Section 148.2(7) does provide some protection to promoters in avoiding duplication of legal proceedings i.e. to avoid both a compensation order by the [commission] and a decision/judgment of the Court of [King's] Bench.

[13] The panel rejected the plain and ordinary meaning of the words “has commenced a civil court proceeding” (the *SA*, s 148.2(7)). It interpreted the words “has commenced” to mean “such that any action shall not be considered as being commenced where such action has been discontinued, dismissed, stayed or otherwise abandoned.” In its view, this achieved the intent of the legislature “to provide a route to the general public i.e. any investor to obtain compensation through proceedings of the [commission] while at the same time avoiding the duplicity of actions based upon the same loss.”

#### Grounds of Appeal and Positions of the Parties

[14] The appellants' position is that the panel erred in its interpretation of the word commenced in section 148.2(7). They submit that the plain and ordinary meaning of the word commenced means started, inaugurated or begun. They argue that the panel erred in giving the word commenced a non-ordinary meaning. They further argue that the panel did not consider the contextual meaning of the word commenced within the *SA* or that the purpose of section 148.2(7) is to avoid multiplicity of outcomes *and* dual proceedings.

[15] The commission agrees that the plain meaning of the word commenced means to begin or initiate. However, it argues that the purposive approach rejects a purely textual or literal analysis. It submits that the commission did not err in considering that the purpose of securities legislation is to protect the public. It argues that its interpretation gives effect to the legislative “intent to provide investors who have suffered a financial loss with



an avenue to obtain a remedy that is more efficient and less costly than pursuing an action in court.”

[16] Finally, the commission argues that the interpretation advanced by the appellants would be an injustice to those in Kaufmann’s position given that the timing, availability and outcome of a compensation order are outside a claimant’s control. It points out that, faced with a civil action limitation deadline, a claimant is forced to choose between commencing an action or waiting for a decision from the director to proceed with a compensation request. If the director’s decision on whether to apply for a compensation order comes after the expiration of the civil action limitation period, a claimant could lose the right to proceed with a civil action. The commission maintains that this cannot be the intent of the Legislature.

### Discussion

#### *Standard of Review and Error of Law Committed*

[17] The parties agree, as do I, that this is a statutory right of appeal pursuant to section 30 of the *SA*. Therefore, appellate standards of review apply (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 17). The issue of statutory interpretation is a question of law to be reviewed on the standard of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8).

[18] In its analysis, the panel correctly stated the principle of statutory interpretation endorsed in *Rizzo*. However, in my view, the panel erred in law in its statutory interpretation of the use of the word commenced as it appears in section 148.2(7) of the *SA*. Specifically, it disregarded the words chosen

by the Legislature and gave them a meaning that was beyond the scope of that section. It is my view that the intent of section 148.2(7), when read with section 148.2(9), is to avoid duplicate proceedings in any fashion—not just to avoid multiple outcomes. There are no exceptions.

*Plain and Ordinary Meaning*

[19] As agreed by the parties, the plain and ordinary meaning of the term commenced, in this context, is limited to the start of a civil proceeding, “typically with the filing of a formal complaint” (Bryan A Garner, ed, *Black's Law Dictionary*, 12th ed (2024) sub verbo “commencement of an action”, online: (WL) Thomson Reuters).

[20] In this case, it means when the statement of claim was filed.

*Context*

[21] Contextually, support for the position that the word commenced does not include an action that is currently in existence or continuing is found in sections 148.2(8) and 148.2(9) of the *SA*. Section 148.2(8) requires the claimant to “inform the commission without delay after commencing a civil court proceeding for the same loss.” Presumably, this would then bar the commission from considering a request for a compensation order where the claimant had made a request for one but, prior to the hearing before the commission, commenced a civil proceeding. Similarly, section 148.2(9) provides that, once a hearing opens, “the claimant is not entitled to commence a civil court proceeding . . . for the same loss”.

[22] In addition, support for finding that legislative intent regarding the meaning of commenced does not include an action that has been commenced and later discontinued, dismissed, stayed or otherwise abandoned can be found in the Legislature's use of the word commenced in other sections of the *SA*. As pointed out by the appellants, section 114 of the *SA* (which deals with insider trading) provides for an application to the Court of King's Bench "to commence or continue an action" (for an accounting) "on behalf of the reporting or other issuer", thereby distinguishing between the commencement and the continuation of an action.

