FCAA
Financial and
Consumer
Affairs Authority

Suite 500
1919 Saskatchewan Drive
Regina, SK
Canada S4P 4H2

IN THE MATTER OF

THE CONSUMER PROTECTION AND BUSINESS PRACTICES ACT
S.S. 2013, c. C-30.2

AND

1292709 ALBERTA LTD.

MARTIN HAUSNER

DECISION
(re Notice of Proposed Action dated April 9, 2019)

I. Introduction

1. Due to events alleged to have occurred on or about August 11, 2017, Martin Hausner was charged with extortion contrary to subsection 346(1.1)(B) of the *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*]. Mr. Hausner is the sole owner, director and shareholder of 1292709 Alberta Ltd. (the "Company") and this entity is licensed under *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2 [*Act*] and *The Consumer Protection and Business Practices Regulations*, c C-30.2 Reg 1 [*Regulations*] to sell motor vehicles (the "Licensee").

2. Mr. Hausner and the Licensee failed to disclose to our office as required by the *Act* and *Regulations* that Mr. Hausner had criminal proceedings instituted against him. In addition, Mr. Hausner refused to comply with a formal demand from our office for details as to the events that led to those proceedings.

3. As such, on April 9, 2019, a Notice of Proposed Action ("NOPA") was issued pursuant to section 71 of the *Act* indicating an inclination to suspend the Licensee's licence until such time as Mr. Hausner provided our office with details regarding the background that led to the extortion charge and our office thereafter had an opportunity to assess how those details might impact the Licensee's suitability to remain licensed.

4. After a NOPA is issued and any opportunity to be heard is exercised, the director (which includes myself as Deputy Director) must, amongst other things, consider any submissions, make a decision, and provide written reasons for that decision (*Act*, s 71(10)). Mr. Hausner opted, as was his right, to exercise

his opportunity to be heard in the present regulatory proceedings by way of written submissions. Through his submissions, Mr. Hausner argues that:

(i) this office does not have, did not have, and never has had jurisdiction to take action against the Licensee;

(ii) he does not have to comply with our office's formal demand for details because the *Charter* shields him from having to do so; and

(iii) I am biased and/or these proceedings disclose a reasonable apprehension of bias.

5. With respect, after considering the submissions of Mr. Hausner I have decided for the reasons that follow that his submissions are without merit. In addition, I have decided it is appropriate to impose a suspension in line with the one proposed in the NOPA. Therefore, the Licensee's licence is suspended effective immediately and until such time as he provides our office with complete details as to the circumstances leading to the extortion charge and we have thereafter had the opportunity to conduct a suitability analysis that takes into account those details (if applicable) as well as the Licensee's history of non-disclosures and refusals to comply with the demands of regulators and the requirements of regulations.

II. Background

6. A significant part of the relevant background facts and information for this decision is based on evidence gathered by our office prior to issuing the NOPA. These background facts and information were canvassed in the NOPA and for convenience will be repeated, and where necessary added to or amended, below.

7. Before doing so, it is important to note that Mr. Hausner had an opportunity to file evidence in response to the NOPA and the disclosure materials provided with the NOPA, but, with a limited exception noted below, chose not to. Mr. Hausner did not file any affidavit evidence or statutory declaration(s). Instead, he opted, through learned counsel, to submit an approximate two-page letter advancing his legal positions and submissions. None of these submissions challenged the evidence disclosed to Mr. Hausner that was relied upon in issuing the NOPA. As such, the facts and information set out in the NOPA remain mostly unchallenged and will in large part form the background for, and will be applied throughout, this decision.

8. With that said, there was an important development that occurred after the NOPA was issued and that Mr. Hausner has used to advance many of his submissions. The development was that the criminal proceedings brought against Mr. Hausner ended up being withdrawn by the Crown prior to trial.

9. It is helpful to explain the evidence filed in this regard, including the nature of the withdrawal. On or about April 25, 2019, Mr. Hausner provided our office with a picture of Information No. 180391450P1 that contained the charge of extortion brought against him. Through the picture, one can see a number of stamps on the Information indicating the status of the matter as of April 23, 2019 (or a little over one year after the Information was laid):

(i) The Information was "WITHDRAWN AT THE REQUEST OF THE CROWN"; and

(ii) "ALL ITEMS SEIZED TO BE FORFEITED TO CROWN".

10. Mr. Hausner submitted that it was his position that the charge against him was false; however, Mr. Hausner did not provide any details as to what led to the Crown withdrawing the charges. He also did not provide any details as to what property was seized by the Crown and/or why the property needed to be forfeited to the Crown. Moreover, Mr. Hausner continued to refuse to provide any details as to the circumstances that led to the charges.

11. With these additional details in mind, it is helpful to reiterate the most important factual and evidentiary background from the NOPA.

12. The Licensee operates as a motor vehicle dealer in Saskatoon, Saskatchewan. In early January 2016, Mr. Hausner, on behalf of the Company, applied for a licence to become a dealer.

13. The initial application contained answers that were false. In particular, Mr. Hausner, who signed the application, represented that the Company never had a licence cancelled under the laws of another province. However, it later came to the attention of our office that on or about October 27, 2015, the Licensee did have its Automotive Business Licence cancelled in Alberta pursuant to the laws of that jurisdiction. At the same time, again pursuant to Alberta laws, Mr. Hausner's Provincial Salesperson Registration was cancelled. Shortly after those proceedings were brought, Mr. Hausner applied for a stay of those proceedings. On December 31, 2015, the Appeal Board in Alberta denied that application. Mr. Hausner then appealed.

14. On appeal, Mr. Hausner and the Alberta regulator entered into an Agreed Statement of Facts where Mr. Hausner admitted to numerous instances of failing to comply with regulatory requirements in that jurisdiction (see *Re 1292709 Alberta Ltd. o/a Cars on white from the Decision of the Director of Fair Trading*, Appeal Board Decision (September 9, 2016) at 4-6). Shortcomings that Mr. Hausner admitted to included, but were not limited to, failing to renew licences and failing pay levies as required, engaging in advertising violations, and failing to pay an administration penalty.

15. In his representations before the Appeal Board, Mr. Hausner submitted that Alberta's Director erred in cancelling his licence. He argued that the administrative shortcomings should not be met with a licence

cancellation. The Appeal Board, however, disagreed, and upheld the Director's decision to cancel Mr. Hausner's licence, noting that he appeared to have a "callous disregard for the regulatory role" that the regulator played.

16. On December 22, 2016, Mr. Hausner appealed the Appeal Board's decision, alleging that the procedure taken to that date had "not been fair, independent or transparent", and that he did not have an opportunity to properly address things like hearsay evidence that was submitted. Mr. Hausner appealed both the cancellation of his business licence and the cancellation of his salesperson registration.

17. In respect to the business licence appeal, Mr. Hausner did not dispute that his company, i.e. the licensed entity in Alberta, repeatedly failed to meet reporting requirements, file licence renewal applications on time, and pay levies, renewal fees, and at least one administrative penalty. However, the Appeal Panel noted that there was evidence that approximately 35% to 40% of licensees in Alberta are late with their renewals as well as payment of fees and levies. As such, the Appeal Panel found that Mr. Hauser and his company were not necessarily behaving in any unique manner. (see *1292709 Alberta Ltd. v Alberta Motor Vehicle Industry Council*, Appeal Board Decision re Licence (August 29, 2017) at para 40).

18. In addition, the Appeal Panel found that other allegations made by the regulator relating to more serious issues, like breaching the codes of conduct or that Mr. Hausner was a danger to the public, were not founded. As such, the only legitimate delinquencies found in respect to Mr. Hauser were administrative in nature, which the Appeal Panel held were not sufficient to warrant a licence cancellation in all the circumstances. Instead, the Appeal Panel held that Mr. Hausner was entitled to apply for and be granted a 1 year licence subject to conditions that would help guard against further administrative shortcomings.

19. In respect to the salesperson registration appeal, there were similar findings as in the business licence appeal in respect to administrative delinquencies. That said, the Appeal Panel decided to also overturn Alberta's Director and held that Mr. Hausner should be given a salesperson registration subject to conditions in light of the long history of administrative delinquencies. (see generally *Martin Hausner v Alberta Motor Vehicle Industry Council*, Appeal Board Decision re Salesperson Registration (April 20, 2017)).

20. **While** the above matters were still being litigated, in January 2016 Mr. Hausner applied for a licence in respect to a motor vehicle dealership he was looking to establish in Saskatoon, Saskatchewan. As a part of the application form for the licence, Mr. Hausner was asked whether him and/or the Licensee had ever had a dealer licence cancelled pursuant to the laws of another jurisdiction. In response to this question, Mr. Hausner answered "No" which, as demonstrated by the above, was not truthful.

21. As this office was unaware that Mr. Hausner's answer was not truthful, on March 10, 2016 we issued Mr. Hausner a broker's licence. It was not until September 12, 2016, or over 6 months later, that

our office learned from the Alberta regulator that Mr. Hausner's licence had been cancelled in Alberta prior to his application for a licence in Saskatchewan, thus demonstrating that Mr. Hausner made a false statement on his Saskatchewan application.

22. On the basis of this false statement, our office issued a NOPA to cancel the Licensee's licence. In response, Mr. Hausner exercised his right to be heard by making submissions as to the non-disclosure. Mr. Hausner submitted that one of his assistants filled out the form and he simply signed it, suggesting that the non-disclosure was not intentional.

23. In addition, by the time of Mr. Hausner's opportunity to be heard, the two Appeal Board decisions noted above were released. As such, Mr. Hausner relied on these decisions to show that the licence cancellations were not appropriate and that he remained suitable to be licensed in Alberta.

