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

DECISION REGARIDNG COSTS

INTRODUCTION

1. The Appellant, Portfolio Strategies Corporation, was successful in its appeal (Second Appeal) of the Second Market Practices Committee Hearing (Second Hearing) involving three witnesses over one day. It submits it is entitled to costs of the First Market Practices Committee Hearing (First Hearing) and appeal (the First Appeal) as well as the Second Hearing and Appeal. It claims costs on a solicitor-client basis of $136,629.12 or alternatively 50% of the costs being $68,314.56. These costs include taxes and disbursements.

2. The Respondent, the Life Insurance Council of Saskatchewan, opposes the Appellant's request for costs. It submits the Appellant should not receive any costs or, in the alternative, costs should be awarded after a determination on the merit of the charges against the Appellant or, in the further alternative, nominal costs of $650.

3. For the following reasons, I award costs to the Appellant of $23,300.00 plus applicable taxes payable after the expiry of the appeal period applicable to this decision.

PROCEDURE ON COST APPLICATION

4. During the Second Appeal, both parties requested the issue of costs be addressed after the merits of the appeal were decided. The Second Appeal overturned the Second Hearing on the basis that the Market Practices Committee (MPC) failed to properly consider removing a Panel member for a reasonable apprehension of bias. The parties were invited to agree on the procedure governing the costs issue – ie. oral or written submissions. They agreed to file and exchange written materials at a mutually agreed upon date without an oral hearing.

5. On January 22, 2024, materials were filed with the Registrar. The next day, the Respondent requested leave to file additional materials or, in the alternative, the opportunity to make oral submissions. The Appellant opposed the Respondent's request. The nature of the Respondent's additional material was not identified. I denied the Respondent's requests on the basis that the parties had previously agreed to the process. In addition, the parties did not anticipate further filing of materials which would affect decisions on the nature of the materials to file and there needed to be some finality to the process.

6. The Appellant filed a Brief and two Affidavits; the Respondent filed a Brief.

7. The quantum of costs advanced by each party is significantly disparate. The Appellant claims costs of $136,629.12 or, in the alternative, $68,314.56. The Respondent submits costs range from $0 to $650.

LEGAL FRAMEWORK

8. The jurisdiction of the Appeal Panel to adjudicate on costs is found in *The Insurance Act,* SS 2015*,* c I-9.11 (the Act) Section 10-37(4):

> (4) On an appeal pursuant to sections 10-33 and 10-34, the appeal panel may do any of the following:
>
> (a) dismiss the appeal;
> (b) allow the appeal;
> (c) direct a new hearing or further inquiries by the Superintendent or the insurance council;
> (d) vary the decision or order of the Superintendent or the insurance council;

(e) substitute the appeal panel's own decision for the decision of the Superintendent or the insurance council;
(f) in the case of an appeal pursuant to section 10-34, order the insurance council to issue or reinstate the licence or endorsement;
(g) if applicable, vary any terms and conditions imposed by the Superintendent or insurance council on the appellant's licence or endorsement;
(h) make any order as to costs that the appeal panel considers appropriate.

9. Specifically, Section 10-37(4)(h) grants the Appeal Panel broad discretion to make any costs order it considers appropriate.

10. Neither the legislation nor the regulations provide guidance as to the applicable principles guiding the broad exercise of discretion referred to in the Act. Similarly, there is no guidance as to the quantum of costs. There is no reference to quantum of costs in any regulations nor is there reference to the Tariff of Costs for either of the Court of King's Bench or the Court of Appeal nor any other schedule of costs.

11. As a starting point there is a general principle in Canadian law that costs follow the successful party. In *B(R) v Children's Aid Society of Metropolitan Toronto* 1995 CanLii 115, the Supreme Court states the rationale for awarding the successful party its costs is that "had the unsuccessful party initially agreed with the position of the successful party, no costs would have been incurred by the successful party" (at page 404- 5).

12. As noted by the Saskatchewan Court of Appeal in *Abrametz v. The Law Society of Saskatchewan* 2018 SKCA 37 at par. 59), an order depriving the successful party of costs must be based on misconduct, miscarriage in the procedure, or oppressive and vexatious conduct of the proceedings.

13. Although the statutory discretion to award costs is unfettered, it must be exercised carefully and judicially (*George v. Penner* 2020 SKKB 99 at par. 15).

