Court of Appeal for Saskatchewan	**Citation:** ***101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*****, 2019 SKCA 31**
	Date: 2019-03-29

Docket: CACV2576

Between:

101115379 Saskatchewan Ltd., 101114386 Saskatchewan Ltd., Cryptguard Ltd., Alena Pastuch, Teamworx Productions Ltd., Idendego Inc.

Appellants

And

Financial and Consumer Affairs Authority

Respondent

Docket: CACV2655

Between:

101115379 Saskatchewan Ltd., 101114386 Saskatchewan Ltd., Cryptguard Ltd., Alena Pastuch, Teamworx Productions Ltd., Idendego Inc.

Appellants

And

Financial and Consumer Affairs Authority

Respondent

Before:	Jackson, Whitmore and Ryan-Froslie JJ.A.
Disposition:	Appeals dismissed
Written reasons by:	The Honourable Madam Justice Ryan-Froslie
In concurrence:	The Honourable Madam Justice Jackson The Honourable Mr. Justice Whitmore
On Appeal From:	Financial and Consumer Affairs Authority Decision dated July 23, 2014
Appeal Heard:	March 14, 2018
Counsel:	Alena Pastuch on her own behalf and on behalf of the corporate appellants Sonne Udemgba and Nathaniel Day for the Respondents

Ryan-Froslie J.A.

I. INTRODUCTION

[1] On July 23, 2014, a panel appointed pursuant to s. 17 of *The Securities Act, 1988*, SS 1988–89, c S-42.2 [*Securities Act*], found Alena Pastuch, 101114386 Saskatchewan Ltd., 101115379 Saskatchewan Ltd., Cryptguard Ltd., Idendego Inc. (also known as Strikeback Ltd.) and Teamworx Productions Ltd. [collectively the appellants] had breached ss. 27(2), 58(1), 44.1(2), 55.1(b), and 135.7(1) and (2) of the *Securities Act* [*Merits Decision*]. In a December 18, 2014, decision, that same hearing panel imposed an administrative penalty against the appellants of $100,000, ordered them to pay up to $100,000 to each person or company that had suffered financial loss as a result of their conduct and assessed costs against the appellants of $46,638. In addition, Ms. Pastuch, who was the sole director and officer of all the corporate appellants, was prohibited pursuant to s. 134(1)(h.1) from becoming or acting as a registrant, an investment fund manager or a promotor [*Sanctions Decision*].

[2] The appellants now appeal both the *Merits Decision* and the *Sanctions Decision* pursuant to s. 11 of the *Securities Act*. The grounds for the appeals are numerous but in essence allege bias or a reasonable apprehension of bias on the part of the chair and the panel, a denial of procedural fairness and that the decisions were unreasonable. The appellants contend these are questions of law, which resulted in a denial of fundamental justice and a breach of their ss. 7, 11 and 15 *Charter* rights.

[3] In my view, for the reasons set out herein, the appeals must be dismissed.

II. BACKGROUND

[4] Up until October 1, 2012, the *Securities Act* was administered by the Saskatchewan Financial Services Commission. As of that date, the Saskatchewan Financial Services Commission was continued as the Financial and Consumer Affairs Authority for Saskatchewan [FCAA]. In these reasons, FCAA should be taken as referring to the Saskatchewan Financial Services Commission where the context so requires.

[5] In January 2008, the FCAA received a request for information with respect to Teamworx Productions Ltd. That inquiry led to an investigation by FCAA staff – April Stadnek, Ed Rodonets and Sandra Novak – as to whether the appellants were operating in contravention of the *Securities Act*. The investigation culminated in a notice of hearing dated August 27, 2010. A public hearing was then held, which began on November 16, 2012, and continued for over a year finally concluding in December 2013. A sanctions hearing followed. During the hearings, Brian Pederson acted as a lay representative for the appellants and also testified on their behalf.

[6] The appellants brought numerous applications both prior to and during the merits hearing. Those applications included multiple requests for disclosure, applications to remove the notice of hearing from FCAA's website, motions requiring an investigation into the conduct of FCAA investigators and for removal of the FCAA prosecutor, requests to stay the hearing, motions for the recusal of the chair and the hearing panel, and requests for a closed hearing, publication bans and confidentiality orders. In addition, there were numerous requests for adjournments, many of which related to Ms. Pastuch's medical issues. Appendix A, attached to this judgment, summarizes the most significant of these proceedings.

[7] On December 5, 2012, as testimony in the merits hearing was about to begin, Ms. Pastuch requested an adjournment or a stay of proceedings on the basis that full disclosure had not been made by the FCAA. When that request was denied, the appellants decided not to attend the hearing. The chair made two phone calls on the record – one to Mr. Pederson and one to Ms. Pastuch. He left messages for both inquiring why the appellants had not appeared and advising them that the panel had no option but to proceed with the hearing in their absence.

[8] The FCAA called its first witness – Ms. Stadnek. At the end of her testimony, the hearing was adjourned and resumed on December 10, 2012. Mr. Pederson appeared on that date and requested the issuance of 17 subpoena *duces tecum* "to compel disclosure of evidence". He asked that the hearing not proceed until all the material associated with the subpoenas had been provided and reviewed by the appellants. A publication ban was also requested. Mr. Pederson read a statement from Ms. Pastuch regarding her participation and appearance at the hearing. Ms. Pastuch indicated that if the proceedings continued, neither she nor any agent on the appellants' behalf would be able to cross-examine the FCAA witnesses as the appellants had not

received full disclosure. She also alleged the hearing panel was not impartial. When the panel took a recess, Mr. Pederson left the proceedings and did not return.

[9] The appellants were given notice that the merits hearing would proceed in their absence on numerous occasions including August 27, 2010, April 25, 2012, October 26, 2012, December 10, 2012, December 13, 2012, January 4, 2013, March 20, 2013, April 16, 2013, and May 10, 2013.

[10] Other than to bring various applications, the appellants did not participate in the merits hearing until after the FCAA had closed its case. All but one of the FCAA witnesses testified in the absence of the appellants and none of them were cross-examined by the appellants.

[11] The appellants attended the merits hearing on June 21, 2013, after being notified by the chair that the panel would proceed to closing arguments if they did not appear and present evidence. The appellants then presented their case, which included testimony from both Mr. Pederson and Ms. Pastuch.

[12] On July 12, 2013, Ms. Pastuch indicated that for health reasons she was unable to continue to testify orally. The hearing panel suggested she give the remainder of her testimony-in-chief in writing. Ms. Pastuch agreed. She was given until close of business on July 22, 2013, to provide her written testimony. That deadline was extended to late September. While Ms. Pastuch provided some written testimony-in-chief, she never completed that testimony. By letter dated October 21, 2013, the hearing panel advised Ms. Pastuch there was little to be gained by delaying the hearing further and the parties were directed to and did file written arguments.

[13] On July 23, 2014, the hearing panel rendered its decision on the merits. It found the appellants had committed the following breaches of the *Securities Act*: (a) trading in securities without registering as a dealer (s. 27(2)); (b) trading in securities without filing a preliminary or other prospectus and obtaining the Director's receipt (s. 58(1)); (c) engaging in unfair practices (s. 44.1(2)); (d) fraud (s. 55.1); and (e) withholding and concealing information reasonably required for a hearing and hindering or interfering with investigators (s. 135.7).

