Court of Appeal for Saskatchewan

Docket: CACV2969

Citation: *Berger v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 89

Date: 2019-09-16

Between:

Andrew Berger

Appellant

And

Financial and Consumer Affairs Authority of Saskatchewan

Respondent

Before:	Richards C.J.S., Ottenbreit and Caldwell JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Chief Justice Richards
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Mr. Justice Caldwell
On Appeal From:	A decision of the Hearing Panel of the Financial and Consumer Affairs Authority, August 1, 2016
Appeal Heard:	November 21, 2018
Counsel:	Khurrum Awan and Kyla Duchin for the Appellant Sonne Udemgba and Nathanial Day for the Respondent

Richards C.J.S.

I. INTRODUCTION

[1] This is an appeal from a decision of a hearing panel [Panel] appointed pursuant to *The Securities Act, 1988,* SS 1988–89, c S-42.2 [*Act*]. The Panel found that the appellant, Andrew Berger, had violated s. 27(2)(a) of the *Act* by trading in securities without being registered.

[2] Mr. Berger contends the Panel denied him procedural fairness, made a key factual determination based on no evidence and erred in concluding that it had jurisdiction in relation to the allegations in issue.

[3] As explained below, Mr. Berger's appeal must be allowed. There was no denial of procedural fairness. However, the Panel made a critical error in its fact-finding and it applied the wrong test in determining whether it had jurisdiction to deal with the allegations against Mr. Berger. As a result, it is necessary to refer this matter back to the Financial and Consumer Affairs Authority of Saskatchewan [Authority] for rehearing.

II. BACKGROUND LEADING TO THE COMPLAINT

[4] Mr. Berger lives in Costa Rica. David Evans, a Saskatchewan resident, has friends who had invested through Mr. Berger and obtained good returns.

[5] In June of 2013, Mr. Evans contacted Mr. Berger by telephone and the two men had a conversation about Mr. Berger's day trading activities and his investments in commodities.

[6] On June 7, 2013, Mr. Evans received, by email, documents from Latin Clearing Corporation. He recalled that the email had been sent to him by Mr. Berger. It read as follows:

> My Company is willing to put our money where our mouth is. … Depending on the amount you invest; Latin Clearing will either match your investment Dollar for Dollar in broker Guarantees, or as much as $2 for every $1 invested. … After we accomplish a 50% return, you will then have a 100% gain in your investment. … Profits from that point forward will be shared Client 80%, Latin Clearing 20% of profits. … If you deposit more than $100,000 into your trading account. Latin Clearing will award a Broker Guarantee in the amount of $2 for every $1 deposited into your account. …

[7] Mr. Berger provided necessary instructions and Mr. Evans transferred $50,000 US to Enterprise Holding in Panama City and $50,000 US to Gravy Clearing International Ltd. of San José, Costa Rica. The latter was a company owned by Mr. Berger. It had apparently also been agreed that Mr. Berger would provide $200,000 US to be invested along with the $100,000 US from Mr. Evans. Mr. Berger characterized all of this as him having entered into a partnership with Mr. Evans.

[8] From June of 2013 through to October of 2013, Mr. Evans received trading statements. The statements, on Latin Clearing letterhead, showed the deposit of both Mr. Evans's $100,000 US and a $200,000 US "broker guarantee". By October 17, 2013, the balance in the account had increased to $335,287.50 US.

[9] In September of 2013, Mr. Berger raised the possibility of Mr. Evans opening a second trading account. According to Mr. Evans, Mr. Berger then opened that account notwithstanding his instructions that he would go ahead with an additional investment only when funds became available. Mr. Evans refused to fund the second account. After October 17, 2013, no further trading statements were sent to Mr. Evans. His trading account was frozen after he refused to cover a $300,000 US margin call issued in October of 2013.

[10] Mr. Evans made several requests of Mr. Berger for the refund of his original investment but those funds were never returned.

III. THE DECISION OF THE PANEL

[11] Mr. Evans contacted the Authority to complain about what had happened. After an investigation, the Director of the Securities Division filed a Statement of Allegations against Mr. Berger and Latin Clearing. It alleged that, in their dealings with Mr. Evans, they had contravened s. 27(2)(a) of the *Act* because, without being registered as required, they had engaged in the business of trading securities or exchange contracts in Saskatchewan.

[12] The Panel was appointed and a hearing was held. Mr. Berger appeared by Skype link to defend himself. Latin Clearing did not appear and took no part in the proceedings.