14. The costs must be reasonable and proportional (*Hawkins v. Hawkins* 2020 ONSC 1107 at par. 40) which means the costs much be reasonable and proportional to the issue and amounts in question as well as the outcome of the case (*Snelgrove v. Kelly 2017 ONSC 4625* at par. 31). The amount actually incurred by the successful party is not determinative of whether the amount claimed is reasonable and proportional.

15. An award of solicitor-client costs is extraordinary. As discussed in *Siemens v. Bawolin* 2002 SKCA 84 at par. 118, the following principles apply when considering a solicitor-client cost award.

> [118] These are the principles, relevant to this appeal, which I take from my review of the above authorities:
>
> 1. solicitor and client costs are awarded in rare and exceptional cases only;
> 2. solicitor and client costs are awarded in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible;
> 3. solicitor and client costs are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone;
> 4. notwithstanding point 3, solicitor and client costs may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred.

Position of the Appellant

16. The Appellant submits it is entitled to the costs of both hearings and appeals. In support of its position, the Appellant filed two Affidavits. The Affidavit of Mark Kent, Chief Executive Officer and designated representative for the Appellant, deposes to payment of the Appellant's legal fees and disbursements and attaches the invoices and receipts. The Affidavit of Shirley Mandziuk, legal assistant to the Appellant's legal team, deposes to the breakdown of legal fees, disbursements and taxes by billing date and invoice reference.

Position of the Respondent

17. The Respondent submits that the Appellant is not entitled to any costs because there was no winner in the Second Appeal or, in the alternative, the costs should be decided after a merit decision on the charges. In the further alternative the Respondent argues the Appellant should receive a nominal cost award.

18. The Respondent argues the failure of the Second MPC properly consider the issue of reasonable apprehension of bias of one of its members was a decision of the MPC and not that of the Respondent. Simply put, the error of the MPC should not be visited upon the Respondent.

ISSUES

19. There are a number of issues for consideration regarding costs:

1. Was there a "winner" in the Second Appeal such that the Appellant is entitled to its costs?
2. If so, is the Appellant entitled to solicitor-client costs?
3. If so, is the Appellant entitled to costs of a second counsel?
4. If so, what is the quantum of costs available to the Appellant?
   (a) Is the Appellant entitled to costs of the First Hearing and Appeal? If so, in what amount?
   (b) Is the Appellant entitled to costs of the Second Hearing and Appeal? If so, in what amount?

(1) Status of the Outcome on the Second Appeal – Was there a winner?

20. The Respondent submits there was no winner in the second Appeal because the error was that of the second MPC and not that of the Respondent. It refers to *Lapcevich v. Real Estate* 2010 ONSC 1145 wherein neither party was awarded costs on the appeal of a tribunal decision. The hearing decision was overturned because the tribunal exceeded the jurisdiction granted by its statutory framework.

21. *Lapcevich* does not provide guidance on the issue of costs in this case. Firstly, as properly noted by the Respondent, the mutual appeal of both parties in *Lapcevich* is not analogous to our case wherein only one party appealed. Secondly, the tribunal exceeded its jurisdiction whereas in our case the results of the Second Hearing was overturned on the basis of procedural fairness. The Respondent provided no other authority to support its characterization that there was no winner in the Second Appeal.

22. At the Second Hearing, the Respondent was allied with the error of the Second MPC. The Respondent did not advance a neutral position nor agree that the potentially biased member needed to be replaced before the hearing could continue. Rather, the Respondent argued the MPC Panel Member did not have a reasonable apprehension of bias.

23. As a point of interest, the Respondent claimed its solicitor-client costs on the Second Appeal (Brief at par. 148).

24. I find there is no merit in the Respondent's suggestion there was no winner. The Second Appeal by the Appellant was wholly successful in overturning the MPC's decision in the Second Hearing. Accordingly, the general principle that costs follow the successful party apply in this case.

(2) Are Solicitor-client Costs Available to the Appellant?

25. The Appellant submits it should be awarded solicitor-client costs. While recognizing costs should not be punitive, it argues its entitlement to the highest level of costs because it was successful on both appeals. The Appellant submits the decision on the First Hearing was overturned because the Respondent submitted a Second Memorandum to the MPC without providing it to the Appellant and the Respondent lost the Second Appeal because of the reasonable apprehension of bias of a MPC member. The Appellant argues that given the MPC had not been procedurally fair on two occasion, something more is required to ensure the MPC "will fulfill its duty to provide procedurally fair hearings."

