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 an Appeal under subsection 10-34(2) of *The Insurance Act*, SS 2015, c. I-9.11

BETWEEN:

PORTFOLIO STRATEGIES CORPORATION, as represented by its designated representative Mark Stephen Kent

APPELLANT

AND:

THE LIFE INSURANCE COUNCIL OF SASKATCHEWAN

RESPONDENT

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

Karen Prisciak, K.C. (Panel Chairperson)

APPEAL: Conducted by way of WebEx conference call on June 12, 2023

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

Allison Graham, Solicitor, MLT Aikens LLP

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

Titli Datta, Solicitor, Miller Thomson LLP

INTRODUCTION

1. This is an appeal from the decision of the Market Practices Committee of the Insurance Council of Saskatchewan ("MPC") by Portfolio Strategies Corporation ("PSC") pursuant to Section 10-34(2) of *The Insurance Act,* SS 2015, c. I-9.*1* ("*Act*"). Counsel for the Appellant ("PSC") and the Respondent ("LIC") accepted the Appeal Panel had jurisdiction, was properly appointed to hear the appeal and had no other objections to the Panel.

2. The decision under appeal is from the MPC ("the second MPC") dated January 17, 2023 (date corrected from the decision stating 2022) which found PSC in breach of the Bylaws of the Life Insurance Council (the "Bylaws")

3. PSC's Notice of Appeal dated February 16, 2023 included 13 main and 11 subpoints of appeal which were distilled in PSC's Brief dated May 5, 2023 and Reply Brief dated June 1, 2023. The LIC replied to those points of appeal in its Brief dated May 19, 2023. All Briefs and a Joint Exhibit Book were filed prior to the oral appeal hearing conducted virtually on June 12, 2023.

4. The purpose of this appeal is to assess whether there is merit to PSC's assertions that the second MPC made errors of law, errors of procedural fairness and/or errors of fact in the January 17, 2023 decision. This appeal is not a hearing to reconsider the parties' evidence or arguments advanced at the second MPC hearing to overturn or support MPC's decision. Rather, this appeal is limited to a review of the second MPC's decision.

5. At the commencement of the second MPC hearing PSC argued there was a reasonable apprehension of bias on the part of one member of the MPC. The MPC dismissed this objection (as well as another objection) and the hearing proceeded.

6. Based on my review, I find the MPC did not apply the correct test, nor did it apply the facts necessary to analyze whether there was a reasonable apprehension of bias involving one member of the second MPC. For the reasons that follow, this matter is remitted for a rehearing to a MPC with costs of this appeal to be spoken to on a date and time to be scheduled between counsel and this Panel.

BACKGROUND

7. Following an investigation, charges were brought against PSC alleging breaches of the Bylaws.

8. The Bylaws require corporations selling life insurance to be registered with ISC. Each year the corporation is required to file, amongst other requirements, a report disclosing any Settlement Agreements made in other provinces. It was alleged that PSC failed to comply with these requirements.

9. On May 5, 2021 an initial MPC the original MPC considered these allegations (the "original MPC"). It found that from 2013 to 2019, PSC was not registered with ISC in violation of Bylaw 4-1(c). It also found that PSC had made material misrepresentations on its initial license application and on Annual Reporting Forms from 2014 to 2019 in violation of Bylaw 4-1(2)(k). The original MPC awarded monetary sanctions against PSC.

10. The decision of the original MPC was appealed. The Appeal Panel in its decision of November 24, 2021 ordered a new hearing allowing PSC to apply to have fresh evidence admitted (*Act* Section 10-37(3)) and to allow PSC to advance arguments of bias/conflict of interest against two of the four members of the MPC.

11. On February 1, 2022 PSC was provided with the names of four people who would be on the second MPC. On February 18, 2022 PSC objected to one of the individuals who was then removed leaving three members on the second MPC. On March 7, 2022 an updated list was provided to PSC confirming the appointment of the three members to the second MPC.

12. On December 9, 2022, the second MPC convened a prehearing conference. PSC did not indicate any objection to the three members on the second MPC. However, on December 12, 2022 PSC advised that it objected to one member of the MPC, Stacy Hnatiuk ("Hnatiuk") arguing he should be removed for a reasonable apprehension of bias because he was a member of the original MPC. PSC advanced this

objection again at the second MPC hearing on December 14, 2022. Both counsels argued this objection and filed briefs. The second MPC ruled against the objection and the hearing proceeded.