[13] The Panel issued a written decision and concluded that Mr. Berger and Latin Clearing had "jointly and separately breached clause 27(2)(a) of the [*Act*] in the transactions involving Evans" (at para 47). In doing so, the Panel found, first, that the investments in issue were "futures contracts" and, as such, fell squarely within the definition of "security" as per s. 2(1)(ss) of the *Act*. The Panel then went on to conclude that Mr. Berger and Latin Clearing had acted as dealers in Saskatchewan while not registered to do so, contrary to s. 27(2)(a) of the *Act*. That provision reads as follows:

> (2) No person or company shall:
>
> (a) act as a dealer or underwriter unless the person or company:
>
> (i) is registered as a dealer; or
>
> (ii) is registered as a representative of a registered dealer and is acting on behalf of the dealer[.]

[14] The Panel imposed a number of sanctions on Mr. Berger and Latin Clearing including orders that they permanently cease trading in securities in Saskatchewan, pay an administrative penalty of $50,000 to the Authority and pay compensation to each individual or company determined to have sustained losses as a result of their contraventions of the *Act*.

IV. ANALYSIS

[15] Section 11 of the *Act* allows any person directly affected by a decision of the Panel to appeal to this Court "on matters of law only".

[16] Mr. Berger advances two main grounds of appeal. First, he submits the Panel breached its duty of procedural fairness. Second, in relation to what he characterizes as jurisdictional issues, Mr. Berger contends the Panel made a key finding of fact based on no evidence and submits the Panel erred in deciding that it had the authority to entertain the allegations made against him.

A. Procedural fairness

[17] Mr. Berger's procedural fairness argument has two wings. To begin, he submits the Panel acted improperly or unfairly when it declined to adjourn its hearing as he had requested. As well, Mr. Berger submits he was denied procedural fairness because the Panel failed to provide him, a

self-represented party, with appropriate guidance throughout the course of the hearing. It is necessary to examine these lines of argument separately.

1. The adjournment issue

[18] As indicated, Mr. Berger submits that he was denied procedural fairness when the Panel declined to adjourn the hearing for the length of time he had requested.

[19] I accept that a refusal to grant an adjournment by an administrative decision-maker can give rise to a denial of procedural fairness. However, in my view, the decision of the Panel at issue here cannot be impugned on this basis. Let me explain.

[20] The history of the decision-making in relation to the hearing date can be summarized as follows:

(a) On September 24, 2015, the Director of the Securities Division issued a Statement of Allegations against Mr. Berger and Latin Clearing. The central allegation was that Mr. Berger and Latin Clearing had engaged in the business of trading in securities or exchange contracts without being registered as dealers as required by the *Act*.

(b) On September 30, 2015, the Registrar issued a Notice of First Appearance to Mr. Berger and Latin Clearing indicating that, on October 27, 2015, a teleconference would be held to set a date for a hearing into the matters referred to in the Statement of Allegations. It appears that the hearing was scheduled to begin on February 2, 2016.

(c) On October 20, 2015, the Director of the Securities Division issued an Amended Statement of Allegations. It effected no change that is relevant for present purposes.

(d) On December 23, 2015, the Registrar issued a Notice indicating that the hearing would be adjourned from February of 2016 to a date to be determined by the Panel at a teleconference scheduled for January 14, 2016. The record does not reveal what precipitated this change.

(e) On January 14, 2016, after hearing from Authority staff and Mr. Berger, the Chairperson of the Panel issued an Order Setting Hearing Dates that scheduled the hearing for April 18 and 19 and, if necessary, April 20, 2016.

(f) On January 25, 2016, for reasons that are not apparent from the record, the Chairperson of the Panel issued another Order Setting Hearing Dates repeating that the hearing was set for April 18, 19 and 20, 2016. The Notice stated that, by providing written notice to the Registrar as soon as possible, any party could raise preliminary matters including availability on the hearing dates.

(g) On March 15, 2016, Mr. Berger emailed the Authority to ask for advice about how to request an adjournment of the hearing. The Authority provided him with that information on March 16, 2016.

(h) On March 22, 2016, Mr. Berger emailed an adjournment request to the Registrar. He wrote as follows:

> Hello … I would like to get an extension please. I am trying to get legal council [*sic*] for help on this and its easter week and it will not give [my] attorney enough time to prepare … I thought I could handle it on my own and evidently its too much for me … please I would request an additional 45-60 days to properly get an attorney to help me with this … please give me an extension.

(i) On March 31, 2016, the Chairperson of the Panel issued an Adjournment Notice indicating that the hearing had been "adjourned by consent" to May 9 and 10 and, if necessary, May 11, 2016.

(j) On April 6, 2016, Mr. Berger sent an email to the Registrar asking if he could appear at the hearing by way of Skype and, it would appear, asking for the hearing to be adjourned to "[a]ny time after June 5th (6/5/2016)". He provided no reasons for that adjournment request.