26. The Appellant's suggestion that the MPC will be incentivized to conduct procedurally fair hearings by a high award of costs implies a punitive component to the costs. Said in another manner, punishing the

MPC for its past conduct through costs will ensure future procedural compliance. This is not a proper use of a cost award as noted by the Appellant in reference to *Abrametz*, at par. 47.

27. As discussed in Siemens (see par 15 herein), an award of solicitor-client costs is a rare and exceptional award made where the conduct of the unsuccessful party is scandalous, outrageous or reprehensive and/or requiring censure of the unsuccessful party's conduct. I turn to examine the decision of both Appeals to determine whether the Respondent's conduct met this characterization.

28. In the First Appeal, the Appellant stated the reason the decision was overturned was because the Respondent filed a Second Memorandum with the MPC without providing it to the Respondent. The Appellant characterizes this document as the "Secret Memorandum". The First Appeal Panel did not characterize the Respondent's Memorandum as a "Secret" Memorandum.

29. At the First Appeal, the Appellant first made an application to admit fresh evidence before moving to advance the actual grounds of appeal. The Respondent initially agreed to the Appellant's request but, after consulting with legal counsel, the Respondent withdrew its consent to admit the Appellant's fresh evidence. The issue before the Appeal Panel was whether the Appellant's fresh evidence should be allowed- not whether the Respondent's conduct in filing documents without providing them to the Appellant was an error. The Appeal Panel found the Appellant had met the requirements for fresh evidence pursuant to *Palmer v. The Queen* 1979 SCC 8. It held the Appellant's fresh evidence was necessary to raise the question of a reasonable apprehension of bias and procedural fairness of the first MPC. Neither the First Appeal Panel, nor the Second MPC nor the Second Appeal Panel determined whether the First Hearing was flawed on the basis of the Appellant's grounds of appeal on the First Hearing.

30. The Appellant asserts the conduct of the Respondent in not serving the Second Memorandum was the reason the First Appeal Panel sent the charges back to a MPC for a rehearing. However, contrary to the position advanced by the Appellant, the First Appeal Panel did not make any finding regarding the Respondent's conduct vis a vis the filed but not served Memorandum. The First Appeal Panel made no finding on whether there was a conflict of interest or a breach of procedural fairness or any other grounds of appeal as submitted by the Appellant (see par. 30 of First Appeal Panel Decision).

31. There is nothing in the First Appeal decision describing the Respondent's conduct as scandalous, outrageous or reprehensible. There is no reference to the Respondent's conduct during the First Hearing or Appeal being worthy of censure.

32. The decision in the Second Appeal did not support the Respondent's legal position. There are no direct facts or facts leading to a reasonable assumption to suggest the Respondent was scandalous,

outrageous or reprehensible in taking the position it did. Although I found the Second MPC erred in its assessment of reasonable apprehension of bias, the Respondent's decision to support the Second MPC does not warrant censure through a solicitor-client cost award.

33. The Appellant submits four reasons to characterize this case as exceptional in order to justify its request for solicitor-client costs. Firstly, it was denied procedural fairness twice by the MPC. Secondly, it was necessary for it to appeal two MPC Hearings to "vindicate" its procedural rights. Thirdly, both denials of procedural fairness were the fault of the regulator. The last reason the Appellant argues the Respondent's conduct is worthy of censure is because of the Respondent's conduct in filing the Second Memorandum without serving it on the Appellant; the Respondent changing its position on the fresh application on the First Appeal; and the late filing of the Respondent's Brief and Memorandum.

34. What are considered exceptional circumstances is a matter of characterization. The Appellant suggest the cumulative effect of the four reasons supports its claim for a higher level of costs. I do not agree.

35. Certainly, it would be preferable for all parties to have the case concluded in one hearing without the need for an appeal. The reason for oversight through the appeal process is, in part, to assure the parties of procedural fairness. Errors occur in administrative proceedings and at superior court trials. The fact the initial decision is reversed on appeal does not in and of itself justify the case as extraordinary or exceptional. Neither does the pursuit of the appeal remedy by the Appellant support an exceptional characterization. A successful appeal is one of tools available to the Appellant when it determines it has been aggrieved. Where an appeal is successful, it is reasonable to infer a finding of fault – but that is not exceptional on its face. Lastly, the change of position by the Respondent on the First Appeal is not unusual given the fact it changed its position after consulting with legal counsel. Similarly, although I do not condone disrespecting deadlines by late filing or filing documents without providing them to opposing counsel, this is not an unusual or extraordinary occurrence. In the ordinary course of superior court litigation, it unfortunately occurs more often than is desirable.