24. As a result of the submissions, including the fact that the licence cancellation in Alberta was overturned on appeal, I ultimately decided not to cancel the Licensee's licence. That said, I also made expressly clear to Mr. Hausner that it was critical that he comply with the rules and regulations imposed by the *Act* and the *Regulations* on a go-forward basis.

25. After the decision not to cancel, the Licensee continued to have regulatory issues. On April 30, 2018, our office issued a NOPA to the Licensee due to the fact that the Licensee failed to submit the required annual filings (see *Regulations*, 5-5). The annual filing requires numerous things of the Licensee, including disclosure of any changes in circumstance as defined by section 70 of the *Act* and section 5-2 of the *Regulations*. Importantly, a change in circumstance includes whether a director of a licensee has had criminal proceedings instituted against her or him.

26. After receiving the NOPA, Mr. Hausner made some efforts to deal with the outstanding annual returns. However, as a part of the filing requirements, Mr. Hausner needed to submit an updated criminal record check. As such, on April 19, 2018, our office expressly reminded Mr. Hausner by email that he was obligated to provide us with an updated criminal record check.

27. On May 1, 2018, we wrote to Mr. Hausner reminding him that his annual filing had not been completed and submitted. We also asked him when our office might receive this information.

28. On May 3, 2018, Mr. Hausner responded by apologizing for the delay and indicated that he is trying to obtain the record check from the Alberta regulator.

29. On May 17, 2018, we wrote again to Mr. Hausner by email to advise him that if his filing was not submitted by May 23, 2018, which included an updated criminal record check, it was our office's intention to suspend his licence.

30. On May 18, 2018, Mr. Hausner wrote to our office to say that his annual filing had been completed subject to the criminal record check. Mr. Hausner further indicated that he tried to obtain the criminal record he submitted to his Alberta regulator, but the Alberta regulator refused to release it. As such, Mr. Hausner said there would be further delay.

31. On May 22, 2018, Mr. Hausner wrote to our office to indicate that he went to the police station to obtain a criminal record check and that his application in this regard was currently being processed. He further indicated that it would take approximately 10 business days.

32. On June 11, 2018, Mr. Hausner forwarded our office his updated criminal record check. This criminal record check showed that Mr. Hausner had an outstanding and serious criminal allegation made against him. The allegation was that on or about August 11, 2017, Mr. Hausner committed the indictable offence of extortion contrary to section 346(1.1)(b) of the *Criminal Code of Canada*, RSC 1985, c C-46. It also showed a court date of May 24, 2018. There was no indication when Mr. Hausner was actually charged, nor was there any indication of the details underlying the allegation.

33. Upon receiving and reviewing the criminal record check, we contacted Mr. Hausner to make further inquiries. By email dated October 25, 2018, I wrote to Mr. Hausner and advised him that his criminal record check showed that he was charged with extortion on August 11, 2017 and that this charge was not disclosed to our office in likely contravention of section 70 of the *Act* and subsection 5-2(h) of the *Regulations*. I then asked Mr. Hausner the following questions:

(i) Why was the extortion charge not disclosed to our office?

(ii) What were the details surrounding the extortion charge?

(iii) What was the result of his most recent court appearance?

(iv) What is the current status of the charge?

34. On October 29, 2018 I sent Mr. Hausner a second email to advise that our office expected a response to the above inquiries by November 9, 2018.

35. By email dated November 5, 2018, Mr. Hausner responded and indicated:

- He had a lack of knowledge regarding the entire *Act* and *Regulations* as they related to the charge he incurred, suggesting he did not realize he needed to disclose the charges within the five days required by the *Act* and *Regulations*;

- His May 24, 2018 court appearance was adjourned to April 2019 for the purposes of his counsel being able to obtain and review disclosure;

- His counsel had received the disclosure, reviewed it, and based on that review Mr. Hausner was "confident the charges will be withdrawn";

- Because the criminal proceedings were still before the courts in Alberta, Mr. Hausner did not want to discuss the details of the charges at this time;

- After the criminal proceedings were finalized, he would "be more than happy to let [our office] know the details"; and

- He would keep our office updated on the criminal proceedings as they moved forward.

36. On January 3, 2019, I wrote back to Mr. Hausner to indicate that his November 5, 2018 response answered some, but not all, of my initial inquiries. In particular, the response did not provide the details regarding the extortion charge. I indicated to Mr. Hausner that while it was his preference not to discuss the details of the charges, I needed those details in order to properly administer the *Act* and the *Regulations*. I then cited for Mr. Hausner subsection 78(3)(c)(i) of the *Act* and required him "to provide me in writing an explanation of the details surrounding the extortion charge" by January 17, 2019.

37. On January 22, 2019, Mr. Hausner responded. He indicated that his reply was late because my January 3, 2019 email went to his spam folder. In respect to the demand for details that I made upon him, he indicated that:

- He hoped our office could respect the advice he received from his counsel not to discuss this matter because it was currently before the courts;

- His trial in respect to the extortion charge was scheduled for April 23 – 29, 2019;

- After the trial, he would be able to provide more information regarding the extortion charge;

- He appreciates we have a duty to protect the public, but he wanted to first discuss our office's demand with his counsel and had left a message with his counsel to call him;

- To the best of his understanding, our demand for details was equivalent to a request for him to waive his rights guaranteed by the *Canadian Charter of Rights and Freedoms* [*Charter*]; and

- He was not willing to waive his *Charter* rights until he spoke with this counsel about our office's demand for details.

38. By email dated February 7, 2019, I responded to Mr. Hausner's January 22, 2019 email. Out of an abundance of caution to ensure that Mr. Hausner's *Charter* rights would not be detrimentally impacted, and to ensure that my regulatory responsibilities under the *Act* and the *Regulations* could still be met, I clarified

for Mr. Hausner that the demand for details into the extortion charge was only made for regulatory purposes to assist me in determining whether the Licensee was still suitable to hold a licence. In addition, I noted that the details were not being sought for the purposes of determining whether any penal proceedings were to be taken under the *Act*.

39. Moreover, and again out of an abundance of caution, I assured Mr. Hausner that our office would not voluntarily disclose the details we obtained to the Crown Prosecutor in Alberta or Alberta's Ministry of Justice and Solicitor General. I then once again advised Mr. Hausner that the details were only being sought for regulatory purposes. I closed by asking again that the details be provided to our office, this time by February 13, 2019, and that if he failed to do so, we would proceed with sending him a NOPA.

40. Our office did not receive any response from Mr. Hausner or his counsel prior to issuing the NOPA. Moreover, in his response to the NOPA, Mr. Hausner still did not provide the details and therefore, as of the date of this decision, has still chosen not to comply with the demand for details.

III. Issues

32. This matter gives rise to the following issues:

(i) Does the Deputy Director have jurisdiction to take the proposed action against the Licensee?

(ii) Does the Deputy Director have the authority to compel information for regulatory purposes from a director of a licensee in respect to a criminal allegation laid by an entity other than that of the FCAA against that director?

i. In the circumstances, does the *Charter* shield the director of the licensee from the Deputy Director's compulsion powers?

(iii) Does the record disclose bias by the Deputy Director or a reasonable apprehension of bias?

(iv) Should the proposed action regarding the Licensee be implemented?

IV. Analysis

a. Does the Deputy Director have jurisdiction?

41. Mr. Hausner argues that the Deputy Director does not have, did not have, and/or perhaps lost jurisdiction over the present regulatory proceedings. He offers two positions as to why this is the case.

42. First, Mr. Hausner argues that since the charging document (i.e. the Information) was eventually withdrawn, this results in there being no criminal proceedings to be disclosed and, consequently, no jurisdiction.

43. Second, while Mr. Hausner acknowledges that the *Act* and *Regulations* require that a director of a Licensee disclose when criminal proceedings have been instituted against her or him, Mr. Hausner submits that the laying of criminal charges does not amount to instituting criminal proceedings. Instead, Mr. Hausner submits that criminal proceedings are only instituted when an actual trial is commenced and that "then and only then will the obligation [to disclose] under Section 70 be triggered". Perhaps going further, Mr. Hausner submits the wording of subsection 5-2(h) requires "something very close to a conviction" before any disclosure obligations arise.

44. Before analyzing the issues, I note that Mr. Hausner did not cite any case law in support of his positions. Notwithstanding this, his positions appear to be ones involving statutory interpretation. He argues that if the Legislature intended for a director of a licensee to have to disclose when that director was charged with a criminal offence, the Legislature would have specifically stated so.

45. To help orient ourselves, it is useful to begin by setting out the two main provisions of the legislation at issue. Section 70 of the *Act* requires a licensee to disclose within 5 business days any prescribed change in circumstance. Section 70 reads:

> **Licensee to notify director if circumstances change**
>
> **70** Within five business days after a prescribed change in circumstances, an applicant or licensee shall notify the director in wring.

46. As one can see, section 70 uses the mandatory language "shall". As such, licensees **must** disclose any prescribed change in circumstances within 5 business days from when the change occurred. The Legislature has not provided any discretion in this regard.

47. The actual prescribed changes of circumstance are housed in section 5-2 of the *Regulations*. The prescribed change in circumstance at issue in the present case is the one found in subsection 5-2(h)[1]:

> **Change in circumstances**
>
> 5-2 For the purposes of section 70 of the *Act*, a change in circumstances consists of:
>
> ...
>
> (h) the instituting of proceedings against, or conviction of, the applicant or licensee or any director, officer or partner of the applicant or licensee with respect to a criminal offence, or any other offence under the laws of any other jurisdiction, excluding traffic offences; ...