III. THE PANEL'S DECISIONS

[14] Leading up to, and during the course of the merits hearing, the panel rendered numerous decisions on procedural and preliminary matters. Two of those decisions are of particular importance to this appeal. The first is the panel's December 4, 2012, decision pertaining to preliminary motions [*Preliminary Decision*]. It addressed the appellants' request to dismiss the proceedings due to lack of full disclosure. It also addressed the appellants' application to have the panel recuse itself on the basis of bias. The second decision was rendered on September 9, 2013 [*Recusal Decision*], and addressed the appellants' request that the panel chair be recused on the basis of bias.

A. December 4, 2012, *Preliminary Decision*

[15] In its December 4, 2012, *Preliminary Decision*, the panel dealt with a number of procedural complaints made by the appellants, including matters pertaining to disclosure and that the panel and chair should recuse themselves as being biased.

[16] The panel first addressed the disclosure issues, which included an allegation that the FCAA had failed to provide the audio recording of an interview of J.K., one of the investors. It found the FCAA had originally failed to provide the appellants with the digital audio recording of that interview because the recording had been lost or misplaced. However, once it had been found it was provided to the appellants.

[17] Ms. Pastuch had also complained about a failure to disclose service contracts relating to the appellate companies, which she alleged were in a black binder provided to the FCAA by her legal counsel. The panel determined it was the appellants' legal counsel, not FCAA staff, that had misplaced the black binder. Further, based on the evidence before it, the panel found it was "unclear" whether the service contracts had ever been "handed over" to FCAA investigators or "whether they had been retained with (or misplaced by)" the appellants' legal counsel.

[18] With respect to other allegations of inadequate disclosure, including the FCAA's failure to provide to the appellants all the documents in the possession of the appellants' former accountant, Frank Garrett, and the appellants' bank, the panel found there was "insufficient

evidence" to support those allegations, which included a failure to provide full disclosure and an assertion that evidence had been spoiled. The hearing panel indicated, however, that it would remain alert to those allegations during the course of the hearing.

[19] The panel dismissed the appellants' recusal application. Its reasons for doing so were set out at page 5 of its decision:

> The evidence in support of these allegations of bias (or perceived bias) against the Hearing Panel and the Chairperson of the Hearing Panel were based almost exclusively on the Respondents' opinion and perception of facts and events that are substantially different from what the Hearing Panel believed were the facts at the time, or what the Hearing Panel recalled from its collective memory of the particular events. There are two events which illustrate competing apprehensions or perceptions of bias. At one instance, the Hearing Panel through the Commission Secretary requested witness availability from only one party rather than both parties, in deciding on when a hearing would be scheduled. This oversight was improper, even though the canvassed party would be proceeding first with its witnesses. However, that hearing never proceeded on those dates, and no prejudice ensued as a result. The process of canvassing both sides (or neither side) for availability for hearing dates was conducted in a more balanced approach thereafter. On the other hand in the second instance, the Hearing Panel considered an earlier motion by the Respondents for an order to have the Notice of Hearing and Allegations removed from the Commission's website because of concerns about the details contained in it. The Hearing Panel agreed with the Respondents' motion and issued the requested order directing the investigation staff to remove the Notice of Hearing and Allegations.

B. September 9, 2013, *Recusal Decision*

[20] As indicated, the panel's September 9, 2013, decision pertained to a motion by the appellants for recusal of the panel chair. The grounds cited by the appellants as supporting recusal included:

(a) that one of the FCAA witnesses – D.B. – was a brother of one of the chair's law partners;

(b) that there was outstanding civil litigation against one of the appellate corporations – Cryptguard – that involved another partner of the chair's law firm;

(c) that the chair's law firm had prepared an investment contract between D.B. and Cryptguard, one of the appellate corporations;

(d) that the chair had requested Ms. Pastuch's doctor to release medical information without Ms. Pastuch's consent;

(e) that the chair did not protect and keep confidential Ms. Pastuch's medical information;

(f) that the chair had accused Ms. Pastuch of wrongdoing but failed to investigate wrongdoing by counsel and investigators of the FCAA;

(g) that the chair had refused to allow the appellants to recall FCAA witnesses; and

(h) that the chair had refused to permit the presentation of financial documents from the appellants' bank without calling an officer of that bank to identify the documents.

[21] The panel concluded that while one of the FCAA witnesses was the brother of a partner in the chair's law firm, neither that witness nor the law partner were parties in the proceedings before the panel. Further, when the witness had testified, the chair did not know who the witness was or that he was a sibling of one of his law partners.

[22] The panel found as a fact that there was no active litigation file against Cryptguard involving the chair's law firm.

[23] The panel concluded that while the chair's law firm had drafted an investment contract for one investor, the terms of that contract were not in question and the contract itself was "immaterial and irrelevant to the allegations" in issue.

[24] The panel found that on August 17, 2011, Ms. Pastuch's doctor had written to the panel to advise there should be "no communication with Pastuch because of unspecified medical reasons" and stated that "no personnel from the Commission could contact Pastuch for any meetings or hearings". In accordance with those instructions, the chair wrote Ms. Pastuch's doctor requesting additional information from him. The chair reminded the doctor at that time that he would require permission from Ms. Pastuch before disclosing any medical information to

the panel. In the circumstances, the panel concluded that portion of Ms. Pastuch's application was unfounded.

[25] The panel had advised Ms. Pastuch and the appellants' lay representative, Mr. Pederson, that it would be relying upon them to flag any sensitive medical issues that might arise during the hearing and that they believed should be kept out of the public realm. Ms. Pastuch and Mr. Pederson, however, absented themselves for the bulk of the hearing. The panel stated there were times when it "went *in camera* to question counsel about the relevance of the personal information that was being presented. During such *in camera* meetings, counsel was required to justify the need for certain evidence and was instructed on the scope of medical information considered relevant and/or private".

[26] The panel also set out the basis for its belief that Ms. Pastuch had brought applications to delay or avoid the merits hearing. They referred to the "inordinate amount of motions, requests and submissions" and the fact that on occasion the information or statements submitted by Ms. Pastuch were inconsistent with other information provided or were factually wrong.

[27] The panel was unable to locate any witness list wherein the appellants proposed to call 30 witnesses. The list submitted by the appellants named 17 witnesses, many of whom had already testified for the FCAA. The appellants were not allowed to recall those witnesses as the appellants had decided not to attend the hearing or cross-examine them. Ms. Pastuch had indicated many of the subpoenas requested were not to compel a witness's appearance for the purpose of testifying but rather to obtain documentation. The panel viewed that as an improper use of the subpoenas.

[28] Finally, the panel dealt with the appellants' ongoing allegation of incomplete disclosure and the requirement that a bank official attend to introduce bank documents into evidence. The panel noted Ms. Pastuch had signing authority on the relevant bank accounts yet she had not asked for copies of the bank statements. A subpoena was in fact issued for the bank executive but there was no evidence it was served and the bank executive did not testify.

[29] As a result of its findings, the panel dismissed the recusal application.

C. The July 23, 2014, *Merits Decision*

[30] The panel identified "balance of probabilities" as the standard of proof to be applied in rendering its decision.

[31] The panel determined that all of the corporate appellants had been directed and controlled by Ms. Pastuch. It found the material supplied by the appellants "primarily through written submission, failed to focus on the key elements of the allegations against them … [t]oo often it contained general statements or a singular example, while failing to address the large number of detailed particulars that supported the allegations against them".

[32] The panel went on to conclude at paragraph 22 of its decision that:

> 22. … In order for the Panel to dismiss the large volume of evidence that was presented in an effort to prove the allegations, it would have to conclude that the investigators were both incompetent and unethical, and that the majority of the witnesses were lying to the Panel during their testimony. …

[33] Based on the evidence, including that of Mr. Pederson and Ms. Pastuch, the panel held that the appellants had traded in securities and that they had done so without being registered under the *Securities Act* in contravention of s. 27(2). Further, the panel found the appellants had not filed prospectuses as required by s. 58 of the *Securities Act*. By way of explanation, Ms. Pastuch had testified that she relied on advice from legal and financial advisors, which proved to be incorrect. The panel viewed that testimony as an admission that s. 58 had been breached.