36. I do not find the conduct of the Respondent supports an award of the Appellant's solicitor-client costs. The Respondent's conduct does not meet the characterization required by the Saskatchewan Court of Appeal in *Siemens*, *supra.*

(3) Was there a Need for Second Counsel

37. As noted by Justice Danyliuk in *George v. Penner* 2020 SKKB 99 at par 29, second counsel is a benefit for lead counsel and is a valuable learning opportunity for second counsel. I would add that a law

firm may have internal reasons for involving second counsel such as increasing the expertise to further opportunities to service clients. For costs assessment purposes, the issue is whether two lawyers were required in this case.

38. The First Hearing considered written submissions without oral representations from either party. At the First Appeal, the Appellant had one counsel and the Respondent had two. Both parties had two counsel at the Second Hearing and subsequent appeals.

39. At the one day Second Hearing, the Appellant's lead counsel examined its primary witness and cross examined the Respondent's only witness. Second counsel for the Appellant, examined one witness and presented the final argument. At the Second Appeal, the Appellant's arguments were split between the two counsel.

40. Although I appreciate the importance of this case to the Appellant, the question is whether this case required two counsel. In my opinion, it did not. The Second Hearing concluded in one day and involved three witnesses. The substantive issue was straight forward and dealt predominately with the interpretation and explanation of the documents. Expert reports and evidence were not presented nor required. Overall, the evidence was not complicated, and the legal and factual issues were not complex.

41. The issues in the Second Appeal were multi-faceted but not factually or legally complex. It took three hours for both parties to present their legal positions.

42. The involvement of second counsel is warranted when a case is complex. Characteristics of a complex case would include numerous witnesses being examined and cross-examined, expert witnesses and reports, complicated documentary and demonstrative evidence, the length of the hearing and the complexity of the issues and evidence (see *Jans v. Jans Esta*te 2016 SKQB 275). None of these characteristics were present in this case. The entirety of the second Hearing dealt with documents and the Appellant's explanation of why the documents contained the information they did.

43. Accordingly, it is my opinion that one lawyer was capable of handling both the Second Hearing and Appeal.

(4) Quantum – what costs are available to the Appellant?

44. As previously noted, there is no legislative or regulatory framework to assess the quantum of costs.

45. The First Hearing was a paper review and did not involve *viva voce testimony*. The Respondent received half of its investigation costs being $550 and no costs for legal fees or disbursements.

46. The First Appeal was an oral hearing with representations from both parties. The First Appeal Panel did not address the issue of costs and remitted the matter and "new evidence back to the MPC for redetermination" (at par. 31). Given the Appeal Panel did not adjudicate on costs, I am not prepared to substitute my assessment of what is fair and reasonable or speculate as to why the First Appeal Panel did not address the costs issue.

47. The Respondent suggests quantum of costs are guided by principles of reasonableness and proportionality as referred to in the Ontario decisions of *Hawkins v. Hawkins* 2020 ONSC 1107 and *Snelgrove v. Kelly* 2017 ONSC 4625. Proportionality of costs refer to the issue and amounts in question and the outcome of the case (Snelgrove, *supra*. at par. 36).

48. I agree considering the reasonableness of costs is a necessary inquiry, but proportionality is difficult to assess in regulatory cases where monetary amounts are often less relevant.

49. The Appellant submits its entitlement to 40 to 50% of its total solicitor-client costs based on the authority of *McAllister v. Calgary (City)* 2021 ABCA 25 and *Barkwell v. Mcdonald* 2023 ABCA 87. This approach has not been ratified in Saskatchewan Courts and I decline to assess costs on a percentage of the total invoice paid by the Appellant's client.

(a) Should the Appellant receive its costs for the First Hearing and Appeal

50. There was no award for costs at the First Hearing nor the First Appeal except for $550 representing half the investigation costs. The Appeal Panel's silence on this issue signals it was not appropriate to order costs. This approach is understandable give that it was the Appellant's Application for Fresh Evidence that was before the Appeal Panel. Although it can be argued that the Appellant was successful on its application, the Appeal Panel's decision was not a final determination of the broader appeal issues of conflict of interest or breach of procedural fairness which were the Appellant's grounds of appeal after the First Hearing. Accordingly, I decline to award the Appellant costs related to the First Hearing and Appeal.

