DECISION OF AN APPEAL PANEL APPOINTED PURSUANT TO *THE INSURANCE ACT AND THE FINANCIAL AND CONSUMER AFFAIRS AUTHORITY OF SASKATCHEWAN ACT*

IN THE MATTER OF The Insurance Act, SS 2015, c. I-9.11 (the "Act");

AND IN THE MATTER OF a Decision of the Market Practices Committee of the Life Insurance Council of Saskatchewan dated May 5,2021;

AND IN THE MATTER OF a Notice of Appeal filed by PORTFOLIO STRATEGIES CORPORATION, as represented by its designated representative Mark Stephen Kent under subsection 10- 34(2) of the Act

BETWEEN:

Portfolio Strategies Corporation, as represented by its designated representative Mark Stephen Kent

APPELLANT

and

The Market Practices Committee of the Life Insurance Council of Saskatchewan

RESPONDENT

BEFORE: An Appeal Panel of the Financial and Consumer Affairs Authority of Saskatchewan

Peter Carton (Panel Chairperson)

Howard Crofts (Panel Member)

The Honourable Eugene Scheibel (Panel Member)

APPEAL: Conducted by way of WebEx conference call on November 14, 2021

APPEARANCES: For the Appellant: Tristen N. Culham, Solicitor, MLT Aikens LLP

For the Respondent: Roger J.F. Lepage, Solicitor, Miller Thomson LLP

Titli Datta, Solicitor, Miller Thomson LLP

April Stadnek, Director Compliance and Enforcement, Life Insurance Council

Introduction

1. This is an appeal by Portfolio Strategies Corporation to the Financial Consumers Affairs Authority under subsection 10-34(2) of the Insurance Act.

2. Portfolio Strategies Corporation is appealing a decision made by the Life Insurance Council on May 5, 2021. In that decision the Market Practice Committee (MPC) of the Life Insurance Council found that Portfolio Strategies Corporation (PSC) had:

a. Breached Bylaw 4 – 1(1)C The licensee was not registered with the Corporate Registry of the Information Services Corporation of Saskatchewan (ISC) when it submitted an application for a Life including Accident and Sickness license which was signed by the Designated Representative (DR) on June 7, 2013, contrary to Bylaw 7 – 4(1) 1)a. The licensee did not reinstate its registration with the ISC until November 29,2019, a period in excess of six years and five months.

b. Breached Bylaw 4 – 1 (2)k The Licensee failed to disclose Settlement agreements it had entered into with the MFDA and the BC Securities Commission in 2010 on its 2013 application for a license. The Licensee also failed to report these Settlements on its 2014,2015.2016,2017,2018, and 2019 Annual Reporting forms (ARF).

c. In its decision the MPC levied fines and costs to the Portfolio Strategies Corporation in the amount of $4,050 dollars.

3. On June 4, 2021 the PSC filed a Notice of Appeal under subsection 10-34(2) of the Insurance Act, SS 2015,c.I-9.11 with the Financial and Consumers Affair Authority (FCAA)on the grounds that:

a. The Committee failed to consider or address the “material “requirement in Bylaw 4-1(2)k.

b. The Committee incorrectly considered “material misstatement” to be equivalent with mis-statement.

c. The Committees reasons were not justified.

d. The Appellant also felt the process followed by the Investigator and the Committee has resulted in a fundamental breach of procedural fairness requirements.

e. Lastly they raised concerns of potential bias in the decision makers on the Committee.

4. On June 16, 2021 the FCAA appointed a panel to hear the matter, a conference call was scheduled for June 22 ,2021 to schedule a date to hear the Appeal.

5. On the conference call on June 22,2021, as a preliminary matter, the Appellant advised the Panel and the Respondent that they planned to file a Notice of Application for Fresh Evidence. Dates were discussed, the Appellant was given until July 20, 2021 to file the same , the Respondent (MPC) had a right to reply by Aug 3,2021

6. On July 16, 2021, PSC served and filed an Application for Fresh Evidence (the "Evidence Application"). In that Application, PSC asked that the Panel issue an order pursuant to s. 10-37(2) of The Insurance Act, SS 2015, c I-9.11 [Insurance Act] permitting it to adduce the Kent Affidavit. Simultaneously, it filed the Kent Affidavit and the July 16 Brief in support of the Application – both of which were provided to the Committee.