[34] The panel then found the appellants had breached s. 44.1 of the *Securities Act* by engaging in unfair trading practices. Those practices included pressuring investors to make initial purchases quickly and to increase their investments; advising investors not to ask too many questions or they would be removed as investors and subjected to legal action or police investigation; and by falsely advising investors that their funds were "guaranteed" and that a trust fund had been established to cover initial investments. The panel described those tactics as "overly aggressive threats combined with misinformation whenever someone questioned the authenticity of the investment" (*Merits Decision* at para 39).

[35] The panel found the appellants had also breached s. 55.1 of the *Securities Act* in that Ms. Pastuch had made misleading and untrue statements that had influenced both potential and existing investors and had lied to them about material facts to influence their perception of the value and security of their investment. As such, the hearing panel concluded Ms. Pastuch had acted in a manner that was deceitful and dishonest and that she had been fraudulent. In effect, the panel found the appellants had sought and accepted people's investment funds under fraudulent and false pretences and used those funds for personal purposes.

[36] The panel then turned to the question of whether the appellants had breached s. 135.7 of the *Securities Act*. The panel found Ms. Pastuch had initially failed to provide a full list of investors when requested to do so by FCAA staff and that she had feigned confusion over what she was being asked to provide. The panel also found that it took about a year for Ms. Pastuch to attend a meeting requested by FCAA investigators and for which she had been subpoenaed. The panel further found there had been obvious interference with the investigation as a result of excessive delays in meeting with the investigators and Ms. Pastuch's reluctance to provide complete documentation on the investors. Finally, the panel found Ms. Pastuch had contacted investors about the ongoing investigation and directed them to sign a document refusing to cooperate with the investigators. Based on those findings, the hearing panel convicted the appellants of breaching s. 135.7 of the *Securities Act*.

D. December 18, 2014, *Sanctions Decision*

[37] Before rendering its *Sanctions Decision*, the panel requested and received further submissions from the appellants and the FCAA.

[38] The FCAA had requested the panel apply the provisions of s. 135.6(4) of the *Securities Act* as amended by *The Securities Amendment Act, 2012*, SS 2012, c 32, s 21, which removed the maximum limit of $100,000 on financial compensation that can be ordered paid to persons affected by contraventions or non-compliance with the *Securities Act*. The FCAA also requested costs of $71,178.10.

[39] The panel was unwilling to apply s. 135.6(4) as amended as to do so would amount to a retroactive application of that section as it had not been in existence when the appellants were served with the notice of hearing.

[40] The panel went on to state:

> The Hearing Panel continues to be mindful of the fact that Alena Pastuch has accepted no responsibility for her actions. She continues to blame legal and financial advisors, the FCAA, the investigation staff, the Hearing Panel, and certain investors, among others. At no time did she express remorse for her actions and the impact that her actions had on those who invested in her business activities. She consistently and persistently initiated steps and proceedings that can only be described as a deliberate abuse of process. On that basis, there are no mitigating factors for the Panel to consider in assessing the appropriate sanctions in this case. These factors influenced the Panel's conclusions in determining the appropriate sanctions as set out below.

[41] The panel then imposed the following sanctions:

(a) that the appellants, individually and collectively, cease trading in any securities or exchange contracts pursuant to s. 134(1)(d) of the *Securities Act*;

(b) that the appellants, individually and collectively, cease acquiring securities or exchange contracts pursuant to s. 134(1)(d.l) of the *Securities Act*;

(c) that the appellants, individually and collectively, cease giving advice pursuant to s. 134(l)(e) of the *Securities Act*;

(d) that pursuant to s. 134(1)(h) of the *Securities Act*, Ms. Pastuch:

(i) resign her position as a director or officer of an issuer, registrant or investment fund manager;

(iv) be prohibited from becoming or acting as a director or officer of an issuer, registrant or investment fund manager; and

(v) not be employed by an issuer, registrant or investment fund manager;

(e) that Ms. Pastuch be prohibited from becoming or acting as a registrant, an investment fund manager or a promoter pursuant to s. 134(1)(h.l) of the *Securities Act*;

(f) that the appellants pay an administrative penalty of $100,000 pursuant to s. 135.1 of the *Securities Act*;

(g) that the appellants pay financial compensation of up to $100,000 to each person who, or company that, has suffered a financial loss as a result of the appellants' contravention of and failure to comply with Saskatchewan securities laws pursuant to s. 135.6 of the *Securities Act*; and

(h) that the appellants pay costs of $46,638 with respect to the hearing pursuant to s. 161 of the *Securities Act*.

[42] The panel indicated the hearing costs assessed against the appellants were "nominal" and significantly less than the actual costs incurred. The panel made the costs order it did because it did not wish "to have hearing costs negatively impact the potential for those persons who suffered a financial loss to receive the compensation to which they are entitled" pursuant to its decision.

IV. ISSUES

[43] Section 11(1) of the *Securities Act* grants a right of appeal to this Court on "matters of law only". Some of the appellants' grounds of appeal, namely, grounds (d) and (f) of their amended notice of appeal with respect to the *Merits Decision* and the costs portion of their sanctions appeal raise matters that do not constitute questions of law. Having said that, insofar as the appellants argue those alleged factual errors demonstrate a reasonable apprehension of bias or procedural unfairness, they will be addressed by this Court.

[44] The appellants initiated two appeals – one pertaining to the *Merits Decision* and one pertaining to the *Sanctions Decision*. There was a significant overlap in the grounds for those appeals. Those grounds raise four distinct areas of concern. I would thus frame the issues for determination by this Court as follows:

(a) whether the appellants were denied procedural fairness (grounds A, E, G, H, J, L and N of the merits appeal and grounds B, D and E of the sanctions appeal);

(b) whether the hearing panel applied the proper standard of proof in arriving at its decision (ground M of the merits appeal);

(c) whether the appellants demonstrated bias or a reasonable apprehension of bias on the part of the chair and panel (grounds B, C, F, I, J and L of the merits appeal and A and B of the sanctions appeal); and

(d) whether there was witness tampering (ground K of the merits appeal).

V. STANDARD OF REVIEW

[45] Where an appellate court is considering allegations of procedural fairness and natural justice, the standard of review to be applied is one of correctness. As Binnie J., writing for the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339, stated:

> [43] Judicial intervention is also authorized where a federal board, commission or other tribunal
>
> > *(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*
>
> **No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review.** Relief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice (*Pal*, at para. 9). …
>
> (Emphasis added)

See also *Phillips Legal Professional Corp v Vo*, 2017 SKCA 58, [2017] 12 WWR 779.

[46] Claims of bias and reasonable apprehension of bias are facets of procedural fairness. They, too, must be considered with no deference to the tribunal or agency that made the decision under appeal.