48. This provision requires a licensee to disclose when criminal proceedings are instituted against it or any of its directors, officers or partners.

49. In my view, the statutory interpretation issue raised requires me to determine what is meant by the phrase "the *instituting* of [criminal] proceedings" as found in subsection 5(h) [emphasis added]. Once this phrase is properly interpreted, the actual event that triggers section 70 the *Act* by way of subsection 5-2(h) of the *Regulations* will be understood.

50. It is well settled that there is only one way by which decision makers should conduct a statutory interpretation analysis. In *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27, Iacobucci J. for a unanimous Supreme Court of Canada adopted Elmer Drieger's approach to statutory interpretation as follows:

> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > **Today there is only one principle or approach, 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.**
>
> [emphasis added]

(see also and for e.g. *Broome v Prince Edward Island*, 2010 SCC 11, [2010] 1 SCR 360, *Veolia Water Technologies Inc. v K+S Potash Canada General Partnership,* 2019 SKCA 73, *City Centre Equities Inc. v Regina (City)*, 2019 SKCA 80, *ADAG Corporation Canada Ltd. v SaskEnergy Incorporated*, 2018 SKCA

[1] In his written submissions, Mr. Hausner cited to subsection 5-2(f); however, it appears that this must have been a typographical error. Subsection 5-2(f) makes reference to certain civil and regulatory proceedings as opposed to criminal proceedings. The latter is referred to in subsection 5-2(h).

14, 87 RPR (5th) 177, and *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38, 457 Sask R 254)

51. The law is quite clear that criminal proceedings are "commenced" when an Information is sworn. (see e.g. *R v McHale*, 2010 ONCA 361 at para 33, 261 OAC 354 and *R v Wilson*, 2015 SKCA 58, 460 Sask R 147). That said, subsection 5-2(h) of the *Regulations* does not state that a prescribed change in circumstance occurs when criminal proceedings are "commenced". Instead, the provision states that the change occurs when criminal proceedings are "instituted". So, refining the issue a bit, is there any legal difference between criminal proceedings being instituted or commenced?

52. In my respectful view, and keeping in mind the modern approach to statutory interpretation set out above, instituting criminal proceedings means the same thing legally as commencing criminal proceedings. I say this for a number of reasons.

53. First, I find support for this interpretation from the definition of "institute" as found in the legal dictionary Daphne A. Dukelow, *the Dictionary of Canadian Law*, 3rd ed (Scarborough, ON: Thomson Canada, 2004). The definition of institute is simply "to commence" (at 642).

54. Second, a lengthy history of jurisprudence has held that the terms "commence" and "institute" mean the same thing in law. For example, I am guided by, and adopt, the analysis in *Grenier v Alberta (Minister of Infrastructure)*, 2006 ABQB 917 at para 25, 411 AR 92 whereby that Court, in a civil context, was tasked with determining the meaning of "institute" as it related to legal proceedings. Citing to various authorities, the Court held that "institute", "commence", and "initiate" all in law mean the same thing and therefore may be used interchangeably. In the words of the Court:

> 25 Black's Law Dictionary [8th ed. (West Publishing, 2004)] defines "institute" to mean "to begin or start, commence". "Proceeding" is defined as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment" and "any procedural means for seeking redress from a tribunal or agency". In *Foy v. Foy (No. 2)*, [1979] O.J. No. 4386 (Ont. C.A.), the court considered how the courts have defined "proceeding instituted". At paragraph 33, the court quotes from *Hood Barrs v. Cathcart*, [1894] 3 Ch. 376 (Eng. C.A.), where Lopes L. J. said that "the expression 'proceeding instituted' conveys to my mind the idea of some action commenced or proceeding initiated; as for instance, an originating summons, or any summons which is the initiation of the matter which has to be dealt with..." At paragraph 35, the court quoted from *Hood Barrs v. Heriot*, [1897] A.C. 177 (U.K. H.L.) where the House of Lords found that the words "in any action or proceeding instituted" refer to an action or some other litigation initiated. The case law indicates that "institute", "commence" and "initiate" are used interchangeably.
>
> [footnotes omitted]

55. Moreover, this interpretation accords with the purpose, intent, and scheme of the *Act* and *Regulations* as well as the objectives of the Legislature in enacting consumer protection legislation. The *Act* and *Regulations* constitute public welfare legislation aimed at protecting consumers. Consumer

protection legislation is remedial in nature and should be interpreted largely, liberally, and generously in favour of consumers (*Seidel v Telus Communications Inc.*, 2011 SCC 15 at para 37, [2011] 1 SCR 531; *Schroeder v DJO Canada Inc*, 2010 SKQB 125 at para 41, 356 Sask R 162 citing *Prebushewski v Dodge City Auto (1984)*, 2005 SCC 28, [2005] 1 SCR 649). Interpretations that provide better protections to consumers should be favoured over those that provide weaker protections.

56. Mr. Hausner's interpretation, in my respectful view, does not accord with the above principles. His interpretation is overly restrictive which tends to undermine the objective of providing consumers with proper and adequate protection.

57. In addition, the nature of Crown discretion in criminal proceedings helps illuminate some of the difficulty I have in accepting Mr. Hausner's interpretation. The Crown enjoys broad discretion in how it administers the criminal law. Crown Prosecutors exercise discretion in deciding whether to, *inter alia*, withdraw charges before a plea is entered and evidence is heard, or to stay charges before judgment is entered (see generally *R v Power*, [1994] 1 SCR 601; *R v Beare*, [1988] 2 SCR 387 at 410; *R v McHale*, 2010 ONCA 361 at para 32, 261 OAC 354 [*McHale*] and the authorities cited therein; see also *Criminal Code*, s 579). Criminal proceedings are often resolved prior to a trial in a variety of different ways and for a variety of different reasons. Charges can be withdrawn or stayed upon an acceptable resolution being reached with the Crown. The Crown will sometimes agree to resolve criminal proceedings through alternative measures, such as through mediation. But this does not mean that in these types of situations, the underlying allegations are without merit. And it does not mean that the background facts leading to the criminal proceedings do not or cannot raise suitability concerns for a regulator.

58. Mr. Hausner's interpretation makes the triggering of subsection 5-2(h) dependent on how the Crown in criminal proceedings decides to exercise its discretion all the way up to trial. In my view, section 5-2(h) was not intended by the Legislature to be susceptible to this sort of limbo. In fact, such an interpretation could lead to absurdities (which should be avoided).

59. Take for example the situation where there is a 14-day trial and the Crown decides to exercise its prosecutorial discretion to withdraw the proceedings (with leave of the court) on the 7th day of the trial. In this circumstance, it would be nonsensical for subsection 5-2(h) of the *Regulations* to be triggered on the 1st day of trial thereby requiring disclosure to the regulator 5 days later (or on the 6th day of trial), but then a day later be deemed in law to have never been triggered at all simply because the proceedings were withdrawn. In my respectful view, the Legislature did not intend for these types of paradoxical issues to arise when it directed licensee's to self-report material changes in circumstance. In addition, I do not think the Legislature intended legal gymnastics to have to be undertaken in order to determine whether a criminal proceeding has been instituted.

60. Instead, and in my respectful view, section 70 and subsection 5-2(h) are rather straightforward. Read in their ordinary and grammatical sense while taking into account the scheme of the *Act* and

Regulations (the protection of consumers and regulation of particular industries such as motor vehicle dealing), they are intended to require licensee's to self-report within five business days after the particular prerequisite for self-reporting first comes into existence, i.e. criminal proceedings being instituted through the swearing of an Information. This interpretation provides clarity for licensees as to self-reporting requirements. It also supports timely and effective oversight of potential suitability concerns which are raised by the prescribed changes in circumstance found in the *Regulations*.

61. In addition, a review of some of the other subsections of section 5-2 of the *Regulations* supports an interpretation for criminal proceedings being disclosed earlier rather than later. For example, subsection 5-2(f) of the *Regulations* requires that a licensee disclose the existence of a civil action or regulatory proceeding that has been "brought" against it regarding things such as fraud or deceit. Use of the word "brought" signals disclosure is required early in the process, prior to trial or judgment being entered, when the defendant is first made aware that an action has been initiated. In addition, subsection 5-2(c) of the *Regulations* also requires early disclosure. This provision states that a licensee must disclose bankruptcy, receivership, or winding-up proceedings when they are "commenced". Here again the Legislature has intended that these types of proceedings be self-reported to the regulator upon them being initiated. In my respectful view, to interpret subsection 5-2(h) in a way that would require delayed self-reporting would be to draw an unnecessary and ill-advised distinction between it and other provisions that are like it.

62. Finally, I note that simply because a licensee may hold a belief that a criminal proceeding might later be withdrawn does not mean that the existence of the proceeding itself does not have to be disclosed within five business days pursuant to section 70 of the *Act*. Criminal proceedings cannot be withdrawn or stayed if they did not first exist. As a corollary, in order for the Crown to be able to withdraw or stay proceedings, the proceedings must first exist. Applying this logic to Mr. Hausner's situation, the only way the Crown could have withdrawn his criminal proceedings were if those criminal proceedings were already in existence. As we saw from the analysis above, those proceedings came into existence when they were instituted, which occurs at the time the Information is sworn. I see no basis to read into section 70 an exception whereby a licensee would not have to abide by the five business day timeline for self-reporting if she or he somehow held an expectation that the criminal charge would eventually be withdrawn. The wording of subsection 5-2(h) does not support an interpretation that the Legislature made self-reporting dependent on the subjective beliefs of licensees.