7. Then, on July 30, 2021, the Committee filed its own written submissions in response (the "**Initial Committee Brief**"). It wrote:

> 3. The Respondent does not oppose the Appellant's Application, provided that the Respondent is then given an opportunity to respond to the new allegations made by the DR on behalf of the licensee, Portfolio Strategies Corporation ("PSC") prior to the hearing of this appeal. These allegations include the DR's allegations of bias against two of the four Committee members, as well as changes to the DR's evidence on certain matters.

8. A conference call was then scheduled for August 10 to discuss the application of new Evidence, as the MPC again confirmed orally that was not opposed to the New Evidence application there was discussion about moving forward with discussions amongst the parties, working towards the possibility of a consent order. The Respondent (MPC) would have until September 16th to put forward its response to the new allegations, the Appellant would have until September 30 to reply, a date of October 14,2021 was set at that call to either approve the Consent order or hear the Appeal if the parties could not work things out.

9. Sometime between August 10 and Sept 15,2021 the Market Practice Committee retained legal counsel. On September 17 2021, the MPC filed a Brief of Law which outlined its new position with respect to the Appeal and the Fresh Evidence Application. The MPC was now opposing the Application and asked the Panel to dismiss it.

10. The Panel then received a letter on Sept 23,2021 from the Solicitor for the PSC, in it he observed that the Committee had previously indicated that it did not oppose PSC's Evidence Application, and that PSC had agreed the Committee would have an opportunity to respond to the Kent Affidavit based on that indication. PSC argued that the Committee was estopped from now taking the opposite position and asked that the Panel issue an order admitting the Kent Affidavit as new evidence.

11. The Panel then issued the following communique on September 29,2021 to the parties:

a. The Panel would like to hear submissions from both parties at the hearing already scheduled for October 14th, 2021 regarding Market Practices Committee's change in position regarding the admissibility of the fresh evidence. Both parties are invited to deliver written submissions on this issue by no later than October 8, 2021. Any submissions in response to the other party's written submissions can be made orally on October 14, 2021. The Panel will issue a written decision as soon as possible thereafter.

12. Written Briefs were received from both Parties by October 8,2021, a WebEx call was held on October14,2021 in which arguments were heard.

Issues to be Determined

13. Should the Appellant's Application for New Evidence be allowed?

14. In the event the new evidence is allowed, what is the appropriate remedy?

Analysis

Should the Appellants application for New Evidence be allowed?

15. Section 10-37 of the Act enables the Appeal Panel to authorize the introduction of new or additional evidence by an appellant or its legal counsel at the appeal stage upon an application made by them. The Section states as follows:

> **10-37**(1) Subject to subsection (2), the appeal panel shall determine the appealon the basis of:
>
> (a) the notice of appeal;
>
> (b) any information provided pursuant to subsection 10-36(2); and

(c) the materials provided pursuant to subsection 10-36(4).

(2) If the appellant or the appellant's lawyer or agent applies to the appeal panel to present new or additional evidence, the appeal panel **may authorize** the appellant to introduce the new or additional evidence.

(3) If the appellant or the appellant's lawyer or agent presents new or additional evidence during the hearing of an appeal, the appeal panel may, **if it considersit to be appropriate to do so**:

(a) consider the new or additional evidence;

(b) exclude the new or additional evidence;

(c) direct a new hearing by the Superintendent or the insurance council on the basis of the new or additional evidence and the materials mentioned in subsection 10-36(2); or

(d) direct further inquiries by the Superintendent or the insurance council.

16. Clearly the Act gives the Panel broad discretion to consider an application by an appellant to adduce fresh evidence.

17. The Respondent despite giving their consent once in writing and again orally, changed their position to opposing the fresh evidence application based on the advice they received from legal counsel which was retained halfway through the hearing of this appeal. In their submission they stated the following:

a. "that the Fresh Evidence filed by the Appellant does not constitute new or additional evidence at all. The Appellant had every opportunity to file all of its evidence and supporting documentation at the time it made its written submissions to the MPC, as has been submitted in the MPC's First Brief of Law. The Fresh Evidence filed by the Appellant through the Fresh Evidence Application clearly fails the test set out in Palmer v. The Queen, 1979 SCC 8 and does not even qualify under the rules of Affidavit evidence. The contents of the Fresh Evidence comprise (a) reiteration of previously mentioned facts; (b) hearsay; and (c) argumentative opinions. To declare that the Fresh Evidence is admissible on

> Appeal would seriously undermine the significance of the Appeal procedure, the intent of the Legislation and general principles of law."