13. After the second hearing, the MPC reserved on the matter and subsequently rendered its decision supporting LIC's allegations against PSC. It found PSC breached the same Bylaws as the original MPC and awarded monetary sanctions against PSC. In its decision of January 17, 2023 it provided reasons for dismissing the objections and reasons for finding the Bylaw breaches.

14. PSC appeals the second MPC decision on numerous grounds as first articulated in its Notice of Appeal and subsequently distilled in its Appeal Brief.

15. This Appeal Panel's jurisdiction to hear this appeal is pursuant to Section 10-34 of the *Act*. A further appeal to the Saskatchewan Court of Appeal pursuant to the *Act* Section 10-38(1) is limited to questions of law.

16. Both parties agree the standard of review on this appeal is correctness on questions of law. They also agree that whether the MPC correctly identified and applied the reasonable apprehension of bias test is a question of law. Therefore, this appeal is to determine whether the MPC was correct based on a review of its decision.

APPLICABLE STANDARD OF NATURAL JUSTICE AND THE DUTY OF FAIRNESS

17. The rules of natural justice and the duty of fairness apply to administrative tribunals such as the MPC. The Supreme Court of Canada in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* 1990 CanLII 31 (SCC) ("*Boniface*") stated the standards will be variable depending on the statutory provisions, the circumstances of the case and the substantive issue to be decided (see also *Baker v. Canada* 1999 SCC 699):

> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

18. The Saskatchewan Court of Appeal referred to these principles in *Harker v. Regina (City)* 1995 CanLII 3906.

19. The *Boniface* variables require examination in the context of this appeal to determine the standards applicable to MPC hearings.

20. The statutory framework for MPC hearings is governed by the *Act*, its Regulations and the Bylaws of the LIC. Section 5-32(1)(a) of the Regulations delegates power to the MPC from the LIC.

21. Section 2-3 of the Bylaws address the broad scope of the jurisdiction of the MPC which includes granting or refusing licenses, inspections, investigation and adjudication of complaints, and the imposition of penalties and charges:

> (2) The functions and powers delegated by LICS to the MPC, pursuant to clause 5-32(1)(a) of the regulations are:
> (a) to hear and determine whether to grant or refuse a licence, pursuant to sections 5-14, 5-51 or 5-71 of the Act;
> (b) to make decisions regarding the placement of terms or conditions on licences: (i) on any new or subsisting licence pursuant to sections 5-17, 5-54, and 5-71 of the Act; or (ii) as a penalty pursuant to sections 5-39, 5-64 and 5-82 of the Act;
> (c) to hear and determine applications for an extension of time to meet a licensing requirement, pursuant to section 3-2;
> (d) to hear and determine applications for an exemption from meeting certain licence requirements, pursuant to section 3-3;
> (e) to investigate complaints and adjudicate or mediate disputes respecting alleged non-compliance with the Act, the regulations or these bylaws by applicants, licensees or persons who are required to be licensees, pursuant to clause 5-31(3)(i) of the regulations;
> (f) to dismiss a complaint if there is insufficient evidence to substantiate the complaint;
> (g) to make decisions respecting penalties and other charges, pursuant to clause 5-31(3)(k) of the regulations; and
> (h) to carry out examinations, inspections and investigations of licensees, pursuant to clause 5-31 3)(j) of the regulations.

22. Pursuant to LIC Bylaw 2-3(2), MPC hearings are subject to the procedures set out in Section 10-11 of the *Act*. The MPC is mandated to consider submissions, make decisions, notify the person affected with written reasons and advise on the right of appeal (Section 10-11(10)(a)-(d)). The *Act* provides immunity from proceedings (Section 10-22) as well protection from defamation lawsuits (Section 10-21).

23. The *Act* provides the Respondent with the right to be heard (Section 10-11) either in writing or in a hearing (Section 10-11(8)). The Respondent may request an oral hearing (Section 10-11(3)(a)).

24. In the circumstances of this appeal, an examination of the transcripts from the second MPC hearing confirm the MPC and the parties were conducting themselves in a manner akin to the formalities of a trial. Counsel for PSC made preliminary objections which were addressed by counsel for LIC and both counsel provided briefs on these issues; both counsel presented opening statements, witnesses testified and were cross examined; and both counsel presented final arguments followed by a final brief.

25. Lastly, as directed by *Boniface*, the substantive issue before the second MPC was whether PSC was in breach of the Bylaws and, if so, what were the appropriate sanctions. The scope of sanctions available to the MPC were quite broad and could have a significant impact on the business of PSC.