63. The standards, issues, and/or considerations involved in a criminal prosecution are not necessarily aligned with those of a regulatory proceeding. As a regulator, allegations of criminal conduct in a sworn Information raise potential for suitability concerns. If a licensee (or one of its directors) would only be obligated to disclose the existence of criminal proceedings once a trial commences, which could occur months or even years after the Information is sworn, this could place consumers in situations of unnecessary and otherwise avoidable risk. Mr. Hausner's interpretation must therefore be rejected in favour of one that results in the regulator being provided with disclosure of the existence of criminal

proceedings at the earliest opportunity (i.e. within 5 business days from when an Information has been sworn).

64. Ultimately then, and in my respectful view, criminal proceedings were instituted against Mr. Hausner on April 6, 2018 when Information 180391450P1 was sworn. At this time, section 70 of the *Act* was triggered and the Licensee was required to self-report to our office the fact that criminal proceedings had been instituted against its director, Mr. Hausner. As noted in the NOPA and above, Mr. Hausner on behalf of the Licensee failed to self-report within the five business days required by the *Act*. This, in turn, resulted in a breach of the section 70 of the *Act* and, correspondingly, grounded my jurisdiction to commence the present regulatory proceedings pursuant to section 65 of the *Act*.

b. Can Mr. Hausner rely on the *Charter* to refuse to comply with this office's formal demand for details pursuant to the *Act*?

65. Before analyzing the *Charter* issue in any depth, it is helpful to note the boundaries of Mr. Hausner's constitutional argument. Mr. Hausner's position does not seek to impugn the constitutionality of any provision of the *Act* or *Regulations*. Mr. Hausner has not applied for any remedy in respect to any provision of the *Act* or *Regulations* on constitutional grounds. He has not argued that any provision of the *Act* or *Regulations* offends the constitution and should consequently be remedied (by, for example, being struck or read down). He also did not provide any notice of constitutional question to this office, nor is there any evidence that he served a notice of constitutional question upon the Attorney General for Saskatchewan.

66. Instead, it appears Mr. Hausner is attempting to rely on the *Charter* to shield him from having to comply with a demand for information made by myself in my capacity as Deputy Director. As noted above, after Mr. Hausner provided an updated criminal record check, our office learned from that criminal record check that Mr. Hausner had been charged with extortion contrary to subsection 346(1.1)(B) of the *Criminal Code*. Thereafter, pursuant to section 78 of the *Act*, I demanded that Mr. Hausner answer certain questions regarding the background facts that led to him being charged.

67. Section 78 of the *Act* provides broad and important regulatory powers that assist the director (and Deputy Director) in monitoring whether the *Act* and *Regulations* are being complied with. Subsection 78(1) instills in the director the power to "make inquiries and conduct inspections, audits or examinations of the business and activities of each supplier to ensure that the supplier is complying with the imposed requirements." The phrase "imposed requirements" is defined in subsection 76(a) of the *Act* to include, amongst other things, the *Act* and *Regulations*. The remaining provisions of section 78 of the *Act* further define the powers that can be exercised by the director in making inquiries and conducting those inspections, audits or examinations. They read as follows:

78...

(2) In an inspection, audit or examination conducted pursuant to this section, the director may inquire into:

(a) whether the supplier has complied with the imposed requirements; and

(b) if the imposed requirements have not been met, any explanation for the differences between the results and the imposed requirements.

(3) In an inspection, examination or audit, the director may:

(a) at any reasonable time, enter any place, including the business premises of the supplier, any vehicle or any place containing any records or property required to be kept pursuant to this Act or the regulations or related to the administration of this Act or the regulations;

(b) inspect the vehicle or place mentioned in clause (a) or examine any record or property found in the vehicle or place that may be relevant to the administration of this Act or the regulations;

(c) require the supplier and any agent, representative, partner, director, officer or employee of the supplier to:

(i) answer any questions that may be relevant to the inspection, examination or audit; and

(ii) provide the director with all reasonable assistance, including using any computer hardware or software or any other data storage, processing or retrieval device or system to produce information;

(d) in order to produce information, use any computer hardware or software or any other data storage, processing or retrieval device or system that is used in connection with the business or activities of the supplier;

(e) after giving a receipt, remove for examination and copying anything that may be relevant to the inspection, audit or examination, including removing any computer hardware or software or any other data storage, processing or retrieval device or system in order to produce information;

(f) make copies of any record or property examined;
(g) retain any record or property examined that may be relevant to the administration of this Act or the regulations; and

(h) inquire into:

(i) any negotiations, transactions, loans or borrowing made by or on behalf of or in relation to the supplier that may be relevant to the administration of this Act or the regulations; and

(ii) any assets, property or things owned, acquired or disposed of in whole or in part by the supplier, or by any other person acting on the supplier's behalf, that may be relevant to the administration of this Act or the regulations.

> (4) If, pursuant to this section, the director removes any computer hardware or software or any other data storage, processing or retrieval device required to produce a readable record, the director shall:
>
> (a) produce that record with reasonable dispatch; and
>
> (b) promptly return the computer hardware or software or any other data storage, processing or retrieval device to:
>
> (i) the place from which it was removed; or
>
> (ii) any other place that may be agreed to by the director and the person from whom it was taken.

68. It is important to emphasize here that the section 78 powers are *regulatory* in nature. They are not intended to be, nor are they, penal in nature, although their exercise could lead to the discovery of evidence that could result (though not necessarily so) in penal action being taken. Section 78 provides a critical set of tools to the director (and Deputy Director) to ensure that suppliers *comply* with imposed requirements established by, *inter alia*, the *Act* and *Regulations*.

69. Moving back now to Mr. Hausner's position regarding the *Charter*, it is rather opaque. In fact, it is difficult to ascertain exactly what his submissions are in relation to his position as the submissions appear to be undeveloped. In full, they read follows:

> Mr. Hausner maintained his innocence as well as his Charter Rightas [*sic*] to not say anything. This was based on advice and direction from his legal representative.
>
> Mr. Hausner provided enough information to meet any secondary responsibility he had from the inquiries of the Director.

70. I glean from these submissions two things. First, Mr. Hausner is submitting that he is able to, as a matter of law, rely on the *Charter* to shield him from the various inquiries made pursuant to section 78 of the *Act* and that were made for regulatory purposes. Second, Mr. Hausner submits that the criminal proceedings were the primary proceedings, while the present regulatory proceedings are secondary to the criminal proceedings. Put another way, I take Mr. Hausner's second submission as stating that the criminal proceedings take precedent over these regulatory proceedings.

71. In respect to his first submission, and with great respect, this submission misapprehends the law regarding the interplay between *Charter* rights and compulsion powers invoked by a regulator for regulatory purposes pursuant to regulatory legislation. A number of important Supreme Court of Canada authorities on this issue demonstrate that Mr. Hausner is not able to rely on the *Charter*, and particularly the section 7 principle against self-incrimination, to thwart a demand for details in the present regulatory context (see e.g. *R v Jarvis*, 2002 SCC 73, [2002] 3 SCR 757 [*Jarvis*], *R v Fitzpatrick*, [1995] 4 SCR 154 [*Fitzpatrick*], *British*

Columbia (Securities Commission) v Branch, [1995] 2 SCR 3, and *Thomson Newspapers Ltd. v Canada (Director of Investigation & Research)*, [1990] 1 SCR 425).

72. One of the leading Supreme Court of Canada decisions on the issue is *R v Jarvis*, 2002 SCC 73, [2002] 3 SCR 757 [*Jarvis*]. This was a tax audit case where evidence revealed by way of an audit eventually led to a decision by Canada Revenue Agency to engage in an investigation for penal liability, which in turn led to charges being laid pursuant to the *Income Tax Act*. The Court was tasked with considering when during the course of the audit the matter turned from an administrative matter into an investigation for penal liability and whether this distinction had any implication on the nature of protections afforded by the *Charter*.

73. The Court, within the context of the provisions of the *Income Tax Act* at issue, held that the principle against self-incrimination flowing from section 7 of the *Charter* is only engaged once the predominant purpose of the state's inquiries are to determine penal liability (*Jarvis* at para 88). It is at this time that the state is said to "cross the Rubicon" from a regulatory relationship with an individual or entity to one that is adversarial in nature.

74. The Court went on to hold that once the predominant purpose of a state's inquiries is to determine penal liability, it will at this time be the case that the "full panoply" of *Charter* rights are bestowed upon the individual. In other words, once the state decides to investigate an individual predominantly for penal purposes, that individual is entitled to full *Charter* protections, including the section 7 principle against self-incrimination. The constitutional consequences flowing from this state of affairs was explained by the Court as follows:

> 96 ... First, no further statements may be compelled from the taxpayer by way of s. 231.1(1)(*d*) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.3 of the ITA or s. 487 of the *Criminal Code*, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation. CCRA officials conducting inquiries, the predominant purpose of which is the determination of penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.

75. Like the *Income Tax Act*, the *Act* is legislation that contains both regulatory compliance powers as well as penal powers and consequences. While provisions such as those in section 78 of the *Act*, for example and as discussed above, are regulatory in nature and compliance driven, the *Act* also has a provision that contains penal offences, i.e. section 108.[2] Section 108 reads:

[2] There are other provisions of the *Act* that are driven towards assisting in investigations to determine penal liability: see e.g. section 83, which is the section setting out powers to obtain various types of warrants.

Offences and penalties

108(1) No person shall:

> (a) contravene any provision of this Act, the regulations or an order of the director pursuant to this Act;
>
> (b) refuse or fail to furnish information as required by this Act or the regulations, or furnish false information to a person acting pursuant to this Act;
>
> (c) fail to comply with an order of the court; or
>
> (d) fail to comply with a voluntary compliance agreement entered into pursuant to section 80 unless the agreement has been rescinded by written consent of the director or by the court.