18. The Panel does not concur with these thoughts or this line of thinking.

19. In arguments, both parties have sought to address the Appellant's application to adduce fresh evidence as a question of whether the test set out in *Palmer v The Queen* is satisfied by the Appellant's evidence. While the panel agrees that the Appellant has met the test set out in *Palmer*, it is worth noting that, given this is a review of an administrative decision, there is a specific set of principles arising out of the administrative law jurisprudence that deals with the question of when evidence extrinsic to the "record" of an administrative decision should be admitted on review of that decision. While these principles were developed in the context of the *judicial* review of administrative decision, the panel's view is that they support its conclusion that the "fresh evidence" would have been admitted in any event, notwithstanding the issue of the Committee's consent. As the Alberta Court of Queen's Bench noted in *Anglin v Alberta (Chief Electoral Officer)*, 2018 ABQB 309, at para. 57, "[t]here is a difference between administrative law and civil litigation".

20. The Saskatchewan Court of Appeal in *Saskatchewan (Workers Compensation Board) v Gjerde* endorsed the legal principle that generally speaking the review of administrative decisions proceed on the "record". However, as the Court of Appeal recognized, this is subject to several recognized exceptions, one of which is when issues of procedural fairness or bias are raised. The following passage from the Court of Appeal's reasons in *Gjerde* highlight the evolution of the law on this point (emphasis added):

> [42] Denning L.J.'s comments in *Northumberland* set out the general rule relating to supplementing the record where there has been an adjudication i.e., after a hearing. The rule in that context makes sense because in such circumstances there usually an "official record" consisting of the transcript of the proceedings, the documents filed and arguments made before the administrative tribunal. *Hartwig* and *SELI* demonstrate that the record relating to administrative adjudications may sometimes be deficient requiring it to be supplemented so that the reviewing court has before it the necessary material to do its job. Many provinces (Saskatchewan is not one of them) and the Federal Court have legislation that defines the record for judicial review purposes, at least where the review relates to adjudicative matters. Determining what constitutes the "record" when reviewing other types of administrative decisions can be more challenging. Many non-adjudicative actions by administrative bodies have no "official record" and purely administrative decisions are rarely accompanied by reasons.

[43] In the journal article "Evidentiary Rules in a Post-*Dunsmuir* World: Modernizing the Scope of Admissible Evidence on Judicial Review" (2015) 28 Can J Admin L & Prac, Lauren J. Wihak and Benjamin J. Oliphant examined the need to modernize the rules of evidence pertaining to judicial review. When addressing the record with respect to administrative decisions, as opposed to decisions from a tribunal, they stated at 339-340:

> In our view, applying strict limitations on the admissibility of evidence on judicial review of these non-adjudicative or legislative decisions carries important consequences. A restrictive view of the record and of admissible evidence may frustrate the courts' application of *Dunsmuir*, and in particular the determination of whether the outcome is "defensible" in light of the facts and the law. Moreover, if the information available to a court on judicial review remains as limited as was suggested in cases like *Northumberland* and *Nat Bell Liquor*, not only will this potentially frustrate the court's task on judicial review, but may also occasion considerable unfairness to affected parties; many would not be permitted to argue that a decision falls below the *Dunsmuir* standard, but unable to file the evidence necessary to establish why this is so.

I agree with these comments.

[44] In my view, the appropriate approach to when the "record" should be supplemented on judicial review was set out by Stratas J.A. of the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras. 19 and 20, 428 NR 297. After acknowledging the general rule that judicial review should be restricted to the evidentiary record that was before the Board when it made a decision, Stratas J.A. went on to recognize there will be exceptions to that general rule, including evidence (i) that provides general background (as opposed to addressing the merits) in circumstances where that information might assist in understanding the issues for judicial review, (ii) to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record, such as fraud, bribery or bias, and (iii) to highlight the complete absence of evidence before the administrative decision maker when making a particular finding…. To these I would add the exception highlighted by *Hartwig* and *SELI* where, in appropriate circumstances, evidence may be received by a reviewing court to elucidate the record upon which the administrative body's reasons were based.

21. Application of the "procedural fairness" and/or "bias" exception to review of administrative decision-making on the "record" is well-excepted as a matter of administrative law. Justice Stratas of the Federal Court of Appeal noted in Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22, that "Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for

procedural fairness" (para. 20). (see also Scarlett v Canada, 2008 FC 1051, at paral 9; Cruz v Canada, 2021 FC 1101; Queensway Excavating & Landscaping Ltd. v City of Toronto, 2019 ONSC 5860 (Div Ct.), at para. 46; Morse v Crystal River Court Ltd., 2021 BCSC 1868, at para. 15; Alberta Liquor Store Association v Alberta (Liquor and Gaming Commission), 2006 ABQB 904, at paras. 40-41).