VI. PRELIMINARY MATTER

[47] The appellants filed two applications for leave to adduce fresh evidence on the hearing of their appeals. Those applications overlap. In effect, the appellants sought leave to adduce the following documents:

(a) specific records the FCAA had been ordered to produce by Whitmore J.A. of this Court on September 14, 2017;

(b) a report from the Professional Conduct Committee of the Chartered Professional Accountants of Saskatchewan regarding the appellants' former accountant, Mr. Garrett;

(c) Ms. Novak's oath or declaration of office dated January 11, 2002;

(d) a series of emails between Ms. Pastuch and the Financial Planning Standards Council during the period January 8 to October 2, 2015, advising that Ms. Novak had been a CFP professional from October 1, 1996, to March 31, 2012, but was no longer certified;

(e) a calendar regarding FCAA boardroom availability for the period December 12, 2011, to January 11, 2013;

(f) records of contracted services all dated March 22, 2010, between Cryptguard and nine individuals or companies; and

(g) a series of emails between Ms. Pastuch and the appellants' former accountant, Mr. Garrett, dated March 2 to 11, 2009, regarding the scope of work to be done by Mr. Garrett for the appellants.

[48] The appellants and counsel for the FCAA argued for and against the admission of this evidence based on the test set out by the Supreme Court of Canada in *R v Palmer*, [1980] 1 SCR 759 at 775. In my view, however, as a general rule, appeals of administrative decisions should be restricted to the evidentiary record that was before the administrative decision-maker when it rendered its decision. Key to the application of that rule is what constitutes the "record" for

judicial review purposes. In this case, the Legislature in s. 9 of the *Securities Act* saw fit to define the record of a hearing panel acting under the auspices of the *Securities Act*. The relevant portions of that section read as follows:

> 9(8) All oral evidence received shall be taken down in writing or recorded by electronic means.
>
> (9) All the evidence taken down in writing or recorded by electronic means and all documentary evidence and things received in evidence at a hearing or review forms the record of the proceeding.

[49] The appellants' application to adduce fresh evidence raises the question of when the hearing panel's record should be "supplemented". That the Legislature envisioned the admission of fresh evidence on appeal is evident from s. 11 of the *Securities Act*, which provides for a right of appeal to this Court:

> 11(3) On an appeal pursuant to this section, the Court of Appeal **may hear evidence** and argument with respect to the matter of appeal.
>
> (Emphasis added)

[50] The question is when such evidence should be allowed.

[51] In *Saskatchewan (Workers' Compensation Board) v Gjerde*, 2016 SKCA 30, [2016] 4 WWR 423 [*Gjerde*], this Court had an opportunity to consider when the record of an administrative tribunal should be supplemented. As a general rule, judicial review of an administrative tribunal's decision should be restricted to the evidentiary record before the tribunal when the decision was made. Having said that, as this Court noted at paragraph 41 of *Gjerde*, given the scope of administrative decision-making, which may give rise to judicial review, there can be no "one size fits all" approach to that question. As stated in *Gjerde*:

> [44] … [T]he appropriate approach to when the "record" should be supplemented on judicial review was set out by Stratas J.A. of the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19 and 20, 428 NR 297. After acknowledging the general rule that judicial review should be restricted to the evidentiary record that was before the Board when it made its decision, Stratas J.A. went on to recognize there will be exceptions to that general rule, including evidence (i) that provides general background (as opposed to addressing the merits) in circumstances where that information might assist in understanding the issues for judicial review, (ii) to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record such as fraud, bribery, or bias, and (iii) to highlight the complete absence of evidence before the administrative decision maker when making a particular finding. (See also *Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 29 OR (2d) 513 (CA); *Mr. Shredding Waste Management v New Brunswick (Minister of Environment and Local*

> *Government)*, 2004 NBCA 69 at para 64, 274 NBR (2d) 340; *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 20, 466 NR 44.) To these I would add the exception highlighted by *Hartwig* and *SELI* where, in appropriate circumstances, evidence may be received by a reviewing court to elucidate the record upon which the administrative body's reasons were based.

This Court's decision in *Hartwig v Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 DLR (4th) 268, is also instructive.

[52] The exceptions to the general rule as described by Stratas J.A. in *Association of University and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19 and 20, 428 NR 297, and this Court in *Gjerde* form a non-exhaustive list of when fresh evidence will be allowed on appeal of an administrative decision.

[53] With these principles in mind, I turn to consider the evidence now sought to be adduced by the appellants.

[54] I begin by noting that the fresh evidence, for the most part, does not relate to the appellants' allegations of bias or procedural fairness but rather is directed at the substance of the hearing panel's merits and sanctions decisions.

A. The Specific Records

[55] The appellants contend the FCAA failed to comply with Whitmore J.A.'s September 14, 2017, order for production of certain documents to the appellants. The FCAA attests it complied with that order. This issue is not properly the subject of a fresh evidence application. Rather, it is an issue relating to disclosure and, accordingly, as the FCAA's failure to provide full disclosure is one of the appellants' grounds of appeal, it will be dealt with under that heading in the appeal proper.

B. Report of the Professional Conduct Committee regarding Mr. Garrett

[56] The appellants seek to adduce as evidence a report by the accounting profession's Professional Conduct Committee to its Discipline Committee. The report was rendered following the investigation of a complaint laid against Mr. Garrett, the appellants' former accountant. The

investigation was conducted pursuant to *The Accounting Profession Act*, SS 2014, c A-3.1. The report is dated March 14, 2016, more than 20 months **after** the *Merits Decision* was rendered.

[57] The report was made after an investigation into allegations of discreditable conduct by Mr. Garrett. That alleged conduct included in part that Mr. Garrett had failed to exercise due care in his engagement with the appellants by failing to prepare or obtain and retain a written agreement as to the nature and scope of his engagement, that he did not explicitly limit the nature and scope of what he understood he was engaged to do and that he did not provide clarification of the separation of duties between himself, the appellants and the appellants' lawyers. Some of the allegations relate to whether Mr. Garrett was engaged to value the appellants' business.

[58] The Professional Conduct Committee recommended a hearing be held to determine whether the allegations were well founded.

[59] This evidence does not relate to the questions of law raised by this appeal, nor does it assist the Court in understanding the issues before it. It does not elucidate the record, rather it constitutes new evidence tendered to support the appellants' position that Mr. Garrett was the person who had valued the appellants' business. Whether Mr. Garrett valued the business is a question of fact not law. Further, the report merely identifies allegations. There is nothing to suggest those allegations were ever proven. Allegations do not establish that the appellants relied on Mr. Garrett to do a business valuation. Mr. Garrett himself testified and the hearing panel accepted his evidence that he did not prepare such a valuation. Further, the value of the business was only one of several misleading or fraudulent statements attributed to the appellants. The panel found that Ms. Pastuch had lied to investors about the existence of a trust fund; that her statements to investors to the effect their investments were "guaranteed" was also untrue; as was the assertion that "three of us" had injected over a million dollars into the business. Thus, even if the fresh evidence established what the appellants say it does, namely, that it was their accountant, Mr. Garrett, who valued the business at twenty million dollars, the panel's findings of fraud would not be impugned as that was only one of a number of lies the hearing panel found Ms. Pastuch had told to investors to induce them to invest.

C. Ms. Novak's Oath or Declaration of Office

[60] The appellants wish to have this document entered as evidence to elucidate how Ms. Novak, in the course of the FCAA investigation, breached her oath of office. However, the appellants have failed to establish this document meets the criteria for admission.

D. Emails between Alana Pastuch and the Financial Planning Standards Council regarding Ms. Novak's CFP Certification

[61] This evidence consists of a number of emails exchanged between Ms. Pastuch and the Financial Planning Standards Council regarding whether Ms. Novak was a CFP when she testified before the panel. That evidence goes to Ms. Novak's credibility but, in my view, it does not qualify for admission as fresh evidence in this Court. Ms. Novak was only one of many witnesses who testified at the hearing. The crucial part of her evidence that was referred to by the panel in its decision was verified by independent evidence. Even without her testimony, there was sufficient evidence to convict the appellants on all charges. Again, the appellants have not established any basis for departing from the general rule that judicial review should be restricted to the evidentiary record before the hearing panel.