(k) On April 12, 2016, the Registrar advised Mr. Berger by email that the Panel had considered his adjournment request but had denied it because it "lacked sufficient reasons as to why you require a further adjournment". She confirmed that the hearing dates remained May 9, 10 and 11, 2016.

(l) Later in the day on April 12, 2016, Mr. Berger replied to the Registrar by email and stated "I cant make it those days which is why my request for an adjournment asked for 45 days … I will not be properly prepared with counsel and if thats how you want to win … thats embarrassing".

(m) On April 18, 2016, the Registrar responded to Mr. Berger. On behalf of the Panel, she gave him a further opportunity to explain why an adjournment was necessary by writing as follows:

> The panel refused your request for an adjournment as they determined your request lacked sufficient justification for moving the date. Your email below provides no further justification for the requested adjournment. If you wish, you may set out more detailed reasons to substantiate your request you could ask the panel to reconsider. Pursuant to section 11 of The Securities Act 1988, there is a right to appeal the decisions of the panel to the Saskatchewan Court of Appeal.

(n) On April 20, 2016, Mr. Berger replied to the Registrar by indicating, for the first time, that the scheduled hearing dates conflicted with his aunt's birthday party:

> … I will just miss my aunts 90th birthday party … the last time the whole family would be together … my uncle is 96 and hes not long for this world … all the cousins would be there with wives and grandchildren … but I did not think I had to be so specific … it's the 7th to the 10th of May … in Boynton Beach, Florida. …

(o) The Registrar then asked Mr. Berger whether he was asking the Panel to reconsider the adjournment in light of the information he had just provided about the party for his aunt. Mr. Berger replied in the affirmative.

(p) On May 2, 2016, the Registrar advised Mr. Berger by email that the Panel had reconsidered his request for an adjournment in light of the information he had provided on April 20, 2016. She indicated that the hearing would not be adjourned and would proceed as scheduled on May 9, 10 and 11, 2016.

[21] Taking all of this into account, I am not persuaded that the Panel denied Mr. Berger procedural fairness by declining to grant an adjournment of the length he had requested. Several points are of particular note in this regard.

[22] First, the Statement of Allegations was issued on September 24, 2015. Mr. Berger had to have understood that, as of that date, he was in legal jeopardy. However, there is no suggestion in

the record that, on receiving the Statement of Allegations, Mr. Berger acted with diligence to consult and retain counsel. The first mention of any effort to secure the services of a lawyer is in his March 22, 2016, email to the Registrar.

[23] Second, the Panel gave Mr. Berger an early opportunity to express any concerns that he might have had about proposed hearing dates. The January 25, 2016, Order Setting Hearing Dates specifically indicated that the parties could raise issues about their availability on the scheduled dates (at that point April 18, 19 and 20, 2016) by notifying the Registrar as soon as possible. Mr. Berger did not raise his scheduling concerns until March 22, 2016.

[24] Third, on March 16, 2016, Mr. Berger was provided with the text of the Authority's Policy Statement concerning adjournments. It reads as follows:

> 10.2 Factors Considered
>
> 10.2 In deciding whether to grant an adjournment, the Panel will consider all relevant factors, including the following:
>
> (a) whether an adjournment would be in the public interest;
>
> (b) whether all parties consent to the request;
>
> (c) whether granting or denying the adjournment would prejudice any party;
>
> (d) the amount of notice of the hearing date that the requesting party received;
>
> (e) any prior adjournment requests made and by whom and the reasons for those prior requests;
>
> (f) the reasons provided to support the adjournment request;
>
> (g) the cost to the Authority and to the other parties for rescheduling the hearing;
>
> (h) evidence that the party made reasonable efforts to avoid the need for the adjournment; and
>
> (i) whether the adjournment is necessary to provide an opportunity for a fair hearing.

Notwithstanding the terms of the Policy Statement, Mr. Berger provided only a minimal amount of information when he raised the issue of an adjournment.

[25] Fourth, the Panel responded to Mr. Berger's request for an adjournment of 45 to 60 days by granting him an adjournment of 21 days, i.e., from April 18, 19 and 20, 2016, to May 9, 10 and 11, 2016. In other words, the Panel did make some attempt to accommodate Mr. Berger. He has

put nothing before the Court to indicate or explain why this was not enough time for him to bring counsel on board.

[26] Fifth, Mr. Berger ultimately revealed that, to put the matter as favourably to him as possible, there was more than one reason for him to have wanted a longer adjournment. When given a final opportunity to explain why a more extended adjournment was necessary, he said only that his aunt's 90th birthday party in Florida was slated for May 7–10, 2016. All of this necessarily raises a question as to the real reason for Mr. Berger's adjournment request and whether it was his aunt's party, as opposed to an inability to retain counsel.