(2) Any individual who contravenes subsection (1) is guilty of an offence and liable on summary conviction:

> (a) for a first offence, to a fine of not more than $5,000, to imprisonment for a term of not more than one year or to both; and
>
> (b) for a second or subsequent offence, to a fine of not more than $10,000, to imprisonment for a term of not more than one year or to both.

(3) Any corporation that contravenes any provision of this Act or the regulations is guilty of an offence and liable on summary conviction:

> (a) for a first offence, to a fine of not more than $100,000; and
>
> (b) for a second or subsequent offence, to a fine of not more than $500,000.

76. In the present case, when the demand for information was made pursuant to section 78 of the *Act*, Mr. Hausner was expressly advised that the information being sought was only being sought for *regulatory* purposes so that this office could properly determine whether the Licensee remained *suitable* to hold a licence. Suitability is a core component of the regulatory framework established by the *Act* and *Regulations* in respect to a designated business such as motor vehicle dealers. Moreover, and importantly, Mr. Hausner was also expressly advised that the information was not being sought to determine any penal liability under the *Act*. In demanding that information be provided pursuant to section 78 of the *Act*, the focus was not on determining whether Mr. Hausner or the Licensee had committed an offence under section 108 of the *Act* (or under any other legislation), but was instead on whether the Licensee remained suitable to hold a licence. The former is a determination of penal liability that would attract the "full panoply" of *Charter* rights, while the latter is not and therefore does not.

77. In my respectful view then, there is no basis to argue here, in the language of the Supreme Court of Canada, that the "Rubicon was crossed". The section 7 *Charter* principle against self-incrimination is not engaged and Mr. Hausner cannot rely on it to shield him from having to provide the information demanded pursuant to section 78.

78. This conclusion is supported by the holdings and reasoning in other cases. A particularly helpful case is the Supreme Court of Canada's decision in *Fitzpatrick*. This case involved a question of whether statutorily compelled fishing logs and hail reports could be used by the Crown at trial in a regulatory prosecution. The logs and reports were compelled pursuant to provisions of the *Fisheries Act*, RSC 1985, c F-4 [*Fisheries Act*]. The accused argued that use by the Crown of the logs and reports in a prosecution against him violated the principle against self-incrimination found in section 7 of the *Charter*.

79. The Court rejected the accused's argument and made a number of important points applicable to the present case. The Court stated that when considering the scope of the principle of self-incrimination, context is critical (*Fitzpatrick* at paras 30-43). The context in *Fitzpatrick* was that the accused voluntarily decided to engage in a regulated industry (fishery). Indeed, the accused made the decision to obtain a licence pursuant to the *Fisheries Act* for the purposes of engaging in fishery. The accused knew that he was regulated by the *Fisheries Act* and therefore was also taken to have known that he would be subject to the requirements thereunder. In other words, the Court held that the accused must be taken to know in entering a regulated industry, that he would be subject to regulatory oversight as provided by the governing legislation, and that this included the need to provide statutorily compelled information. La Forest J., speaking for a unanimous Court, stated in this regard as follows:

> 30 At issue in this case is the ability of the government to enforce important regulatory objectives relating to the conservation and management of the groundfish fishery. To suggest that s. 7 of the *Charter* protects individuals who voluntary participate in this fishery from being "conscripted" against themselves, by having information used against them that they were knowingly required to provide as a condition of obtaining their fishing licences, would in my view be to overshoot the purposes of the *Charter*. The right against self-incrimination has never yet been extended that far; nor should it be. The *Charter* was not meant to tie the hands of the regulatory state.
>
> 31 In determining the ambit of the principle against self-incrimination in this case, it is important to consider the context in which the appellant's claim arises. This Court has often stated that the context of a *Charter* claim is crucial in determining the extent of the right asserted; see, for example, my comments in *L. (T.P.)*, supra, at p. 361, and in *Thomson Newspapers*, supra, at pp. 505-508 and 516-517. In particular, in *Wholesale Travel*, supra, at p. 226, Cory J. held that "a *Charter* right may have different scope and implications in a regulatory context than in a truly criminal one," and that "constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences." These comments must be borne in mind in approaching the appellant's claims, for it is made in the context of a detailed regulatory regime that governs state conservation and management of the fishery. In this regulatory environment, we must be careful to avoid automatically applying rules that have been developed respecting self-incrimination in the criminal sphere.
>
> ...
>
> 33 In my view, there are several reasons why the general principle against self-incrimination, as applied in the regulatory context of the present case, does *not* require the

appellant to be granted immunity against the use by the Crown of his statutorily-compelled hail report and fishing logs. His rights under s. 7 of the *Charter* simply do not extend that far.

...

34 The parameters of the general principle against self-incrimination were succinctly described by the Chief Justice in *Jones*, supra. Although the Chief Justice was there speaking in dissent, his analysis of the principle against self-incrimination was endorsed by Iacobucci J., for a majority of the Court, in *S. (R.J.)*, and must, accordingly, be considered authoritative. In *Jones*, the Chief Justice wrote (at p. 249):

> Any state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.

35 In applying this definition to the present case, two things should be immediately apparent. First, the information provided in this case was not provided "in a proceeding in which the individual and the state are adversaries." Instead, it was provided in response to a reasonable regulatory requirement relating to fishery management. Second, the "coercion" imposed on the appellant is at best indirect, for it arose only after he had made a conscious choice to participate in a regulated area, with its attendant obligations. ...

80. The present situation, though not identical, in my respectful view is akin. In voluntarily choosing to enter a regulated industry by applying for a licence to sell motor vehicles in Saskatchewan, Mr. Hausner as the sole director of the Licensee must be taken to have known that he would be governed by the *Act* and *Regulations* and would therefore be subject to their provisions. This includes the reporting requirements in respect to prescribed changes in circumstance (*Act*, s 70; *Regulations*, 5-2) and the ability of the regulator to compel information and documents (*Act*, ss 78-79). Requiring a licensee to provide information regarding disclosure of a prescribed change in circumstance in order to ensure that the imposed requirements of the *Act* and *Regulations* are being complied with is a reasonable regulatory requirement. The *Charter* cannot be invoked in this context to deny the regulator information critical to discharging its mandate. If the law so allowed, the purpose and intent of the *Act* and *Regulations* would be seriously undermined, as would the public's confidence in the regulated industry of motor vehicle dealing.

81. In addition, I note that the principle against self-incrimination was held by the Court in *Fitzpatrick* to not apply in a situation where the regulator actually decided to prosecute a licensee. In the present case, the regulator has not decided to take this step, nor from the evidence is such a step even on the regulator's radar. The present case is still in its very infancy where the regulator has simply made a demand upon Mr. Hausner which compels him to provide information. In my respectful view, this makes Mr. Hausner's position a step removed from, and far weaker than, the accused's position in *Fitzpatrick* where the Court held that even there the principle against self-incrimination was not engaged.

82. As an importnat aside, I note that Mr. Hausner indicated in email correspondence that after the extortion charge was resolved, he would "be more than happy to let [our office] know the details". I also note that Mr. Hausner's extortion charge was resolved prior to him filing his written submissions. However, rather than provide the details as he indicated he would, Mr. Hausner chose to continue to defy the section 78 demand. With respect, this is unacceptable and the approach cannot be tolerated.

83. Moving on to Mr. Hausner's second submission, i.e. that the within regulatory proceedings are secondary to the criminal proceedings, with respect this submission is mistaken. The within proceedings are *parallel proceedings* to the criminal proceedings. It is incorrect to label, view, and treat them as either primary or secondary.

84. In *Jarvis*, the Court provided specific analysis regarding the nature of parallel proceedings. The Court held that the predominant purpose test will not preclude a government entity from conducting criminal (or quasi-criminal) and administrative proceedings *at the same time*. Simultaneous investigations are permitted by law. That said, if an investigation into penal liability is commenced, the only information that the penal investigators will be able to access from the administrative proceedings is the information gathered *prior* to the time the Rubicon is crossed. If the penal investigators want to access additional evidence gathered in the administrative proceeding for penal purposes, a search warrant would need to be obtained. The Court reasoned in this regards as follows:

> 97 The predominant purpose test does not thereby prevent the CCRA from conducting parallel criminal investigations and administrative audits. The fact that the CCRA is investigating a taxpayer's penal liability, does not preclude the possibility of a simultaneous investigation, the predominant purpose of which is a determination of the same taxpayer's tax liability. However, if an investigation into penal liability is subsequently commenced, the investigators can avail themselves of that information obtained pursuant to the audit powers prior to the commencement of the criminal investigation, but not with respect to information obtained pursuant to such powers subsequent to the commencement of the investigation into penal liability. This is no less true where the investigations into penal liability and tax liability are in respect of the same tax period. So long as the predominant purpose of the parallel investigation actually is the determination of tax liability, the auditors may continue to resort to ss. 231.1(1) and 231.2(1). It may well be that there will be circumstances in which the CCRA officials conducting the tax liability inquiry will desire to inform the taxpayer that a criminal investigation also is under way and that the taxpayer is not obliged to comply with the requirement powers of ss. 231.1(1) and 231.2(1) for the purposes of the criminal investigation. On the other hand, the authorities may wish to avail themselves of the search warrant procedures under ss. 231.3 of the ITA or 487 of the *Criminal Code* to access the documents necessary to advance the criminal investigation. Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.