E. Calendar regarding FCAA Boardroom Availability – December 12, 2011, to January 11, 2013

[62] This evidence relates to the appellants' contention that the costs awarded against them in the *Sanctions Decision* were unreasonable because the disbursement for rented facilities to host the hearing was unnecessary as the FCAA's boardroom could have been used. As indicated earlier in these reasons, the hearing panel's assessment of that disbursement does not raise a question of law. Thus, the evidence is irrelevant to the matters before this Court.

F. Records of Contracted Services

[63] The appellants wish to adduce records of contracted services to show they had expenses that were not taken into account by the FCAA investigators. There is no indication, however, who prepared the records, or why or when they were created, which raises concerns as to their admissibility. The records do not provide general background that would enable this Court to

understand the issues before it nor do they raise procedural defects, highlight a lack of evidence with respect to any finding by the panel or elucidate the record. In short, the appellants have failed to establish any reason for supplementing the record with these documents.

G. Emails between Ms. Pastuch and Mr. Garrett

[64] The emails being tendered consist of a chain of five communications between Mr. Garrett and Ms. Pastuch between March 2 and 11, 2009. In the email sent March 9, 2009, Ms. Pastuch wrote:

> … You are conducting our business valuation and our documents to raise funds. If we are not on the same page, as to what you are doing, please let me know immediately. …

[65] And then later:

> Bottom line, without losing the info already in there (it should all be contained in that document still), how do we make it a more easy read? without losing any info? and then the documents you are working on are our business valuation and our documents we provide to our investors to raise funds. …

[66] Mr. Garrett's response does not mention the business valuation.

[67] Ms. Pastuch then emails Mr. Garrett again on March 11, 2009. In that email she asks:

> When do you think you will have the business valuation that we hired you to conduct, ready for us, to review by?

[68] In his reply that same day, Mr. Garrett makes no reference to the business valuation.

[69] In her application to adduce fresh evidence, Ms. Pastuch does not indicate, either in her affidavit or the memorandum filed in support thereof, the purpose this email evidence would serve. In my view, the evidence has two potential uses:

(a) it supports the appellants' position that Mr. Garrett valued the business; and

(b) it supports the appellants' position that the FCAA did not provide full disclosure.

[70] The email chain reinforces the appellants' contention that Mr. Garrett was retained to provide a valuation of the business. However, whether Mr. Garrett actually did that valuation and, if so the value he attributed to the business, are separate and distinct issues. The panel found as a fact that Mr. Garrett did not value the business. Appeals to this Court are limited to

questions of law. Further, the issue of the business valuation relates to the charges against the appellants pertaining to both unfair practices and fraud. Even if Mr. Garrett did the business valuation as contended by the appellants, that would not upset the panel's decision. This is so because there was significant other evidence before the hearing panel that supported a conviction on those charges such as Ms. Pastuch's pressuring investors and making false representations that the investments were guaranteed and that a trust fund had been created to protect initial investments.

[71] The second possible use for this email evidence relates to the appellants' continuing assertion that the FCAA did not provide full disclosure. There is evidence that Mr. Garrett provided to the FCAA all of his emails pertaining to the appellants. Mr. Garrett testified to that effect at T10 of the hearing transcript. The appellants take the position they never received those emails as part of the FCAA's disclosure.

[72] The emails sought to be adduced were in existence at the time of the hearing. Ms. Pastuch attests she did not have possession of those emails until after the *Merits Decision* was handed down. She does not, however, explain why that was so when she authored three of those emails and was the recipient of the others. While the evidence is relevant to the issue of whether the FCAA made full disclosure and thus to the question of procedural fairness, as my later reasons indicate, those emails would have had no effect on the ultimate result. As such, the evidence will not be admitted by this Court.

H. Documents Not Before the Panel

[73] The FCAA raises the fact that the appeal book filed by the appellants contains numerous documents that were not part of the hearing panel's record.

[74] The documents objected to were identified on the last page of the FCAA's memorandum of law relating to the appellants' application to adduce fresh evidence. For clarification, a list of the documents is set out in Appendix B to this judgment. As there was no application to adduce most of those documents as fresh evidence, and as the appellants did not indicate they opposed the FCAA's position with respect to those documents, this Court has disregarded them for the purposes of this appeal.

VII. LEGISLATION

[75] The relevant portions of the *Securities Act*, which the appellants were alleged to have breached, are as follows:

> **27**(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;
>
> (b) act as an adviser unless the person or company:
>
> (i) is registered as an adviser; or
>
> (ii) is registered as a representative of a registered adviser and is acting on behalf of the adviser; or
>
> (c) act as an investment fund manager unless the person or company is registered as an investment fund manager.
>
> …
>
> **44.1**(1) In this section, **"unfair practice"** includes:
>
> (a) putting unreasonable pressure on a person to purchase, hold, or sell a security or trade or hold a derivative;
>
> (b) taking advantage of a person's:
>
> (i) inability or incapacity to reasonably protect their own interests because of physical or mental infirmity, ignorance, illiteracy or age; or
>
> (ii) inability to understand the character, nature or the language of any matter relating to a decision to purchase, hold or sell a security or trade or hold a derivative; and
>
> (c) imposing terms, conditions, restrictions or limitations with respect to transactions that are harsh or oppressive.
>
> (2) No person or company shall engage in an unfair practice with the intention of advising or effecting the purchase or sale of a security or trade of a derivative.
>
> …
>
> **55.11**(1) No person or company shall make a statement if that person or company knows or reasonably ought to know that:
>
> (a) the statement either:
>
> (i) is misleading or untrue in a material respect and at the time and in the light of the circumstances under which it is made; or
>
> (ii) does not state a fact required to be stated or that is necessary to make the statement not misleading in a material respect and at the time and in the light of the circumstances under which it is made; and

> (b) the statement would reasonably be expected to have a significant effect on the market price or value of a security or derivative.
>
> …
>
> **58**(1) No person or company shall trade in a security on the person's or the company's own account or on behalf of any other person or company where the trade would be a distribution of the security unless:
>
> (a) a preliminary prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it; and
>
> (b) a prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it.
>
> …
>
> **135.7**(1) No person or company shall, or shall attempt to, destroy, conceal or withhold any information, property or thing reasonably required for a hearing, review or investigation pursuant to this Act.
>
> (2) No person or company shall hinder or interfere with a member, employee, appointee or agent of the Commission in the performance of his or her powers, functions and duties pursuant to this Act.
>
> (3) A person or company contravenes subsection (1) if the person or company knows or ought reasonably to know that a hearing, review or investigation is to be conducted and takes any action mentioned in subsection (1) before the hearing, review or investigation.

VIII. ANALYSIS

A. Procedural Fairness

[76] Administrative decision-makers have a duty of procedural fairness and natural justice. This was recognized by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, where Bastarache and LeBel JJ., writing for the majority, stated:

> [79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. …

[77] Given the vast number of administrative decision-makers that exist and the many different ways their decisions are made, what constitutes procedural fairness will vary depending on the nature of the administrative decision-maker and the context in which the decision is made. This was discussed by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. Justice L'Heureux-Dubé, writing for the majority in *Baker*, set out a non-exhaustive list of factors to be considered in determining the degree of procedural fairness required of an administrative decision-maker:

(a) the nature of the decision being made and the process followed in making it (the closer an administrative process resembles a judicial process the higher the duty of procedural fairness) (at para 23);

(b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates (at para 24);

(c) the importance of the decision to the persons affected (at para 25);

(d) the legitimate expectations of the person challenging the decision (at para 26); and

(e) the choices of procedure made by the administrative decision-maker, particularly where the enabling statute gives the decision-maker the ability to choose the process or when the agency has an expertise in determining what procedures are appropriate in the circumstance (at para 27).