26. The legislative provisions coupled with the circumstances of the case and the nature of the decision cumulatively ensure MPC hearings are conducted with significant procedural fairness which includes the obligation to hold a fair and impartial hearing without a reasonable apprehension of bias.

LEGAL PRINCIPLES APPLICABLE TO THE REASONABLE APPREHENSION OF BIAS

27. PSC argues the second MPC did not apply the correct test to determine whether there was a reasonable apprehension of bias arising from Hnatiuk's involvement in the second MPC. Alternatively, even if the second MPC applied the correct test, it applied the test incorrectly.

28. LIC argues the second MPC applied the correct test and applied it correctly in dismissing the preliminary objection that Hnatiuk should be removed from the MPC.

29. The correct test for reasonable apprehension of bias is supported by both parties. The Supreme Court of Canada stated the test as whether a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, would think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly (See *Committee for Justice and Liberty v. Canada (National Energy Board),* 1976 CarswellNat 434 (S.C.C.) at para. 19; *Gulia v. Canada (Attorney General),* 2021 FCA 106, at para. 17). The test requires a "real likelihood or probability of bias" (See *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851 (S.C.C.), at para. 2; *R v S. (R.D.),* [1997] 3 S.C.R. 484 (S.C.C.) ["S. (R.D.)"], at paras. 112-14).

30. The reasonable and informed person perspective involves an objective characterization of relevant facts. The onus is on the aggrieved party to persuade the adjudicator of the probability of bias.

31. The second MPC's discussion of PCS's objection to Hnatiuk's membership on the second MPC is reproduced in its entirety:

> Hnatiuk was a member of a previously constituted MPC hearing panel concerning the complaints against PSC that had reviewed material and approved the initial Investigation Report.
>
> Counsel for MPC [PSC] was aware of Hnatiuk's presence on the panel in March 2022 and raised no objection to his presence. It is not required that on a re-hearing of an administrative law matter a panel be completely reconstituted. See: *Edmonton Police Service v. Furlong 2013 Alta.C.A.177*. Factors to be considered are fairness, practicality and efficiency.
>
> Here the substantive issues will be determined for the first time by oral evidence before the current panel. This matter has been pending for some time and there were no other potential candidates to replace Hnatiuk on the short notice of the objection raised just before the scheduled hearing date. Counsel for PSC indicated at a pre-hearing scheduling meeting December 8, 2022 he had no objection to the composition of the hearing panel.

32. The second MPC did not specifically articulate the reasonable apprehension test. Instead, the second MPC referred to *Edmonton Police Service v. Furlong* 2013 Alta.C.A.177 ("*Edmonton Police*") in support of its decision to reject PSC's preliminary objection to remove Hnatiuk. The issue in *Edmonton*

Police was whether the Court of Appeal's decision to remit a discipline matter back for a rehearing meant the original panel should rehear the matter or whether a newly constituted panel should be convened. The Court referred to three principles to determine whether the original panel should consider the matter or whether a new panel should be convened:

> [3] When a matter is remitted back to an administrative tribunal, there is no fixed rule: Elk Valley Coal Corp. v United Mine Workers of America Local 1656, 2009 ABCA 407, 474 AR 145, 18 Alta LR (5th) 13; Walsh v Mobil Oil Canada, 2012 ABQB 527 at paras. 54-5, 71 Alta LR (5th) 343. A number of factors are considered:
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> (a) Fairness and the Appearance of Impartiality. If the original panel of the tribunal pronounced on a specific issue and was reversed, a new panel will usually be nominated to avoid any appearance of prejudging. If the issue requiring reconsideration is new or is supplementary or collateral to the issues generating the rehearing, it is sometimes appropriate for the same decision-maker to continue: Chernetz v Eagle Copters Maintenance Ltd., 2008 ABCA 265 at para. 101, 96 Alta LR (4th) 222, 437 AR 104; Interclaim Holdings Ltd. v Down, 2004 ABCA 60, 346 AR 64. Whether the issue on which a rehearing has been directed would raise considerations of impartiality in the mind of a reasonable person is a matter of degree.
>
> (b) Practicality. The size and composition of some tribunals might preclude remitting the issue back to the same panel, or alternatively it might make remission to the same panel inevitable.
>
> (c) Efficiency. If the reconsideration will involve a re-weighing of the evidence, it could be wasteful or expensive to have a new panel conduct a fresh hearing: Chernetz at para. 101. If the issues raised are primarily issues of law or policy, or if they can be satisfactorily resolved based on the evidentiary record from the first hearing, a new panel might be practical.