[27] In light of all of this, the Panel's decision to refuse a further adjournment was entirely understandable. In any event, Mr. Berger has not explained how the Panel's decision to refuse a more extended adjournment worked to affect his ability to defend himself. More specifically, at the opening of the hearing, Mr. Berger explained that the reason he was unrepresented was not because he had had insufficient time to retain and instruct counsel. Rather, he explained it was because he could not afford to hire a lawyer. Mr. Berger said, "I have not hired an attorney because I can't afford to hire [*sic*] at this point". On a related front, Mr. Berger does not argue that, as someone acting without the assistance of counsel, he required more time to prepare for the hearing than he was allowed. Nor has Mr. Berger explained how he would have defended himself more effectively if he had been given more time to prepare for the hearing.

[28] In the end, therefore, Mr. Berger has not established either that the Panel's decision not to grant a further adjournment was a denial of procedural fairness in and of itself or that it had the effect of undermining his ability to defend himself and thereby caused a breach of procedural fairness. Accordingly, this aspect of his procedural fairness argument must be dismissed.

2. The "guidance" issue

[29] Mr. Berger also submits that he was denied procedural fairness by the Panel because it failed to ensure he understood the nature or purpose of the proceedings it was conducting and failed to protect him from what he now submits were irregularities in the hearing.

[30] Mr. Berger's first and most central argument on this front is that, although it was apparent he did not understand the case he had to meet, the Panel did not take appropriate steps to relieve

him of his misapprehensions. More specifically, Mr. Berger says he was under the impression that the proceedings were not about his dealings with Mr. Evans but, rather, about whether he had traded securities in Saskatchewan. In this Court, Mr. Berger's counsel frames all of this around a suggestion that Mr. Berger was under the impression that the hearing was concerned only with a "preliminary motion".

[31] In order to put these submissions in context, it is useful to begin with the Amended Statement of Allegations. It referred to Mr. Evans as "Investor 1". It laid out, in subparagraphs 4(a) to (h), the essential details of Mr. Berger's dealings with Mr. Evans and then went on to allege as follows:

> 5. In carrying out the acts indicated in paragraph 4, above, [Mr. Berger and Latin Clearing] engaged in actions in furtherance of trades in securities or exchange contracts and also bought and sold securities or exchange contracts on behalf of Investor 1, and as such, engaged in the business of trading securities or exchange contracts.
>
> 6. Neither of [Mr. Berger or Latin Clearing] has ever been registered as a 'dealer' as required by the Act, and therefore, [Mr. Berger and Latin Clearing] have contravened clause 27(2)(a) of the Act.

[32] I note, as well, that the disclosure provided by the Authority to Mr. Berger in advance of the hearing related to Mr. Evans's dealings with him and Latin Clearing. Further, prior to the hearing, Mr. Berger had been interviewed by an Authority investigator about his dealings with Mr. Evans.

[33] As a result, there was no room for Mr. Berger to believe, going into the hearing, that his legal jeopardy was grounded in anything different than his dealings with Mr. Evans. Any other view of that matter is simply not credible.

[34] As for the hearing itself, the Panel began with the evidence of Harvey White, an investigator with the Authority. He explained what he had discovered about the situation involving Mr. Evans, Mr. Berger and Latin Clearing. He was cross-examined briefly by Mr. Berger. The next witness was Mr. Evans himself. He testified as to the history and particulars of his dealings with Mr. Berger and Latin Clearing. A lunch break followed his examination-in-chief. Immediately before that break, the transcript suggests Mr. Berger was anxious to cross-examine Mr. Evans. However, after the lunch break, Mr. Berger advised that he was not going to conduct

a cross-examination. Taking a position that he said "flows through my attorney", Mr. Berger stated as follows:

> I wanted to get some clarification first on what this hearing is, and it's a question. In other words, this hearing is to determine whether I actually sold securities in Saskatchewan, not whether Mr. Evans was not handled properly, because unless I sold securities in Saskatchewan, everything else is a moot point.

[35] In response, one of the Panel members advised Mr. Berger that the Panel would first hear all of the evidence and then make "whatever ruling we think appropriate at the time". Mr. Berger nonetheless continued to repeat his position saying, for example, "unless it's shown that I was selling securities in Saskatchewan, this case with David Evans is a moot point". The Chairperson of the Panel then intervened to explain the situation further:

> Mr. Berger, I guess it's alleged that by the selling of -- or accepting the investment money from Mr. Evans, you were selling securities in Saskatchewan. That's what's alleged by the Crown at this point in time.