[78] In my view, all the *Baker* factors weigh in favour of a high degree of procedural fairness in this case. The process involved closely resembles a judicial process. The *Securities Act* gives hearing panels many of the same rights a court has when hearing a civil action including the right to subpoena witnesses and force their attendance through contempt proceedings (s. 9(4) and (5) of the *Securities Act*). The decision in this case had a significant financial impact on the appellants and affected Ms. Pastuch's ability to trade securities. The *Securities Act* generally sets out how hearings are to be conducted but a panel has the ability to choose how it receives evidence and runs the hearing. The general expectation of persons facing allegations of breaching the *Securities Act* or its *Regulations* is one of procedural fairness.

[79] The appellants contend the merits and sanctions hearings were not "procedurally fair". Their complaints may be summarized as follows:

(a) that the FCAA did not provide full disclosure to the appellants;

(b) that the panel imposed "onerous conditions" on the appellants' request to present financial information yet similar conditions were not imposed on the FCAA;

(c) that the appellants were unable to introduce testimony via video conference while the FCAA was allowed to do so;

(d) that the panel set an initial hearing date knowing no disclosure had been made;

(e) that the panel canvassed only the FCAA with respect to witness availability when setting the initial hearing date;

(f) that the panel chair warned the appellants' agent not to make editorial comments about the investigators' motives but provided no similar warning to counsel for the FCAA;

(g) that the panel unfairly "censored" the release of the appellants' testimony and evidence while permitting the release of all of the FCAA's testimony and evidence;

(h) that the panel unfairly refused to issue subpoenas requested by the appellants;

(i) that the panel made false, fraudulent and misleading statements about Ms. Pastuch with respect to her contact with S.B., a partner in the chair's law firm, and with respect to Ms. Pastuch's medical conditions;

(j) that the panel failed to consider the appellants' evidence and submissions;

(k) that the panel disregarded fresh evidence adduced by them;

(l) that the panel curtailed Ms. Pastuch's testimony thus interfering with her right to make full answer and defence and her right to a fair trial;

(m) that the panel denied the appellants the opportunity to cross-examine the FCAA's witnesses; and

(n) that the panel lost jurisdiction when it breached Ms. Pastuch's personal privacy.

[80] I will deal with each of these complaints in turn.

a. Disclosure

[81] The appellants' first procedural argument relates to disclosure. Specifically, the appellants assert they never received full disclosure from the FCAA and thus they were unable to make full answer and defence to the charges against them. In particular, the appellants contend they did not receive the following:

(a) all of the wire transfers from the appellants' bank for the period March 2009 to October 2010;

(b) all of the emails in the possession of the appellants' accountant, Mr. Garrett;

(c) contracts with individuals whose services were retained by one or more of the appellants (these contracts were allegedly in a black binder compiled by Ms. Pastuch and copies of the contents of that binder were allegedly turned over by Ms. Pastuch's legal counsel to investigators for the FCAA but the contracts are now missing from the binder);

(d) documents confirming a payment of $11,985 on April 8, 2009, to G.P., an investor;

(e) documents pertaining to the appellants' bank transactions for the period April 1, 2009, to and including April 29, 2009; and

(f) summary notes allegedly referred to by Ms. Novak during her testimony, a copy of which was purportedly ordered to be produced to the appellants by the hearing panel.

[82] The appellants argue the FCAA's failure to disclose offends the principles of natural justice, is against the FCAA's policies and is a breach of the appellants' s. 7 *Charter* right to life, liberty and security of the person and their s. 11(d) *Charter* right to a fair and public hearing by an independent and impartial tribunal.

[83] The FCAA, on the other hand, maintains they have provided the appellants with full disclosure of everything in their possession.

i. Background

[84] From the inception of the charges against them, the appellants have repeatedly complained about disclosure. Those complaints began before the first hearing date was set.

[85] On October 25, 2010, the panel ordered the hearing to commence on January 10, 2011, and that "[f]ull disclosure shall be provided to [the appellants' then legal counsel] as soon as practical, so that preparation for the hearing may commence".

[86] Disclosure was provided by the FCAA on December 16, 2010, subject to certain specified terms and conditions. Because the appellants did not have an opportunity to review that disclosure, the hearing was adjourned. In addition, the appellants objected to the restrictions imposed by the FCAA on that disclosure, namely, that it would only be used by the appellants, their witnesses and advisors for hearing purposes. Ms. Pastuch did not agree with that restriction and in April 2011, the appellants applied to vary it and for an order for further disclosure. The panel refused to vary the terms of disclosure and determined that full disclosure had been made based on affidavit evidence filed by the FCAA investigators.

[87] On June 20, 2011, before the appellants received the above decision, the appellants filed a further motion requesting a stay of proceedings. One of the grounds for that motion was a lack of full disclosure.

[88] On May 18, 2012, the appellants filed yet another application for full and complete disclosure. On May 28, 2012, the panel issued a decision letter denying that request and indicating that the panel would deal with disclosure issues as they arose during the hearing.

[89] On September 5, 2012, the appellants brought an application to dismiss the proceedings, one of the grounds of which was that full disclosure had been denied.

[90] On December 4, 2012, after hearing *viva voce* evidence with respect to disclosure, the panel rendered a written decision indicating there was "insufficient evidence" upon which to support the appellants' allegations with respect to disclosure and "spoliation" of evidence. The hearing panel, however, indicated it would "remain alert" to those allegations throughout the formal hearing.

[91] The appellants then applied to the Court of Queen's Bench for a stay of proceedings but that application was dismissed.

[92] On December 5, 2012, at the commencement of the hearing proper, the appellants requested an adjournment or stay of proceedings because full disclosure had not been made. When that request was denied, the appellants decided not to attend the hearing, which then proceeded in their absence. As a result of the appellants' decision, they did not cross-examine any of the FCAA witnesses about disclosure.

ii. The Law

[93] Since the Supreme Court of Canada's decision in *R v Stinchcombe*, [1991] 3 SCR 326 (QL) [*Stinchcombe*], it is well settled that in criminal proceedings involving indictable offences the Crown has a duty to disclose to an accused all information in its possession that is reasonably capable of affecting the accused's ability to make full answer and defence. That includes both inculpatory and exculpatory evidence. This is so whether the Crown intends to use that evidence at trial or not (*Stinchcombe* at paras 19 and 29). An accused person's right to make full answer and defence is a fundamental principle of justice (*Stinchcombe* at para 17; *R v La*, [1997] 2 SCR 680 at para 20).

[94] Justice Sopinka, writing for a unanimous court in *Stinchcombe*, indicated disclosure includes the "fruits of the investigation":

> [12] I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. …

[95] *Stinchcombe* sets out a number of principles relating to disclosure including:

(a) The Crown's obligation to disclose is not absolute. Disclosure may be limited by considerations such as relevance, privilege and security of informants. Whether there is a valid reason for not disclosing evidence in any given case is subject to judicial review (*Stinchcombe* at paras 20 and 21).

(b) In determining whether a failure to disclose is justified, trial judges should be guided by the general principle that information ought not to be withheld if there

is a reasonable possibility failure to disclose will impair the right of an accused to make full answer and defence. This is, of course, subject to considerations that would support denying disclosure (*Stinchcombe* at para 22).

(c) The onus of establishing full disclosure or that a failure to disclose is justified rests with the Crown (*Stinchcombe* at para 21).