22. The Appellant was entitled to raise as grounds of appeal in this matter both the question of whether the Committee had a reasonable apprehension of bias in making its decision, and also whether the decision gave rise to a breach of procedural fairness. It is unclear how the Appellant could have raised a factual foundation for those grounds of appeal without the fresh evidence.

23. In order to ensure fairness in the appeal for the above reasons, the Panel will allow the Affidavit of Mark Kent to be entered as new Fresh Evidence.

What is the appropriate remedy?

24. Having determined that the Fresh Evidence should be admitted, the question becomes what the appropriate remedy is, and what are the next steps that should be taken in this matter.

25. When a Panel decides to admit fresh evidence, Section 10-37(1) 3(c) gives the Panel the explicit discretion to:

> (d) **direct a new hearing by the Superintendent or the insurance council on the basis of the new or additional evidence and the materials mentioned in subsection 10-36(2);**

26. The Panel notes that s. 10-37(3) contemplates the application for fresh evidence being made "during the hearing of an appeal". In this case, because of the change of position by the MPC, these proceedings have been bifurcated, and the admissibility of the Appellant's Fresh Evidence has been the subject of a preliminary hearing, and a stand-alone decision on the admissibility of the Fresh Evidence.

27. Nevertheless, and on a narrow basis, the Panel is of the view that this matter should be remitted at this stage to the MPC for redetermination.

28. One of the allegations advanced in the Appellant's Fresh Evidence is that the MPC determined this matter with a panel that included two members who are either direct competitors of, and/or compete for market share with, the Appellant. Moreover, because the composition of the MPC panel was not

known to the Appellant in advance of a decision being rendered, the Appellant had no opportunity to raise concerns about bias (actual or apprehended) or conflict of interest before the decision was made.

29. The Panel says this for three reasons. First, it is generally well-accepted in the case law that allegations of bias or conflict of interest, which may or may not warrant a recusal, should be made to the decision-maker at first instance. Remitting this matter back to the MPC to address the issues of bias or conflict of interest, either before the same or a different panel, is consistent with this case law. Second, and on a related point, this Panel sits on appeal of decisions of the MPC. If there was a procedural deficiency in the hearing before the MPC, and the Panel is of the view that on the bias/conflict of interest issue there was, it is for the MPC to remedy it by way of a new hearing. Indeed, this is the traditional administrative law remedy in cases where a breach of natural justice has been found. The matter is remitted back to the original decision-maker so that the matter can be re-determined through a proper procedure. Third, while the Panel has identified an issue with the manner in which the MPC panel was constituted in the circumstances of this case, it is not for this Panel to determine the procedure that the MPC should adopt in dealing with matters of conflict and the constitution of panels.

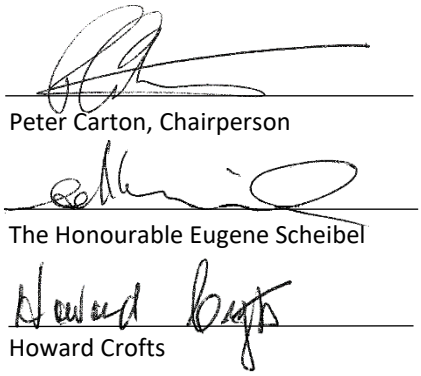
30. Finally, any suggestion that the MPC has not been afforded an opportunity to refute the allegations of breach of natural justice arising specifically from the bias/conflict of interest issue must be rejected. As noted, the MPC was given an opportunity to provide evidence in response to the Fresh Evidence, and instead of doing so it elected to resile from its position that the Fresh Evidence should be admitted. Furthermore, the issue is not whether there *was* a conflict of interest or bias on the part of the two members of the MPC panel. This Panel makes no such finding. Rather, it is that the failure to permit the Appellant – or any appellant for that matter – to even raise that issue until after the decision was already made, is a fundamental flaw in the process below.

Conclusion

31. For all of these reasons, the Panel remits this matter and the new evidence back to the MPC for redetermination. Nothing in these reasons should be taken as preventing either the Appellant or the MPC from leading any of the evidence that they would have led on appeal before this Panel, in the new proceedings.

32. This is a unanimous decision of the Panel.

Dated at Regina, Saskatchewan this 24th day of November, 2021.



Peter Carton, Chairperson

The Honourable Eugene Scheibel

Howard Crofts