33. *Edmonton Police* comes close to the reasonable apprehension of bias test. The Court noted the decision to convene a new panel must be considered in the context of whether a consideration of impartiality would arise in the mind of a reasonable person.

34. LIC suggests the second MPC incorporated the reasonable apprehension test by reference to *Edmonton Police*. However, as pointed out by PSC, the second MPC does not specifically refer to the reasonable apprehension test or the question of whether impartiality would arise in the mind of a reasonable person sufficient to find that an impartial panel is an unbiased panel.

35. Although the second MPC referenced the *Edmonton Police* decision, it is unclear how it applied the considerations of fairness and impartiality as required by the first factor of Edmonton Police. The only statement that arguably may be considered part of the fairness factor is MPC's comment that "Here the substantive issues will be determined for the first time by oral evidence before the current panel". This is the MPC's singular reference to the impartiality factor other than noticing Hnatiuk was on the original MPC. While the distinction between the original MPC's paper review and the full hearing at the second MPC is noteworthy, the second MPC does not squarely address Hnatiuk's involvement in the original MPC hearing.

Certainly, all oral evidence was new to all three members of the second MPC but not all the evidence was new to Hnatiuk.

36. The second MPC does not discuss other objective facts such as the original MPC's review of documents. The second MPC reviewed documents and heard oral evidence. The documents submitted to the original MPC were similar to the documents presented to the second MPC because the breaches alleged against PSC were exactly the same and involved PSC filing documents for its licensure. Indeed, both the original MPC and the second MPC decisions referred to the same documents such as PSC's acknowledgments that it was properly registered with ISC and that it had not entered into any settlement agreements with other provinces. Although the information in these documents were new to two of the panel members, it was not new to Hnatiuk.

37. For the purpose of this appeal, it is significant to consider that not only did the original MPC review the contents of the documents, it interpreted these documents to find PSC breached the Bylaws. Hnatiuk was involved in this document interpretation in the original decision. It is accurate that Hnatiuk's exposure to the oral testimony was new evidence to him. However, the oral evidence was led by PSC, in part, to explain the circumstances surrounding the information within documents previously reviewed by Hnatiuk to defend itself against the alleged breaches.

38. The second MPC's rationale that its decision will be made on the evidence from the second hearing does not address the issue of whether Hnatiuk's previous involvement, and previous knowledge arising from the original MPC, would be considered a reasonable apprehension of bias and a consequent threat to a fair and impartial second hearing.

39. Another consideration discussed in *Edmonton Police* under the fairness and impartiality factor is a consideration of the nature of the issue decided on the new hearing. *Edmonton Police* states that where a case on appeal from a trial is remitted back to the original trial judge, it is on collateral issues. When a new trial is ordered, a new trial judge is assigned to consider all the evidence, legal issues and arguments with a fresh perspective. The rationale for a new trial judge is to ensure there is no prejudging (par. 3(a)).

40. The same rationale applies to administrative proceedings tasked with rehearing. If the rehearing is on a collateral matter then the original adjudicator may hear the matter. However, where the rehearing is exactly on the same substantive issue the appointment of a new panel meets the rationale of avoiding prejudging the issues.

41. Although the second MPC characterized the second hearing as a new hearing on the substantive issues, it did not consider that the original hearing was exactly on the same substantive issues. That is, whether PSC breached the Bylaws. More significantly, one of the three members of the second MPC was involved in deciding the same substantive issues. The second MPC's decision does not evaluate the nature

of the decision before it as compared to the original MPC and did not fully consider the *Edmonton Police* fairness and impartiality factor.

42. The *Edmonton Police* factors of practicality and efficiency were of particular concern to the second MPC. It stated the hearing had been set some time ago and that panel members were difficult to find. These facts were not fairness or impartiality considerations and are not relevant to the reasonable apprehension of bias test.

43. The concluding justification for the second MPC dismissal of PSC's preliminary objection regarding Hnatiuk was because the MPC is not bound by rules of evidence pursuant to Section 10-10(4) of the *Act*:

> Section 10-10(4) of the Act specifically provides that the rules of evidence do not strictly apply in a hearing of this nature. For these reasons both preliminary objections are dismissed. (Decision of the second MPC)

44. The consideration of whether a panel member is under a reasonable apprehension of bias is not a rule of evidence. Rules of evidence govern, for example, admissibility of documents or hearsay testimony. These are the type of rules that may be relaxed in an administrative hearing.