(d) Disclosure issues should be brought to the attention of the trial judge at the earliest opportunity. Failure to do so is a factor to be considered on appeal in determining whether a new trial should be ordered (*Stinchcombe* at para 24).

(e) Disclosure should occur as soon as practicable after charges are laid (*Stinchcombe* at para 28).

(f) The obligation to disclose is an ongoing one (*Stinchcombe* at para 29).

(g) Witness statements should be disclosed even if the individual will not be called by the Crown to testify (*Stinchcombe* at para 33).

[96] In *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809, the Supreme Court of Canada held that the disclosure principles set out in *Stinchcombe* do not apply to purely administrative decisions (at para 91). Purely administrative decisions, of course, do not involve a hearing process.

[97] In *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326, the Supreme Court of Canada found the determination of whether a security certificate issued under the *Immigration and Refugee Protection Act*, SC 2001, c 27, is reasonable is not a purely administrative measure and thus disclosure was required. The Court stated:

> [59] It is not enough to say that there is a duty to disclose. We must determine exactly how that duty is to be discharged in the context of the procedures relating to the issuance of a security certificate and the review of its reasonableness, and to the detention review.

The Court applied the *Stinchcombe* test of relevance.

[98] With modifications as necessary, *Stinchcombe* has been applied to disclosure in the administrative decision-making context where disciplinary proceedings and human rights

violations have been involved (*Ontario (Human Rights Commission) v Ontario (Board of Inquiry into Northwestern General Hospital)* (1994), 115 DLR (4th) 279 (Ont Ct J (Gen Div)) at paras 22–24; *Hammami v College of Physicians and Surgeons (British Columbia)*, [1997] 9 WWR 301 (BCSC); *Howe v Institute of Chartered Accountants of Ontario* (1994), 118 DLR (4th) 129 (Ont CA)).

[99] In *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at paras 39–40, [2002] 4 SCR 3 [*Ruby*], the Supreme Court of Canada stressed the importance of adopting a contextual approach in assessing the rules of natural justice and the degree of procedural fairness to which an individual is entitled before an administrative tribunal. As the Court said in *Ruby*, procedural fairness in the administrative context may include disclosure, depending on the circumstances.

[100] Finally, in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, the Court *per curiam* stated:

> [115] What is required by the duty of fairness — and therefore the principles of fundamental justice — is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker*, *supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J. **More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker*, *supra*, at paras. 23-27.** This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker*, *supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.
>
> (Emphasis added)

[101] Based on the above jurisprudence, I conclude that the degree of disclosure required in administrative matters will depend on the context in which the issue arises. If the issue of disclosure arises in a proceeding that closely resembles judicial proceedings and the result of the hearing could significantly affect an individual's livelihood or result in significant consequences, the degree of disclosure as an element of procedural fairness will be high. In such circumstances, the principles enunciated in *Stinchcombe* may apply with any modification necessary to fit the

proceeding or the statute involved. At the very least, the *Stinchcombe* principles provide guidance.

[102] In *Deloitte & Touche LLP v Ontario (Securities Commission)*, 2003 SCC 61 at para 16, [2003] 2 SCR 713, the Supreme Court of Canada upheld the Ontario Securities Commission's and the Ontario Court of Appeal's application of the *Stinchcombe* test of what constitutes relevant information for disclosure purposes, namely, any "material that has a reasonable possibility of being relevant to the ability of a defendant to make full answer and defence".

[103] In the case under appeal here, the merits hearing was held to determine whether the appellants had breached provisions of the *Securities Act*. Witnesses were called and documentary evidence was presented. The hearing itself closely resembled a trial. The consequences of the panel's decision were significant for the appellants as it affected their ability to operate under the *Securities Act* and resulted in an order requiring them to pay significant financial compensation to investors. Ms. Pastuch was prohibited from being or acting as a registrant, an investment fund manager or a promoter. In my view, given those circumstances, a high degree of procedural fairness was warranted, including full disclosure.

[104] Moreover, the FCAA has set out disclosure standards for hearings pursuant to the *Securities Act* in a policy statement – Saskatchewan Policy Statement 12-602 [Policy Statement].[1] Section 4.3 of the Policy Statement requires parties to hearings to provide each other with copies of all documents they intend to rely on at least 20 days before the commencement of the hearing. Of particular relevance to this appeal is s. 4.3(2), which requires the FCAA to provide copies of all documents and things in its possession or control to other parties so long as they are relevant to the hearing:

> 4.3(2) In the case of a hearing under section 134 of the Act, **Staff will provide to every other party copies of all other documents and things that are in the possession or control of Staff that are relevant to the hearing.** Staff will provide copies as soon as is reasonably practicable after the Notice of Hearing is sent, and in any case at least 20 days before the commencement of the hearing.
>
> (Emphasis added)

[1] The Policy Statement came into effect in March 2012, after the notice of hearing had been served on the appellants but before the substantive portion of the merits hearing began.

Section 4.3(2) is restricted to hearings under s. 134 of the *Securities Act*. The hearing in issue here was held pursuant to s. 134 and orders were made against the appellants with respect to that section.

[105] In my view, the Policy Statement required full disclosure by the FCAA of all relevant material in its possession whether or not the FCAA intended to use such material at the hearing.

[106] For the purposes of this appeal, it is important to clarify the difference between disclosure and evidence. The obligation to disclose requires the production of all relevant material in a party's possession, whether in hard copy form or electronically, for the examination of another party. This is normally done by providing copies of that material. Just because something is disclosed, however, does not mean it will be used or accepted as evidence at a hearing. Evidence must be admitted by the trier of fact.

iii. Application of the Law in this Case

[107] From a review of the hearing record, it is clear some of the appellants' complaints relating to disclosure are unfounded. The $11,985 payment to G.P. was disclosed. Supplementary appeal book at 3262 indicates at item number 905215:

> G.P. Document #5 – bank record for partial return of investment Apr 08 09 $11,985;

While neither this document nor the emails relating to the payment were entered as evidence at the hearing, they were provided by the FCAA to the appellants.

[108] Similarly, while the flow chart prepared by the FCAA did not include transactions for the period April 1, 2009, to April 29, 2009, Mr. Garrett, the appellants' accountant, provided logs for those periods. The TD Canada Trust easy web account history for 101115379 Saskatchewan Ltd. also covered that period. Those records were disclosed. Whether they were entered as evidence at the hearing is a separate issue.

[109] Some of the appellants' complaints relate to documents that may either have been returned to the person providing them or were never in the FCAA's possession. In either event, those documents could not be disclosed. This would include the TD Bank transfers, Mr. Garrett's emails and the contracts from the black binder.

[110] Ms. Novak testified she requested account histories from the TD Bank, these being bank statements showing transactions. She did not request specific documents verifying those transactions such as deposit slips or wire orders. The appellants' assertion that the FCAA did not disclose to them all of the bank's "wire orders" is thus without factual foundation as there is no evidence the FCAA ever had copies of the wire orders in issue.

[111] With respect to the service contracts, there was evidence those contracts were not in the black binder when it was given to the FCAA. It goes without saying that the FCAA cannot disclose what it does not possess.

[112] Finally, in my view, the record, even if supplemented by the emails between Mr. Garrett and Ms. Pastuch, does not substantiate that the FCAA had possession of those emails or that it failed to disclose them to the appellants.