85. This is all to illustrate that to rank proceedings as being primary or secondary is a misguided approach. The within regulatory proceedings have a different purpose than that of the (now former) criminal proceedings. The within regulatory proceedings are focused on the Licensee's suitability to hold a licence to sell motor vehicles and in gathering all relevant information to conduct a suitability analysis after there

has been a prescribed change in circumstance. The criminal proceedings were regarding a specific criminal charge and whether the evidence available in that criminal proceeding would satisfy a criminal court, beyond a reasonable doubt, that Mr. Hausner committed all the essential elements of the offence of extortion with which he was charged. The two proceedings are separate and in many ways distinct, even if some of the background facts to each may be relevant for each. But one is not primary or secondary to the other. Instead, they are parallel proceedings, the existence which were acknowledged and approved of in *Jarvis*.

86. Ultimately then, Mr. Hausner's submissions regarding the *Charter* are without merit and provide no defence to his failure to provide information demanded pursuant to section 78 of the *Act*.

c. Is the Deputy Director biased and/or do the present proceedings disclose bias or a reasonable apprehension of bias?

87. Finally, Mr. Hausner appears to raise an issue of bias. I say 'appears to raise' because Mr. Hausner does not actually make any submissions as to how or why there is bias, nor does he cite any case law in support of his position. In addition, Mr. Hausner did not file any evidence that would support an allegation of bias. Instead, Mr. Hausner simply states that "(t)he commentary from 29-37 by the Deputy Director is disputed as inappropriate and disclosing a bias."

88. Paragraphs 29-37 of the NOPA review email correspondence that went back and forth between myself as Deputy Director and Mr. Hausner. In particular, it is the correspondence that occurred after Mr. Hausner delivered his required criminal record check to our office. That criminal record check revealed that Mr. Hausner had been charged with the *Criminal Code* offence of extortion. The paragraphs also canvass things like the questions that I asked Mr. Hausner regarding his criminal record; the formal demand for information I made pursuant to section 78 of the *Act*; Mr. Hausner's various refusals to comply with the demand for information and the reasons for those refusals; and the constitutional safeguards that were provided to Mr. Hausner out of an abundance of caution to ensure his *Charter* rights were not undermined in respect to the criminal proceedings he was facing.

89. The law regarding bias and a reasonable apprehension of bias was recently summarized by our Court of Appeal in *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31 at 192-213, 51 Admin LR (6th) 226 [*Pastuch*]. Before the Court set out the operative test, the Court noted that all administrative bodies owe a duty of fairness to those they regulate, and that an aspect of procedural fairness is the notion that decisions will be made by impartial decision makers. In addition, the Court noted that there is a presumption that administrative decision makers are impartial and that the burden lies on the party raising the issue of bias to rebut that presumption (at paras 196-97).

90. Before citing the Court's statement of the law in full, I note that I would reject Mr. Hausner's submission on bias from the outset on the basis that he has failed to rebut the presumption against bias. As noted above, Mr. Hausner did not make any submissions in respect to his claim of bias, nor did he attempt to develop or put forth a meaningful or coherent argument in respect to bias or a reasonable apprehension of bias. Moreover, he did not provide any of his own evidence that would go to establishing bias or a reasonable apprehension of bias. In my respectful view, Mr. Hausner's approach of simply citing a cluster of paragraphs from a NOPA and then declaring that bias exists falls far short of the burden necessary to rebut the presumption against bias and/or a reasonable apprehension of bias. As such, for these reasons alone I find that Mr. Hausner's position on this issue is without merit.

91. The issue of bias then could very well end here. However, for the sake of completeness, I will also consider the allegation of bias on its merits. This is a challenging endeavor because, as already noted, Mr. Hausner has not put forth analysis regarding his claim of bias, which makes it difficult to ascertain the thrust of the issue. Be that as it may, we can start the analysis by returning to our Court of Appeal's articulation of the law regarding bias in *Pastuch*. This law, of course, is binding upon me and will therefore be applied. The Court stated the law as follows:

> 192 All administrative bodies, no matter their function, owe a duty of fairness to the regulated parties whose interest they must determine (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.) (WL) at para 21 [*Newfoundland Telephone Co.*]; *Bell Canada v. C.T.E.A.*, 2003 SCC 36 (S.C.C.) at para 21, [2003] 1 S.C.R. 884 (S.C.C.) [*Bell Canada*]; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.) at para 82; *Baker* at paras 21-22; and *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para 92 [*S.(R.D.)*] (Justice Cory's reasons on this point were accepted by the majority)).
>
> 193 One aspect of procedural fairness is that decisions be made by impartial decision-makers. As stated by Cory J. in *Newfoundland Telephone Co.* :
>
> > [22] Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. ... The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. ...
>
> See also *Roberts v. R.*, 2003 SCC 45 (S.C.C.) at para 2, [2003] 2 S.C.R. 259 (S.C.C.) [*Wewaykum*].
>
> 194 The right to an impartial decision-maker is enshrined in ss. 7 and 11(d) of the *Charter*. Section 11(d) provides that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent and impartial tribunal*" (emphasis added).
>
> 195 There is a presumption that judges will act impartially. In *Wewaykum*, the majority described that presumption in these terms:

> [59] Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, **the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.** Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.
>
> (Emphasis added)

196 The presumption of impartiality has been applied to members of administrative tribunals (*S. (R.D.)* at para 32). However, the presumption can be rebutted by establishing bias or a reasonable apprehension of bias. The burden of proof in rebutting the presumption lies with the party making the allegation (*Wewaykum* at para 59; and *S. (R.D.)* at para 114).

197 A party alleging actual bias must establish the decision-maker brought or would bring prejudice into consideration as a matter of fact (*Wewaykum* at para 62; and *S. (R.D.)* at paras 103-108). This is difficult to establish because it depends on what is in the mind of the adjudicator. For that reason, most often the allegation is one of a reasonable apprehension of bias as opposed to actual bias (*Newfoundland Telephone Co.* at para 22; and *S. (R.D.)* at para 109).

198 The test for reasonable apprehension of bias was set out by de Grandpré J. in his dissent in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at 394 [*Committee for Justice and Liberty*]:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... [T]hat test is **"what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude.** Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> (Emphasis added)

199 This test has been endorsed by the Supreme Court of Canada in numerous decisions including *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25 (S.C.C.) at para 20, [2015] 2 S.C.R. 282 (S.C.C.); *S. (R.D.)* at paras 11, 31 and 111; *Baker* at para 46; *Wewaykum* at para 60; and *Bell Canada* at para 25. See also the decisions of this Court in *Aalbers v. Aalbers*, 2013 SKCA 64 (Sask. C.A.) at para 75, (2013), 417 Sask. R. 69 (Sask. C.A.); and *Agrium Vanscoy Potash Operations v. USW, Local 7552*, 2014 SKCA 79 (Sask. C.A.) at para 42, [2014] 8 W.W.R. 629 (Sask. C.A.).

200 As de Grandpré J. stated in *Committee for Justice and Liberty* at 395, the grounds underpinning such applications must be "substantial". The test for apprehension of bias is not related to the "very sensitive or scrupulous conscience". See also *Wewaykum* at para 76; and *S. (R.D.)* at para 112.

201 Further, a finding of bias or that there is a reasonable apprehension of bias is not ameliorated by the fact the decision arrived at is correct (*Newfoundland Telephone Co.* at para 40; and *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) at 661).

202 While the requirements of independence and impartiality are related, they are distinct concepts. In *Bell Canada*, McLachlin C.J. and Bastarache J., writing for a unanimous court, described the difference between the two concepts in these terms:

> [18] The requirements of independence and impartiality are not, however, identical. As Le Dain J. wrote in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685 (cited by Gonthier J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 41):
>
> > Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. **Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.** The word "impartial" ... connotes absence of bias, actual or perceived. The word **"independent"** in s. 11(*d*) **reflects or embodies the traditional constitutional value of judicial independence.** As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.
> >
> > (Emphasis added)
>
> Chief Justice McLachlin and Bastarache J. went on at paragraph 19 of *Bell Canada* to indicate that a tribunal's independence pertains to its structure, not its "independence of thought".

203 Where there is a single decision-maker, a finding of bias or a reasonable apprehension of bias necessitates a new trial (*S. (R.D.)* at para 100).

92. In considering whether a reasonable apprehension of bias exists then, one must consider all the circumstances and then determine what an "informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude." (*Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 *per* de Grandpré J.).

93. In addition, as noted in *Pastuch*, the grounds in support of the allegations of bias must be substantial.

94. In my respectful view, an informed person must be taken to understand the regulatory context that underpins this case, including the nature of the *Act* and *Regulations*. An informed person would understand that Mr. Hausner, in being a director of a Licensee, chose to enter a regulated industry and that the governing legislation made him subject to compulsion and compliance powers. In addition, an informed person would understand that it was the Legislature that expressly gave these powers and functions to the director (and Deputy Director).

95. In addition, an informed person would understand that a person must at all times be suitable to hold a licence to engage in the regulated industry of motor vehicles sales in Saskatchewan. Suitability is a critical and central component of the licensing regime established by the *Act* and *Regulations*. An informed person would understand that after disclosing a prescribed change in circumstance set out in the *Act* and *Regulations*, depending on what the circumstance is, the regulator may have follow up inquiries that would need to be answered in order to assist the regulator in determining continued suitability.