[23] As well, section 142(1) of the *SA* provides that "[n]o person may commence or maintain an action or other proceeding against the Crown". Again, that section specifically acknowledges the distinction between an action that has been commenced and one that is ongoing.

[24] In my view, the above affirms that, when the Legislature intends to include the commencement, as well as the continuation, of a proceeding in its provisions, it specifically says so.

[25] I would note that the above interpretation of the word commenced is consistent with *obiter dictum* remarks made by Scurfield J in *Manitoba Securities Commission v Werbeniuk*, 2009 MBQB 59. In that case, Mr. Werbeniuk was alleged to have traded in securities without being registered in contravention of the *SA*. Shortly after claims under section 148.2 were submitted to the commission, Mr. Werbeniuk filed an assignment in bankruptcy. The commission hearing had not yet occurred. Justice Scurfield concluded that the bankruptcy process took precedence over the *SA*. However, he did comment as follows: "A claimant who chooses to have the

Commission address their claim is bound to that process. That is to say, the claimant cannot subsequently re-litigate the matter through the civil court process” (at para 6).

[26] In other words, there cannot be duplicate proceedings.

[27] The above interpretation is also consistent with the interpretation of the word commenced in the case of *Limebeer v Canadian Tire Corp Ltd*, 2013 ONSC 2735. In that case, the issue was whether the plaintiff’s civil proceeding was statute barred by section 97(2) of Ontario’s *Employment Standards Act, 2000*, SO 2000, c 41 [the *ESA*]. The plaintiff had previously filed a claim for termination and severance pay pursuant to the *ESA*. Section 97(2) provides that an employee who has filed such a claim “may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.” Justice Conlan determined at para 19:

I conclude that subsection 97(2) of the *ESA* provides me no discretion in these circumstances. The use of the words “*may not commence a civil proceeding*” as opposed to “*shall not commence a civil proceeding*” is explained by the exception in subsection 97(4). That expression does not suggest, as submitted by counsel for Mr. Limebeer, that a claimant could proceed in both venues in some circumstances.

[emphasis in original]

[28] Briefly, section 97(4) of the *ESA* provides that “an employee who has filed a complaint may commence a civil proceeding . . . if he or she withdraws the complaint within two weeks after it is filed.”

*Purpose of the Legislation*

[29] I agree with the statements made by the panel regarding the purpose and intent of the *SA* and section 148.2.

[30] The legislative history of the *SA* reveals that the intent behind section 148.2 was “to assist those average investors to recover financial losses caused by the negligent or improper conduct of market intermediaries without cost to the investor.”<sup>1</sup> However, “the traditional avenue” of court proceedings remained available for “large losses by institutions or sophisticated investors” or any other “investors who [chose] to sue”.<sup>2</sup> It was intended to allow “aggrieved” investors to obtain financial relief at the commission hearing “instead of being required to start additional proceedings in another venue.”<sup>3</sup> These comments also suggest that the focus of section 148.2 was on avoiding duplicate proceedings.

[31] On the other hand, it is my view that the panel placed too much weight on the purpose of the legislation, thereby disregarding the intent of the Legislature that there not be duplicate proceedings. The panel purported to address the issue of duplicate proceedings in this case by making its

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<sup>1</sup> “Bill 24, The Securities Amendment Act”, 2nd reading, Manitoba, Legislative Assembly, *Debates and Proceedings*, 37-3, vol 52, No 39 (29 May 2002) at 1950 (Hon Scott Smith) online: <[gov.mb.ca/legislature/hansard/hansard.html](http://gov.mb.ca/legislature/hansard/hansard.html)>. The minister prefaced these comments by saying:

It has also become obvious that, in the case of a financial dispute between the average retailer and the average dealer, the investors are at a disadvantage. Court proceedings and arbitration are adversarial processes that must be funded by an investor seeking compensation for losses. Often, the investor, who may be a senior or a person of limited financial means, cannot afford to seek financial redress. Sometimes the loss, although real, is simply too small to warrant the expensive recovery proceedings.

<sup>2</sup> *Ibid* at 1950-51.

<sup>3</sup> *Ibid* at 1951.

compensation order contingent upon Kaufmann's civil action relating to the same matter being discontinued, dismissed, stayed or otherwise abandoned.

[32] In *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, the Supreme Court provided guidance regarding the application of the purposive approach, stating that “[t]he Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted” (at para 40). I am of the view that that is what the panel did in this case.