45. An unbiased panel is fundamental to a fair and impartial determination of the issues between the parties – it is not a rule of evidence. An unbiased panel is a fair and reasonable expectation of the parties to a dispute. It ensures an administrative decision is based on the adjudication of the evidence before it rather than preconceived notions arising prior to, or even during, the hearing. The second MPC's reference to section 10-10(4) is irrelevant to the question of whether there was a reasonable apprehension of bias.

46. LIC argues the first Appeal Panel decided there was no reasonable apprehension of bias because it did not specifically remit the matter back to a new MPC. The first Appeal Panel did state the matter could be remitted back to the "same or different panel". However, the first Appeal Panel did not decide the bias issue. In fact, the Appeal Panel specifically remitted the matter back to the MPC noting the MPC would decide any bias issues. It did not opine on whether the MPC would be newly constituted. The inference suggested by LIC is not accepted.

47. As previously agreed by the parties, the standard of review on this appeal is correctness. That is, whether the second MPC correctly applied the correct test of whether a reasonably informed person would find a reasonable apprehension of bias. I find the second MPC did not apply the correct test- either directly or inferentially by reference to *Edmonton Police*, and alternatively, if it did, it did so incorrectly because it did not articulate the facts it relied upon, or should have relied upon, in dismissing the application to remove Hnatiuk. I now turn to a review of what facts the second MPC should have considered to decide whether there was a reasonable apprehension of bias.

48. The objective facts for a reasonable and informed person to consider in the second MPC were that:

1. Hnatiuk was a decision maker that originally found PSC in breach of the Bylaws.
2. Hnatiuk had previous access to and reviewed the documents to find PSC in breach in the original MPC.
3. Hnatiuk was one of three panel members of the second MPC tasked with deciding whether PSC was in breach of exactly the same Bylaws as decided in the original MPC decision.

49. PSC argued other factors should have been considered by the second MPC on the bias objection. It stated that MPC was represented by counsel for LIC on the appeal of the original MPC decision. PCS points to named counsel for LIC identified immediately following the style of cause on the appeal and the signature of LIC counsel as counsel for the original MPC. Clearly, the first appeal was from the decision of the original MPC. The opposing party to PSC was the LIC. The reference to counsel for LIC being counsel for MPC was clearly an error as represented by counsel for LIC on this appeal.

50. PSC also argued that Hnatiuk had received an Investigation Report in the original MPC which was deemed procedurally unfair in the appeal of the original MPC. PSC suggested the procedural unfairness arising from the original MPC heightened concerns about fairness in the second MPC. The suggestion of "heightened" concerns are the subjective concerns of PSC – not objective factors to be considered in the reasonable apprehension of bias analysis.

51. Lastly, PSC argued that Hnatiuk reviewed documents from the original MPC a second time (the first review being on the original MPC) in advance of the second MPC hearing. This assertion is incorrect as noted in PSC's footnote in its Appeal Brief. Also the second hearing transcripts indicate Hnatiuk denied reviewing these documents prior to the second hearing.

52. PSC did not raise an objection to Hnatiuk's involvement until some 9 months after being so advised. In fact, mere days before the commencement of the hearing, PSC indicated it was content with the members of the MPC. It is notable that the original MPC decision did not disclose the names of the MPC members and is signed by one person - Hnatiuk's name does not appear in the original decision. Counsel for PSC represented that he did not know of Hnatiuk's involvement in the original MPC until he received the email dated December 8, 2022 after the pre-hearing telephone conference call. Although these facts may impact efficiency and practicality, they do not abrogate an administrative tribunal's overarching obligation to conduct a fair and impartial hearing.

53. Therefore, in consideration of the objective relevant facts as referred to in paragraph 48 above, I find that a reasonable person and informed person would find it more probable that there was a reasonable apprehension of bias given that Hnatiuk was on the original MPC that decided PSC breached the same Bylaws after a review of the same documents. The fact that the documents were supplemented by oral evidence on the second hearing does not overcome the reasonable apprehension of bias arising from Hnatiuk's involvement in the original MPC decision.

CONCLUSION

54. Fairness and impartiality are cornerstones of administrative tribunals. It is essential that the parties' dispute is adjudicated by a panel that has not prejudged the hearing evidence placed before it. The integrity of the hearing process and the ultimate decision is predicated on a fair minded and impartial administrative tribunal.

55. I remit this matter back to a MPC hearing with costs of this appeal to be spoken to at a date and time to be arranged between the parties.

Dated at Regina, Saskatchewan this 23 day of October, 2023.

"Karen Prisciak, K.C.
Karen Prisciak, K.C., Hearing Panel Chairperson