[36] Mr. Berger responded by saying, "I think Mr. Evans is being used as a witness to say that I sold securities in Saskatchewan, even though in your complaint it states that he called me, here in Costa Rica". He then went on to comment that the dealings involving Mr. Evans did not "fall into the jurisdiction of Saskatchewan unless it's shown that I was selling securities in Saskatchewan. … That's what I tailored my case to, showing that I wasn't, and he contacted me. He called me". At this juncture, a Panel member responded to Mr. Berger by saying, "if you want to make that [submission] in argument, you make it in argument. You call whatever case you want to". Then, obviously knowing that Mr. Evans had testified it was he who had contacted Mr. Berger and not vice versa, Mr. Berger confirmed he did not want to cross-examine Mr. Evans.

[37] What should be made of this? To begin, it is apparent that the Panel could have explained the nature of the proceedings more clearly to Mr. Berger. In particular, it could have set out in more detail how the factual allegations concerning Mr. Berger's dealings with Mr. Evans might have fit into the proof of the allegations made against him. Nonetheless, it is easy to understand why the Panel went no further than it did. First, it was readily apparent that Mr. Berger's position was based on legal advice he had received, seemingly over the lunch break. Second, it is clear from the transcript that Mr. Berger was in no way disposed to change his mind or position about the nature of the proceedings. Third, notwithstanding Mr. Berger's somewhat curious way of styling what the hearing was about, he had nonetheless firmly grasped the key issue on which the

Panel's decision would turn, i.e., in a situation where Mr. Evans had contacted Mr. Berger in Costa Rica, did the *Act* apply or did his dealings with Mr. Evans fall outside its reach? Taking all of this into account, I am unable to conclude the Panel denied Mr. Berger procedural fairness by failing to do more than it did to explain the nature of the proceedings.

[38] Mr. Berger also submits the Panel denied him procedural fairness in other ways as well. To begin, he suggests it erred by not assisting him to block the introduction of hearsay evidence offered by the investigator, Mr. White. This complaint can be disposed of summarily. There is no merit in Mr. Berger's argument because s. 9(7) of the *Act* stipulates that "[t]he legal and technical rules of evidence do not apply to a hearing or review".

[39] As well, Mr. Berger submits the Panel should have intervened, or helped him to intervene, in order to prevent counsel for the Authority from leading Mr. Evans through part of his testimony. That testimony came when counsel showed Mr. Evans an email from "customerservice@latinclearingcorp.com" and asked whether it had come from that email address. Mr. Evans responded, "In my opinion at that time, that came from Andrew Berger". Counsel then asked, "But your understanding is that at that time Berger was one and the same as Latin Clearing Corporation?" and Mr. Evans replied, "Yeah".

[40] I see no denial of procedural fairness in any of this. Mr. Evans had already testified that, in his view, Mr. Berger and Latin Clearing had been, as he put it, "one in the same" and that, in specific reference to the email on which he was being questioned, it was "the original that Andrew Berger had sent out to me" and that it "would have come from Mr. Berger by email". Thus, although the question put to Mr. Berger by counsel for the Authority was leading in the technical sense that it suggested how it should be answered, the question did no more than bring Mr. Evans back to a view he had just expressed several times, i.e., that Mr. Berger and Latin Clearing were one and the same. In those circumstances, there was no unfairness. No principle of procedural fairness required the Panel to intervene when counsel put her question to Mr. Evans.

[41] Finally, Mr. Berger suggests the Panel denied him procedural fairness when it failed to provide him with guidance about how to introduce evidence in the form of exhibits. This complaint relates to an April 4, 2016, email from Latin Clearing to Mr. Evans that Mr. Berger referred to in

his testimony but did not have marked as an exhibit. I see little merit in Mr. Berger's complaint on this front.

[42] The email was in no way central to his defence of the case against him and, in any event, there is no suggestion in the record that the Panel excluded the email from its consideration because it had not been formally introduced into evidence. To the contrary, the Panel made an effort to ensure it could view the document when Mr. Berger referred to it.

[43] In the end, therefore, I conclude Mr. Berger has not established that the Panel breached a principle of procedural fairness in the course of finding that he had contravened the *Act*.

B. Jurisdiction

[44] Mr. Berger advances something of a two-pronged attack under the banner of what he calls "jurisdiction". First, he contends the Panel erred by conflating the role that he played in the dealings with Mr. Evans and the role played by Latin Clearing. This is said to have involved an error of law and to have wrongly led the Panel to the conclusion that he had violated the *Act*. Second, Mr. Berger submits the Panel used the wrong test in deciding whether the *Act* applied to the allegations against him and, as a result, it improperly concluded that he had offended s. 27(2)(a). Let me deal with these submissions in turn.