(b) Should the Appellant receive its costs for the Second Hearing and Appeal

51. After the Second Hearing the Respondent requested costs of $91,305.94 representing legal fees of $80,056, hearing costs of $2200 and MPC costs of $8196. It was awarded $15,000 for legal fees, $1100 for investigation costs and $8196 for MPC costs for a total of $ $26, 296. The Appellant properly submits the Respondent is no longer entitled to those costs given the decision on the Appeal.

52. The Respondent was entitled to its costs against the Appellant because the charges were successfully proven against the Appellant. Regulators must be held accountable for their conduct in the same manner as those being regulated. Accountability, in part, includes the award of costs to the successful party. The Appellant was successful on the Second Appeal.

53. The Respondent submits that if costs are awarded, the costs should be assessed at $650 with reference to the Tariff of Costs of the Court of Appeal. This Tariff reflects party and party costs and, as noted by the Chief Justice of the Saskatchewan Court of Appeal in 2013, is "seriously out of date" and does not adequately reflect policy considerations in awarding costs (*Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied v. Saskatchewan Labour Relations Board* 2013 SKCA 209 at par. 23). Eleven years later in 2024, the Tariff is more seriously out of date and fails to recognize current realities of the legal marketplace. The unfettered discretion provided under the Act does not reference any Tariff and I decline to reference the Tarriff as suggested by the Respondent.

54. The Appellant's Mr. Kent's Affidavit attached 71 pages of invoices and payments receipts. As previously discussed, this is not an appropriate case for solicitor-client costs nor was there a need for second counsel. Given that I am not awarding costs for the First Hearing and Appeal, the timeline for consideration of costs is after the First Appeal decision of November 24, 2021.

55. My review of the invoices for lead counsel after November 24, 2021, indicates the involvement of others in addition to lead counsel – Britannia Mohrbutter (BMM), Katie M. Newman (KMN), Haley B. Stearms (HBS)and Allison Graham (ALG-as second counsel). For example, in November of 2022 BMM billed 7 entries to draft a hearing brief for a total of 4 hours. This was followed by ALG billing 5.4 hours in December of 2022 for drafting a brief. The Affidavit does not disclose the need for these additional services. If the services were provided by lawyers or articling students, it would have taken some time to get up to speed on the facts and legal issues of the case which involves some duplication of time. While I appreciate and value the need for legal Briefs and, perhaps certain economies of scale in utilizing an hourly rate lower than lead counsel, it is my opinion that there was no need for the involvement of four other lawyers and/or students.

56. Given my decision that second counsel was unnecessary in this case, I turn to examine the entries of lead counsel after November 24, 2021. Approximately 60 hours were billed for the preparation and

participation in the Second Hearing and Appeal. I find that lead counsel's hourly rate of $500.00 reflects a reasonable hourly rate of competent counsel in Saskatchewan. Therefore, on a solicitor -client basis the total fees for lead counsel would be $30,000, accepting that these invoices were not subject to the careful scrutiny of a taxation officer with the corresponding explanations of the necessity of the work by successful counsel and the objections of opposing counsel.

57. In order to bring some finality to the costs assessment, I am prepared to order a lump sum payment based on the straightforward nature of the Second Hearing and Appeal, the issues advanced and argued, the evidence and Briefs presented, the length of the Hearing and Appeal, and the ultimate outcome of the Appeal.

58. The Second Hearing concluded in one day and the Appeal in three hours. The Briefs filed by the Appellant provided the necessary guidance to evaluate the relevant issues for the Second MPC and the subsequent Appeal. Given that solicitor-client fees are not recoverable, I award $22,500 plus applicable taxes for the legal fees incurred by the Appellant.

59. The disbursements billed after November 24, 2021 included payment to Westlaw and Lexis for research ($1512.88), imaging services ($427), and corporate registration searches ($40). The Affidavits do not disclose an explanation of the imaging services nor the need for research tools outside the free service of CanLii. I award half the costs of the research disbursements and the total cost of the corporate searches for a total disbursement reimbursement rounded to $800 plus applicable taxes.

CONCLUSION

60. The Respondent shall pay $23,300 plus applicable taxes in costs to the Appellant after the expiry of the appeal period of this decision.

Dated at Regina, Saskatchewan this 21st day of May, 2024.

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