96. With all of this in mind, I do not agree with Mr. Hausner's declaration of bias or perhaps a reasonable apprehension of bias on the facts. With respect, the communication with Mr. Hausner was appropriate and was done pursuant to the *Act* and *Regulations* in order to fulfill the mandate I have been entrusted with by the Legislature in being appointed Deputy Director. The questions asked of Mr. Hausner were on point in respect to our office's discovery of the criminal proceedings instituted against him and were important for assessing suitability. With respect, I do not see any ground to find bias or a reasonable apprehension of bias, let alone any substantial grounds as is required by law. In my view, an informed person, having thought the matter through, would not realistically and practically conclude there is bias here.

97. Now, having found there is no bias or reasonable apprehension of bias regarding the paragraphs cited by Mr. Hausner, there could be an additional issue that is the crux of Mr. Hausner's concern regarding bias. Mr. Hausner's concern may be with the multiple roles that I, in my capacity as Deputy Director, have engaged in with respect to this matter. For example, I made various inquiries of Mr. Hausner regarding the need for him to file an updated criminal record check; I made additional inquiries regarding that criminal record check once it was received; I made the demand for details pursuant to section 78 of the *Act*; and I also authored the NOPA. In addition, I am also the author of this decision. I was involved in each of these aspects of the present proceedings in my capacity as Deputy Director. As such, in having engaged in these multiple roles, a question could arise as to whether this amounts to institutional bias or reasonable apprehension of institutional bias.

98. In my respectful view, and as I will further explain below, a complete answer to this line of argument is found in *Ringrose v College of Physicians & Surgeons (Alberta)*, [1977] 1 SCR 814 (WL) [*Ringrose*] at para 19 and the authorities cited therein. *Ringrose* was a case where the executive committee of the regulator of a doctor chose to suspend the doctor pending the outcome of an investigation by a discipline committee. One of the members of the discipline committee was also a member of the executive committee, but had no knowledge of the circumstances of the case against the doctor until after the discipline committee was formed. Notwithstanding this, the doctor argued that in serving on both committees concurrently, a reasonable apprehension of bias was established.

99. The Supreme Court of Canada gave three reasons as to why the doctor's argument could not be accepted. First, the evidence established that in being made a member of the discipline committee, the member had no prior knowledge of the case against the doctor and therefore could not have pre-judged the case. Second, in sitting on the discipline committee, the member was not sitting in appeal of the executive committee; instead, each committee had different issues to determine, albeit on some of the same evidence. Ultimately, this was not enough to establish a reasonable apprehension of bias.

100. Finally, and most importantly for the present case, the Court in relying on some of its prior jurisprudence held that "no reasonable apprehension of bias is to be entertained when the statute itself prescribes overlapping of functions." (at para 19) In other words, if the Legislature chooses to bestow upon a person through legislation certain powers and/or functions, then the exercise of those powers and/or functions, should they overlap, cannot amount to bias or a reasonable apprehension of bias. The legislation in this type of scenario operates to insulate that person from a challenge to the exercise of those powers / functions on the basis of bias or a reasonable apprehension of bias.

101. For *Ringrose*, the Court explained how the legislation at issue in that case provided protection to the member from a bias challenge as follows:

> 19 But there is an additional reason to dismiss this appeal. As decided by this Court in *Law Society of Upper Can. v. French*, [1975] 2 S.C.R. 767, 49 D.L.R. (3d) 1, **no reasonable apprehension of bias is to be entertained when the statute itself prescribes overlapping of functions.** Such is exactly the situation under The Medical Profession Act. By s. 66, the council may "suspend any member of the College pending investigation" as to disciplinary matters. On the other hand, by s. 47, the council may "appoint a discipline committee (consisting of not less than three members of the council) to investigate the facts". Thus, the same council, the members of which are by law entitled to take part in all its decisions, is by statute authorized at the same time to suspend during investigation and to appoint a discipline committee staffed by at least three of its midst. **Thus, it is clear that the legislator has created the conditions forcing upon the members of the council overlapping capacities.**
>
> 20 It is true that in the present instance it was not the council but the executive committee that purported to utilize the power of s. 66 and to suspend appellant pending investigation but the fact remains that, if that power had been exercised by council and if Dr. McCutcheon had participated in that decision of council, he would still by law have been empowered to sit as a member of the discipline committee. This is the view we expressed in *French*. We had also expressed it in *King v. University of Sask.*, 68 W.W.R. 745, [1969] S.C.R. 678, 6 D.L.R. (3d) 120. The Court of Appeal, quite rightly so, found that the conduct of Dr. McCutcheon, even if he had sat, had been implicitly authorized by legislation.
>
> [emphasis added]

(see also *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301, *Khurana v Medical Care Insurance Comm. (Sask.)* (1987), 60 Sask R 145 (QB) at paras 59-65, *Huerto v Saskatchewan (Minister of Health)* (1998), 170 Sask R 21, 8 Admin LR (3d) 287) (QB) at paras 34-47, *Duncan v Law Society (Alberta)*

Investigating Committee (1991), 115 AR 161, 79 Alta LR (3d) 228 (CA) (WL) at paras 3-19 and the authorities cited therein, *McArthur v Foothills (Municipal District No. 31* (1977), 4 AR 30, 4 Alta LR (2d) 222 (SC App Div), and *Forget v Law Society of Upper Canada* (2002), 58 OR (3d) 142, 156 OAC 117 (ONSC Div Ct) (WL) at paras 31-37 and the authorities cited therein)

102. Before reviewing the powers and functions assigned to the Deputy Director in the *Act*, I also find the reasoning in *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52 at paras 20-24, [2001] 2 SCR 781 [*Ocean Port*] to be of particular importance to the within issues and should therefore be discussed. In *Ocean Port*, MacLachlin CJC, for a unanimous Supreme Court of Canada, discussed the principle of independence for decision makers, noting that the *degree* of independence required of administrative decision makers can vary depending on the enabling legislation and the intention of the legislature or Parliament. She held that constitutional guarantees of independence and impartiality that apply to superior courts and judges do not necessarily apply to administrative decision makers. Indeed, as a general rule, these constitutional guarantees do not apply to administrative decision makers. Instead, a review of the enabling legislation is required to determine the level of independence that the legislature or Parliament intended. To be sure, principles of natural justice that tend to require independence and impartiality may be overridden by statute. In the words of McLachlin CJC:

> 19 ...[A]bsent a constitutional challenge, a statutory regime prevails over common law principles of natural justice. ... the Court of Appeal elevated a principle of natural justice to constitutional status. In so doing, it committed a clear error of law.
>
> 20 ... **It is well-established that, absent constitutional constraints, the degree of independence required of a particular government decision-maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.**
>
> 21 Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers & Lybrand* (1978), [1979] 1 S.C.R. 495 (S.C.C.), at p. 503, *Law Society of Upper Canada v. French* (1974), [1975] 2 S.C.R. 767 (S.C.C.), at pp. 783-784. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision-maker, one of the fundamental principles of natural justice: *Matsqui*, *supra* (*per* Lamer C.J. and Sopinka J.), *Régie*, *supra*, at para. 39, *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405 (S.C.C.). Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, *supra*, at para. 39.
>
> 22 However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See, generally, *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145

(S.C.C.), *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 (S.C.C.) [hereinafter *Brosseau*], *Ringrose v. College of Physicians & Surgeons (Alberta)* (1976), [1977] 1 S.C.R. 814 (S.C.C.), *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.). Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.

23 This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) (hereinafter the "*Provincial Court Judges Reference*"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges - both in fact and perception - by insulating them from external influence, most notably the influence of the executive: *R. v. Beauregard*, [1986] 2 S.C.R. 56 (S.C.C.), at p. 69, *Régie*, at para. 61.

24 Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

(see also and e.g. *Bell Canada v C.T.E.A.*, 2003 SCC 36 at paras 21-31, [2003] 1 SCR 884, *Imperial Oil Ltd. v Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 SCR 624, *Fitzpatrick v College of Physical Therapists of Alberta*, 2019 ABCA 254 at paras 37-44, *Sutherland v British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 65 at paras 50-56, 73-83, *Searles v Alberta (Minister of Health & Wellness)*, 2011 ABCA 144, 502 AR 198)

103. The enabling legislation in the present case is the *Act*. A review of the *Act* as a whole shows that the Legislature did not intend for the director to have the same independence as a judge of a superior or provincial court. Instead, the Legislature has chosen to establish the office of director for the purposes of administering the *Act* and *Regulations* (*Act*, ss 77(1), (2)). The Legislature has also chosen to allow for the appointment of deputy directors, such as myself. The Legislature has also chosen to provide deputy directors with the same powers as the director, so that when the *Act* uses the term 'director', it includes deputy directors (see *Act*, s 2(d)[3]).

[3] Director is defined in this subsection as a person appointed pursuant to section 77 of the *Act*, which is the section that allows for the appointment of both directors and deputy directors. Therefore, whenever the term 'director' is used in the *Act*, it includes deputy directors.

104. In administering the *Act* and *Regulations*, the director has broad powers of varying nature. For example, the director has informational powers and duties that require her or him to inform consumers and suppliers about the *Act* and *Regulations* (*Act*, ss 77(6)). In addition, the director has compliance powers to assist in getting suppliers to comply with the *Act* and *Regulations* (*Act*, ss 80-82). The director also has broad powers of inspection, audit and examination, including powers to compel information, that assist in monitoring compliance with the *Act* and *Regulations* (*Act*, s 78-79). Moreover, the director has powers to take regulatory action against licensees (*Act*, s 71).

105. The multi-faceted nature of the director's mandate, which includes a significant level of policy implementation, demonstrates that the Legislature did not intend for the director to have a level of independence nearing that of judges. Instead, and in my respectful view, so long as the director does not overextend her or his powers and operates within the bounds delineated by the *Act* and *Regulations*, then there cannot be an argument of bias or a reasonable apprehension of bias on the basis of the director (or a deputy director) invoking powers bestowed upon her or him.