1. The role of Latin Clearing

[45] The proceedings before the Panel were grounded in the Amended Statement of Allegations. It identified the "Respondents" as being Mr. Berger and Latin Clearing. The Amended Statement then went on to describe the relevant factual background in these terms:

> 4. …
>
> a. Via email, [Latin Clearing] provided Investor 1 with documents to open a trading account with LLC, and Berger provided banking instructions so that Investor 1 could deposit funds into a trading account with [Latin Clearing]. Investor 1 was advised that if he deposited between $50,000 - $100,000 into his account, [Latin Clearing] would match his deposit, dollar for dollar. He was also advised as to how profits in his account would be shared, and given a schedule for when withdrawals could be made;
>
> b. In June 2013 Investor 1 signed the necessary documents and returned them to [Latin Clearing]. A trading account was then opened for Investor 1 at [Latin Clearing];
>
> c. Investor 1 attempted, on June 11, 2013, pursuant to instructions received from Berger, to send USD$100,000 to [Mr. Berger and Latin Clearing] at an account with Banco de

> Costa Rica. The funds were held up by the intermediary bank in the transaction, and were eventually sent back to Investor 1;
>
> d. In or around August 2013, per new instructions received from Berger, Investor 1 wired USD$100,000, in two separate tranches of USD$50,000 each, to an account in the name of Gravy Clearing International Ltd., for deposit into his trading account at [Latin Clearing]. These funds appeared to have been received into the account as intended;
>
> e. From time to time between June 2013 and October 2013, Investor 1 received Trading Statements from [Mr. Berger and Latin Clearing] indicating activity within Investor 1's trading account. The statements indicated that Investor 1's account was being used to buy and sell various futures contracts in commodities such as gold, silver, and crude oil. By October 17, 2013, the account showed a balance of USD$335,287.50;
>
> f. Given the substantial returns being shown in his account with [Latin Clearing], in September 2013 Investor 1 discussed the possibility of opening a second account with Berger. Without having definitive instructions to do so, Berger opened a second account for Investor 1 and demanded that he send more money to fund it. When Investor 1 sought to use some of the funds shown to be in his initial account to fund the subsequent account, the relationship with [Mr. Berger and Latin Clearing] broke down;
>
> g. [Mr. Berger and Latin Clearing] refused to allow Investor 1 to transfer any funds from his initial trading account. [Mr. Berger and Latin Clearing] also told Investor 1 that, due to his failure to provide the additional funds requested to fund the subsequent account, the initial account was then frozen; and
>
> h. From September 2013 to September 2014, Investor 1 demanded a return of his initial USD$100,000 from [Mr. Berger and Latin Clearing] on numerous occasions, but has not received any return of funds. Investor 1 last heard from [Mr. Berger and Latin Clearing] in 2013.

[46] The Amended Statement of Allegations next laid out the alleged breach of the *Act* by Mr. Berger and Latin Clearing. As noted above, this was done in the following terms:

> 5. In carrying out the acts indicated in paragraph 4, above, [Mr. Berger and Latin Clearing] engaged in actions in furtherance of trades in securities or exchange contracts and also bought and sold securities or exchange contracts on behalf of Investor 1, and as such, engaged in the business of trading securities or exchange contracts.
>
> 6. Neither of [Mr. Berger and Latin Clearing] has ever been registered as a 'dealer' as required by the Act, and therefore, [Mr. Berger and Latin Clearing] have contravened clause 27(2)(a) of the Act.

[47] At the hearing, Mr. Evans testified his impression was that Mr. Berger was Latin Clearing or that Mr. Berger and Latin Clearing were "one in the same". Further, a LinkedIn page introduced into evidence showed Mr. Berger as being the CEO of Latin Clearing. For his part, Mr. Berger stressed in his evidence that he and Latin Clearing were not one and the same. When asked about his relationship with Latin Clearing, he testified "[t]hey're a clearing firm" and said his contact with Latin Clearing was merely "as a trader". Mr. Berger explained that he had not prepared the

LinkedIn entry describing him as the CEO of Latin Clearing and that the entry had been taken down.

[48] In its decision, the Panel sorted through the nature of the relationship between Mr. Berger and Latin Clearing by writing as follows:

> [24] *Initially, Berger denied any knowledge of the Respondent, Latin Clearing. However, that evidence is false* based on the testimony of White. On August 21, 2014, White viewed and printed a LinkedIn account which identified Berger as the CEO and President of the Respondent, Latin Clearing.
>
> [25] After first denying any relationship with Latin Clearing, Berger later admitted to having trading accounts with Latin Clearing as far back as the year 2010. He also admitted he received the emails directed to Latin Clearing and that he was allowed to use Latin Clearing's accounts for his own transactions.
>
> [26] The clear inference to be drawn from all of the evidence is that the Respondent, Berger, and the Respondent, Latin Clearing, were acting in concert with respect to the entire transaction with Evans.
>
> (Emphasis added)

[49] Mr. Berger argues that this fundamental feature of the Panel's decision is grounded in a clear error. I agree. Mr. Berger did not deny any knowledge of Latin Clearing and then change his story. To the contrary, both Mr. White's account of how Mr. Berger described things during the investigation phase of the proceedings and Mr. Berger's evidence at the hearing were entirely consistent.