[33] The effect of the panel's interpretation of the word commenced meant that the civil proceeding and the claim pursuant to section 148.2(1) of the *SA* coexisted for the duration of the hearing before the panel and the disposition of it, including the order for compensation. That is not consistent with the wording used in the *SA*. It is also inconsistent with legislative intent to avoid duplicate proceedings. The avoidance of duplicate proceedings benefits the plaintiff, the defendant and the administration of justice.

#### *Potential for Unfairness*

[34] In advocating for a wide purposive meaning, the commission further argues that to accord the plain meaning to the word commence would cause an injustice to investors who are in the same position as Kaufmann. It submits that, given limitations legislation, it is unfair for an investor to have to choose between filing a civil claim (and lose the option to seek compensation under the *SA*) or waiting for the possibility that the commission may initiate a hearing in the future (and lose the right to pursue a civil claim).

[35] This issue was addressed by the Saskatchewan Legislature, which had implemented a regime based on Manitoba's section 148.2. Originally, section 135.6(7) of Saskatchewan's *The Securities Act, 1988*, SS 1988-89, c S-42.2, provided that "[t]he Commission shall not make an order if the claimant has commenced an action or proceeding for compensation for the same loss." This section was repealed in 2008, section 135.6(9) was reworded and section 135.6(9.1) was added (see *The Securities Amendment Act, 2008*, SS 2008, c 35, s 25). Those sections now provide:

**Financial compensation**

**135.6(9)** Once the Commission opens a hearing if a claim for compensation for financial loss is one of the matters before it, any action or proceeding commenced by a claimant for compensation for the same loss, or any unclaimed loss arising out of the same transaction, is stayed until the Commission makes a decision after the hearing.

**135.6(9.1)** Nothing in subsection (9) precludes a claimant from commencing an action or proceeding for compensation for the same loss, or any unclaimed loss arising out [of] the same transaction, after the Commission opens a hearing.

[36] Section 135.6(9.1) clearly permits duplicate proceedings. As described in the committee hearings regarding this amendment:

**Mr. Quennell:** — And the ability of a claimant to commence an action or proceeding for compensation, any significant change there?

**Ms. Shourounis:** — There is a significant change. This was a new provision that was brought into force in 2007. It was modelled on Manitoba's provision which was the first time any securities commission in Canada had been given the power to actually order compensation to someone who'd lost money as a result of the contravention of *The Securities Act*.

As we were working through it, once it was implemented, the old provision had a provision subsection that said that once you've made a claim under this provision of the Act, you were precluded from making a civil claim against the same person. And it was felt that that wasn't fair that the old provision said that if [the] claim had been commenced in the civil courts, that civil action was stayed.

We felt that that wasn't fair in that this provision gives the power to the commission to make orders up to \$100,000. In some cases losses may be larger, so they should have the right of civil action. Perhaps the commission will not grant them an order. They shouldn't be precluded from trying to be successful in civil court. So this amendment is to just stay the civil proceeding, but not stay it absolutely, just kind of halt it temporarily while the commission is dealing with the matter.<sup>4</sup>

[37] The Saskatchewan Legislature identified the purported unfairness in the Manitoba model that the commission has identified in this case and remedied it through a legislative amendment. Here, the commission is asking this Court to achieve the same result using the tools of statutory interpretation. In my opinion, that is a matter for the Legislature.

### Conclusion

[38] In conclusion, I would interpret the word commenced as used in section 148.2(7) of the *SA* as "having started or initiated a civil court proceeding". The commission erred in providing that the definition could include a civil court proceeding that had been commenced but discontinued, dismissed, stayed or otherwise abandoned. Therefore, pursuant to

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4 "Bill No 42, The Securities Amendment Act, 2008", Saskatchewan, Legislative Assembly, Standing Committee on Intergovernmental Affairs and Justice, 26-2, No 13 (1 December 2008) at 201 (Hon Morgan) online: <[legassembly.sk.ca/legislative-business/debates-hansard/](http://legassembly.sk.ca/legislative-business/debates-hansard/)>  
Mr. Quennell was an opposition MLA and Ms Shourounis was the Director of the Securities Division of the Saskatchewan Financial Services Commission.



section 148.2(7), the panel was precluded from making an order of compensation in favour of Kaufmann.

[39] In the result, I would allow the appeals, set aside the compensation orders made by the panel and order costs against the commission.

\_\_\_\_\_  
Cameron JA

I agree: \_\_\_\_\_  
Beard JA

I agree: \_\_\_\_\_  
Edmond JA