106. This leads us back to what occurred in the present case. As seen above, in my capacity as Deputy Director, after it came to my office's knowledge that Mr. Hausner had been charged with a criminal offence, I wrote to him to inquire as to the details underlying that offence for the purposes of determining whether the Licensee remained suitable to hold a licence. The Legislature expressly bestowed a power upon the Deputy Director to make such an inquiry pursuant to section 78 of the *Act*. When Mr. Hausner refused to provide those details, I made it plain that I was demanding the details pursuant to section 78 of the *Act*. Again, the Legislature set out this power expressly and plainly.

107. When Mr. Hausner still refused to provide the information, in my capacity as Deputy Director again, the NOPA was issued pursuant to section 71 of the *Act* in respect to the Licensee. The Legislature expressly bestowed the power to take action against a licensee upon the Deputy Director. In addition, the Legislature expressly requires the Deputy Director, after receiving written submissions or conducting a hearing in respect to the NOPA, to consider those submissions and render a decision with written reasons (*Act*, s 71(10)).

108. The Legislature, then, has expressly assigned certain powers and duties to me as Deputy Director. The enabling legislation has assigned the power to compel information from suppliers and has also assigned the power to take action to the Deputy Director. In my respectful view, all of the questions asked of Mr. Hausner fell squarely within the authority conferred by section 78 of the *Act*. There was no overextension here. Moreover, Mr. Hausner did not bring a *Charter* challenge to any aspect of the *Act* or *Regulations* and therefore no issue has been raised regarding the constitutionality of the *Act* or *Regulations*, be it on grounds of independence or otherwise.

109. As such, and in my respectful view, *Ringrose*, *Ocean Port*, and the other authorities cited therein and herein are dispositive of the bias issues raised by Mr. Hausner. Following *Ringrose*, since the legislation is expressly set up to provide the deputy director with powers to, *inter alia*, compel information, take action, and render decisions regarding proposed action, there can be no room to entertain a bias argument on the basis that the Deputy Director invoked those powers. Moreover, following *Ocean Port*, the Deputy Director is not meant to be cloaked with the same or similar independence of superior or provincial court judges, that independence being constitutionally enshrined. Instead, the multi-faceted nature of the Deputy Director's mandate demonstrates that the legislature intended the Deputy Director to serve important policy functions in addition to decision making functions. The Deputy Director's enabling legislation suggests a lower degree of independence is required to ensure that the Deputy Director's other express functions, which include implementation of policy, are also able to be properly exercised.

110. Ultimately then, and in my respectful view, Mr. Hausner has not met his burden to rebut the presumption against there being bias and the submission is without merit in both fact and law.

d. Should the Licensee be suspended?

111. Mr. Hausner's submissions have been rejected as being without merit. The remaining issue then is what action should be taken against Mr. Hausner at this time.

112. Currently, Mr. Hausner has refused to comply with the demand for details into the situation that resulted in him being charged. At this time, this office is lacking critical information needed to conduct a proper suitability analysis. While the criminal proceedings brought against him have been withdrawn thereby ending those proceedings, this does not mean that these regulatory proceedings are also at an end. Simply because Mr. Hausner will not be convicted of extortion does not mean that the background circumstances that led to the charges will not raise suitability concerns.

113. In addition, I would be remiss if I did not say that upon being provided with answers to the inquiries that have been made of Mr. Hausner, it very well may be that there will be no suitability concerns in this regard. It may be that the details reveal a perfectly reasonable explanation of the circumstances. But the point remains that until those details are provided, this office is unable to provide the necessary oversight and engage a proper suitability analysis. At this time, what is known is that there was a prescribed change in circumstance and that, in the present situation, that change has raised the potential for suitability issues. In my respectful view, the inquiries made of Mr. Hausner must be answered.

114. In addition, in context, Mr. Hausner failing to answer a demand for details pursuant to section 78 is very troubling. As indicated in the NOPA and above, Mr. Hausner has a considerable history of failing to comply with regulatory requirements, both in this jurisdiction and in other jurisdictions. On top of this, Mr. Hausner is now outright refusing to comply with the express and lawful demands of his regulator. The concerns in this regard are aggravated considering Mr. Hausner himself indicated in email correspondence that after his criminal proceedings were brought to an end he would be happy to comply with the section 78 demand, yet when those proceedings did end, he chose instead to continue to refuse to comply.

115. I find the following paragraphs in the NOPA regarding Mr. Hausner's non-disclosures and failures to comply to still be fitting and applicable and I therefore think it is helpful to repeat them:

> 61. The behaviour that Mr. Hausner [has exhibited regarding] his apparent lack of respect for motor vehicle regulators simply does not meet the standards of suitability expected and required of licensees under the *Act*. ...
>
> 62. ...Indeed, an established and continuing pattern of non-disclosures in the regulatory context impacts considerably upon suitability as it demonstrates a serious lack of honesty, integrity, and good faith (see e.g. *Ernest Huckerby, Re* (2004), 27 OSCB 5654; *CDN Financial and Mortgages Inc. v Ontario (Superintendent Financial Services)*, 2014 ONFST 10).
>
> 63. I am also in agreement with the reasoning *Couto, Re* (2002), 35 OSCB 4105, where the then Acting Director of the Ontario Securities Commission noted the key concerns that failures to disclose, including failures to disclose past criminal proceedings, raise and how this all impacts upon suitability:
>
> > 14 In *Re Thomas* (1972), O.S.C.B. 118 the Commission wrote at page 120: "The keystone to the registration system is the application form. A desire and an ability to answer the questions in it with candour in many respects can be said to be the first test to which the applicant is put." Given the importance of the application form in our registration system, the OSC rightfully expects that applicants will exercise a reasonable degree of care and due diligence in completing the document. In *John Doe, Re* (2010), 33 O.S.C.B. 1371 (Ont. Securities Comm.), a case which also involved the non-disclosure of a criminal record in an application for registration, I wrote at 1377:
> >
> > > Moreover, even if the Applicant somehow was honestly mistaken in the chain of inaccurate disclosure he provided to OSC staff (which I doubt) I agree with the statement in *Re Doe* [(2007), ABASC 296] that integrity is broader than dishonesty and encompasses a certain duty of care in one's work product. The Applicant had a duty to carefully complete documents relating to his registration, including his initial application for registration. In my view, he did not meet this duty.
> >
> > 15 The OSC's expectations regarding the accurate completion of the application form, as articulated in my decision in *John Doe* (which was based on the Alberta Securities Commission decision of the same name to which I referred in *John Doe*) are important for the following reasons. First, the application form is designed to provide the OSC with the information it needs to assess the applicant's suitability for registration. Sometimes the information sought by the application form may reflect negatively on an applicant's suitability. The effectiveness of the application

> process would be significantly diminished if applicants could avoid disclosing detrimental information on the basis of unreasonable assumptions, forgetfulness, or misunderstandings. Second, the OSC must be reasonably confident that the individuals to whom it grants the privilege of registration will discharge their professional obligations to their clients honestly and diligently. The application process is the seminal event in an applicant's career as a capital markets professional, and a lack of care and diligence in this process may be a worrisome signal about how they will approach the interests of their clients.
>
> 16 The *John Doe* standard calls for due diligence, not perfection. Minor inaccuracies may be excused, but significant errors that reflect a failure to exercise a reasonable degree of care in the completion of the application will not be.

> 64. In my respectful view, the... failures by the Licensee in this case to provide prescribed information to me in an accurate and timely fashion... show a serious disregard for the importance this information has to the regulatory system set up by the *Act* and the *Regulations*. The disclosures at this point cannot be classified as minor, but instead... [are] both significant and intentional. Fundamentally, the non-disclosures are undermining the integrity of the regulatory system and should be met with action.

116. In my respectful view, at this time and in all the circumstances, the appropriate action to be taken against the Licensee is to suspend its licence until:

(i) Mr. Hausner brings himself in compliance with the Deputy Director's section 78 demand;

(ii) this office has thereafter had the opportunity to conduct any investigation it may need to in light of Mr. Hausner's answers to the section 78 demand; and

(iii) this office has had the opportunity to conduct a suitability analysis in light of those details and in light of the established non-disclosures and failures to comply.

117. To be clear, this suspension is not intended as final action with respect to all the issues raised in the NOPA. Mr. Hausner's approach in these proceedings so far has been to frustrate this regulator's ability to properly administer the *Act* and *Regulations*. Once Mr. Hausner brings himself and the Licensee in compliance with the demand for details, this regulator will then and only then be able to determine what, if any, further action is appropriate.

V. Appeal Information

118. Subsection 71(10)(d) of the *Act* requires me to provide any person directly affected by this decision information regarding the right of appeal. Section 85 of the *Act* sets out the right of appeal as follows:

> 85(1) Any person who is directly affected by an order or decision of the director pursuant to this Act may appeal the order or decision to the court.

(2) An appeal must be made within 20 business days after a decision or order of the director.

(3) An appellant shall serve a notice of appeal on the director and any other person that the court may order.

119. Subsection 2(c) of the *Act* defines the word "court" to mean, unless the context requires otherwise, the Court of Queen's Bench. In this situation, context does not require court to mean anything other court besides the Court of Queen's Bench. Therefore, should the Licensee and/or Mr. Hausner wish to appeal this decision, their appeal is to the Court of Queen's Bench.

Dated at the City of Regina in the Province of Saskatchewan this 2nd day of October, 2019.

Denny Huyghebaert
Deputy Director, Consumer Protection Division
Financial and Consumer Affairs Authority of Saskatchewan