[50] More specifically, Mr. White testified that, on being first contacted by the Authority, Mr. Berger had explained he was not Latin Clearing and that he had simply used Latin Clearing accounts. Mr. Berger's testimony at the hearing was to precisely the same effect. He explained that he was not a shareholder or an employee of Latin Clearing and that he had done no more than trade through it.

[51] Accordingly, it is wholly unclear how or why the Panel found that Mr. Berger had initially denied any knowledge of Latin Clearing. This was an error in fact-finding.

[52] As explained above, Mr. Berger's right of appeal is limited by s. 11 of the *Act* to "matters of law only". This might seem, as a matter of first impression, to be a complete answer to Mr. Berger's complaint that the Panel wrongly decided he had falsely denied any knowledge of Latin Clearing. However, as this Court held in *P.S.S. Professional Salon Services Inc. v*

Saskatchewan (Human Rights Commission), 2007 SKCA 149 at para 68, [2008] 5 WWR 440, a finding of fact based on no evidence or on an irrational inference drawn from the evidence is an error of law for purposes of proceedings such as the one at hand. This is the nature of the error in issue here and, therefore, s. 11 does not stand in Mr. Berger's way.

[53] The error made by the Panel about Mr. Berger's explanation of his relationship with Latin Clearing was one of significant consequence. The Panel's finding that he had originally denied any knowledge of Latin Clearing led directly to its conclusion that the evidence of Mr. White and Mr. Evans should be preferred over his. It also led directly to the conclusion that Mr. Berger's testimony had fallen "short of being truthful" in apparently crucial, but unidentified, respects. It was in this context that the Panel concluded Mr. Berger and Latin Clearing had been "acting in concert" with respect to the Evans transaction.

[54] Furthermore, the finding that Mr. Berger and Latin Clearing were acting in concert cascaded into the balance of the Panel's reasoning. Because of that finding, the Panel made no distinction between Mr. Berger and Latin Clearing. Rather, it simply referred to the "Respondents" as if Mr. Berger had done what was attributed to Latin Clearing and Latin Clearing had done what was attributed to Mr. Berger. I note that, in the "conclusion" part of its decision, the Panel did say the "Respondents have jointly and separately breached clause 27(2)(a) of the [*Act*] in the transactions involving Evans". However, this choice of language wholly belied the reasoning that preceded it. At no point in its analysis did the Panel attempt to disentangle the actions of Mr. Berger from those of Latin Clearing. It consistently treated them as being one and the same.

[55] All of this means that the factual foundation necessary to evaluate the complaint against Mr. Berger was, and is, corrupted. We do not know how the Panel would have assessed Mr. Berger's credibility or the strength of his testimony if it had not laboured under a misapprehension that he had been untruthful about his description of his relationship with Latin Clearing. Similarly, we do not know whether, in the absence of its misapprehension, the Panel would have accepted the evidence of Mr. White and Mr. Evans over that of Mr. Berger or whether it would have, in effect, attributed the actions of Latin Clearing to Mr. Berger. There is, as a consequence, no reliable or complete factual basis on which this Court can make its own assessment of the situation.

[56] The result of all of this, in my view, is that this matter must be referred back to the Authority so that it can be heard again by a new panel.

2. The connection to Saskatchewan

[57] Mr. Berger also contends the Panel erred in law by applying the wrong test when deciding whether it had jurisdiction to deal with the allegations against him. He submits the Panel should have asked whether there was a real and substantial connection between his alleged conduct and Saskatchewan, rather than merely concluding that his out-of-province residency did not deprive it of jurisdiction.

[58] Although Mr. Berger's argument is not expressed in precisely these terms, I take him to be contending that s. 27(2)(a) of the *Act* was constitutionally inapplicable in the circumstances at hand. In other words, he does not challenge the validity of s. 27(2)(a) itself. He suggests only that it cannot apply to his situation.

[59] The basic principle governing this corner of the law is clear. A province cannot legislate extraterritorially. See: *Unifund Assurance Company v Insurance Corporation of British Columbia*, 2003 SCC 40 at para 50, [2003] 2 SCR 63 [*Unifund*]; and *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 21, [2012] 1 SCR 572. Expressed in terms of federalism, this means that each province must respect the authority held by other provinces in relation to their own legislative spheres. The same general concept operates in relation to the extranational application of provincial laws. As provided by the opening words of s. 92 of the *Constitution Act, 1867*, "*In each Province*, the Legislature may exclusively make Laws in relation to …" (emphasis added). Peter Hogg in *Constitutional Law of Canada*, loose-leaf (2018-1), 5th ed Supp, vol 1 (Toronto: Thomson Reuters, 2016), makes the point at chapter 13.3(d) by saying, "[a]s a general proposition, it is plain that a province may not regulate extraprovincial activity".

[60] It follows from this that a province cannot use its legislative authority to empower an administrative tribunal to apply laws extraprovincially. The *Constitution Act, 1867* does not permit a provincial legislature to do indirectly what it cannot do directly. Accordingly, the question will always be whether the connection between the matter before a tribunal and the province in question is sufficient to give the tribunal jurisdiction.

[61] The nature of this necessary connection in the context of the applicability of a provincial regulatory scheme to an out-of-province Canadian resident was explained in *Unifund* as follows:

> [56] Consideration of constitutional *applicability* can conveniently be organized around the following propositions:
>
> 1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
>
> 2. What constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
>
> 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
>
> 4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.
>
> (Emphasis in original)

[62] I see no convincing reason why this same general approach should not be applied when dealing with the applicability of provincial regulatory schemes to out-of-country residents like Mr. Berger. That said, concerns about federalism and the potential of legislative conflict among the provinces will obviously not be front and centre in the out-of-country context.

[63] The question for a hearing panel operating under the *Act* will be whether there is a sufficient connection between Saskatchewan and the matter before it to ground provincial jurisdiction. That question will have to be answered with reference to the full slate of relevant factors including the nature of the modern securities industry, the particular provision of the *Act* in issue, the nature of the impugned conduct, and the particulars of the surrounding circumstances. See: *McCabe v British Columbia (Securities Commission)*, 2016 BCCA 7 at paras 35–37, [2016] 6 WWR 289.

[64] Accordingly, I agree with Mr. Berger that the Panel's approach to the jurisdictional question was legally faulty. The Panel began, at paragraph 45 of its decision, by stating that the fact Mr. Berger and Latin Clearing were not resident in Saskatchewan was "not relevant when determining whether [they] acted as dealers in Saskatchewan". There are two problems imbedded in that approach. First, it reveals a failure by the Panel to recognize that the true jurisdictional issue was whether the matter before it had a sufficient connection to Saskatchewan. The second is that, by treating Mr. Berger's place of residence as being "irrelevant", the Panel failed to take account of a fact bearing on the question of whether the connection between Saskatchewan and the

allegations against Mr. Berger was sufficient to ground jurisdiction. His residency might not have been determinative of the issue before the Panel but it was definitely not irrelevant.

[65] After saying in its decision that Mr. Berger's place of residence was not relevant, the Panel went on to cite and rely on *R v W. McKenzie Securities Ltd.* (1966), 56 DLR (2d) 56 (Man CA) [*McKenzie*], as being the full answer to the jurisdictional question before it. In *McKenzie*, Toronto broker-dealers registered in Ontario, but not in Manitoba, made telephone calls and mailed literature to a resident of Manitoba to solicit orders for the purchase of shares. In response, the Manitoba resident drew a cheque on a Manitoba bank and mailed it to Toronto. The broker-dealers were charged under *The Securities Act*, RSM 1954, c 237, with unlawfully trading in securities. On appeal to the Court of Appeal for Manitoba from conviction, the broker-dealers argued that, to the extent *The Securities Act* could be said to have had application to their activities, it was *ultra vires* the Legislature of Manitoba. Justice Freedman, writing for the Court of Appeal, rejected the argument of the broker-dealers on the basis that "what took place in the present case constituted an act of trading in securities within the definition of the *Securities Act* of Manitoba" (at 64).

[66] In light of *Unifund*, the Panel erred in treating *McKenzie*, in and of itself, as being fully dispositive of the jurisdictional question it faced. *McKenzie* was decided some 37 years before *Unifund* and it did not directly or expressly face into the issue of whether there was a sufficient connection between the matters in issue and Manitoba so as to give Manitoba jurisdiction. Relatedly, and obviously not surprisingly, *McKenzie* did not employ the analytical framework now prescribed by *Unifund*. In saying this, I do not intend to suggest, one way or the other, whether the allegations against Mr. Berger have a sufficient connection to Saskatchewan to engage the application of the *Act*. The resolution of that question will have to await the outcome of a fresh fact-finding exercise and the resulting clarification of the nature of the dealings between Mr. Berger and Mr. Evans.

V. CONCLUSION

[67] I conclude that Mr. Berger's appeal must be allowed and the decision of the Panel set aside. This matter is referred back to the Authority for rehearing. Mr. Berger is entitled to costs in the usual way.

"Richards C.J.S."

Richards C.J.S.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Caldwell J.A."

Caldwell J.A.