[113] Mr. Rodonets, when testifying at the disclosure hearing, distinguished between what the FCAA labels as exhibits and disclosure. He stated:

> … Again, we have to go back to what you're -- what we're talking about as exhibits and disclosure. Those are two different things totally. These are items that would have been identified from Frank Garrett that were exhibited, given our exhibit numbers and put in an exhibit ledger and identified as exhibits.
>
> There may be other documents out there attributed to Frank Garrett, emails or other documents that weren't made exhibits, but they would have been disclosed. There is nothing that I'm aware of that we possessed and received from Frank Garrett that was not disclosed that we kept and received. Information that we returned is not in here. We didn't disclose it because, in our opinion, we were returning it to Ms. Pastuch because Mr. Garrett was her agent. So it may not -- there may be something that's attributed to Frank Garrett which is not exhibited, but it would have been disclosed.

[114] An envelope containing documents was returned to Mr. Garrett by the FCAA in April 2011. There was no evidence what documents were in the envelope, which means the emails could have been returned to Mr. Garrett. Further, FCAA exhibit #905412 was an email from Mr. Garrett to Ms. Novak described as "Year 1 Financial Projections" **with attachments**. Some attachments, specifically those contained in exhibit #905412E, were identified as "Other details - not used". Mr. Garrett testified he forwarded to Ms. Novak all his emails (and some financial documents) after his interview by FCAA investigators. This exhibit is the only correspondence in

the record from Mr. Garrett to the FCAA. Unfortunately, there is no evidence what was included in the exhibit.

[115] The biggest hurdle for the appellants to overcome with respect to the disclosure issue, however, is that the panel accepted the evidence of Ms. Novak and Mr. Rodonets that full disclosure had been made. At the disclosure hearing, Ms. Novak and Mr. Rodonets testified but were never asked if the FCAA had possession of the specific items the appellants say were not disclosed. This was so even though the panel chair told Mr. Pederson he needed to ask those witnesses about specific disclosure the appellants asserted was missing. In the absence of such evidence, there is no identifiable error in the panel's decision to accept Ms. Novak's and Mr. Rodonets' assertions that full disclosure had been made.

[116] At the hearing of this appeal, the appellants also complained the FCAA had not complied with the September 14, 2017, disclosure order of Whitmore J.A. The order in issue was made in the context of an appeal management conference and read as follows:

> There will be an order that the FCAA will produce for the appellant:
>
> 1. All correspondence between Frank Garrett and the appellant and/or Dave Bishop and Brian Pederson which is in the possession of the Respondent
> 2. Any documents in the Respondent's possession relating to a $35,000 refund from William Seritello to Alena Pastuch
> 3. Copies of financial receipts and orders from the sale of products from the Appellant's corporate entities in the possession of the Respondent
> 4. Copies of notes and records of Sandy Novak in the Respondent's possession relating to her testimony before the hearing panel
>
> These documents and records will be delivered to the appellant by October 2 2017.
>
> …

[117] The appellants acknowledge that on September 29, 2017, the FCAA provided them with a package of five CDs. They assert, however, that none of the documents ordered to be produced by Whitmore J.A. are on those CDs. On the other hand, the FCAA contends it provided full disclosure as ordered and that it cannot produce what it does not possess. The problem lies with the FCAA's inability to prove a negative. That is, that it does not have possession of the specific documents in issue.

[118] The appellants brought an application for contempt with respect to the FCAA's performance of the order made by Whitmore J.A. in December 2017. A decision with respect to that application was rendered on December 12, 2017. In that decision, Whitmore J.A. determined legal counsel for the FCAA was not in contempt and had not wilfully disobeyed the September 14, 2017, order. He stated:

> [10] In the course of discussions in Court, Mr. Udembga [FCAA's legal counsel] may have said he was in the possession of the disputed documents and that he has seen them. However, I am not satisfied that anything that was said was a deliberate and willful attempt to mislead the Court. In my view, the exchanges between the parties and the Court were part of a process in coming to an order that satisfied the parties and that the parties were able to comply with. The whole of the exchanges were to satisfy the appellants that certain documents be produced and, at the same time, the respondent could only commit to disclose what it had in its possession.
>
> [11] Thus, the order was clearly limited to documents in Mr. Udembga's possession. I am not satisfied at all in the face of Mr. Udembga's submissions that all documents in his possession have not been disclosed.
>
> [12] Further, I am not satisfied beyond a reasonable doubt that any statements made by Mr. Udembga were made with intent to mislead the Court.

The appellants did not appeal that order. Instead they raised the issue before this Court in what amounts to a collateral attack of Whitmore J.A.'s contempt decision. Such an attack is not permissible.

[119] The next issue pertains to the provision of copies of the notes and records used by Ms. Novak in her testimony before the panel. A disclosure issue with respect to those documents arose when Ms. Novak began her testimony before the panel on January 3, 2013. At that point, FCAA legal counsel indicated Ms. Novak would like to refer to a summary she had prepared of what various people had told her [summary notes] as well as a cash flow statement summarizing the banking information.[2] The panel determined that if Ms. Novak was going to refer to that material, it had to be disclosed to the appellants. Legal counsel for the FCAA then indicated he would provide both documents to Ms. Pastuch's lawyer. At that point, Ms. Novak returned her summary notes to the FCAA lawyer indicating they would review whether or not she should rely on them over the lunch hour. The chair indicated that was fine.

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[2] FCAA legal counsel referred to these summaries as "can states".

[120] From a review of the transcript, Ms. Novak did not rely on her summary notes. This was clarified on the record. Moreover, on the morning of January 4, 2013, the FCAA lawyer indicated that Ms. Novak would not be referring to her summary notes and as such it was not necessary to provide copies of them to the appellants. The cash flow statement was referred to by Ms. Novak and it is uncontroverted that it was disclosed to the appellants.

[121] In short, Ms. Novak did not rely on her summary notes when testifying and thus neither the panel nor Whitmore J.A.'s order required their production. Those notes were Ms. Novak's notes made in preparation for the hearing and, accordingly, would not normally qualify for disclosure.

b. Onerous Conditions on Financial Evidence

[122] Ms. Pastuch wanted to present financial information in the possession of a bank representative located in Calgary. The chair told her she could subpoena the bank executive and enter documents in his possession directly through him or through an "authorized signatory". I note Ms. Pastuch was an authorized signatory and could have entered the documents herself. Ms. Pastuch felt this ruling was unfair because the FCAA did not have to follow the same procedure.

[123] Section 12(5)(c) of the *Securities Act* provides that persons appointed to investigate a matter may "compel witnesses to produce documents, records, securities, derivatives and other property". Certified copies of such documents are admissible in evidence pursuant to s. 12(5.1). No similar right is given to any other person.

[124] In my view, the chair's comments simply reflect the legislative provisions and, accordingly, were not unfair.

c. Video Conference

[125] While the appellants complained they were not allowed to call witnesses using video conferencing, a review of the hearing record does not support that contention. In a decision letter dated June 20, 2011, the panel indicated to both the appellants and the FCAA that it would permit witnesses to testify by video conference on certain conditions, namely:

(a) that the parties test the technology to ensure it worked;

(b) that the panel had the right to halt the testimony if the method of communication was not satisfactory;

(c) that the parties must give notice to each other and the commission secretary before June 30, 2011, as to which witnesses would be using video conferencing; and

(d) that the FCAA must provide the appellants with summaries of the expected evidence.

[126] On May 9, 2013, the appellants requested an expert testify by video conference with respect to Ms. Pastuch's medical condition. The evidence was being tendered in support of an adjournment request by Ms. Pastuch. In a decision letter dated May 10, 2013, the panel refused the request because in its view the physician who was to testify had not been treating Ms. Pastuch and therefore his proposed testimony was not relevant to the issue before the panel. This is the only witness the appellants requested to have testify by video conference. The panel's decision did not disclose any procedural unfairness.

d. Setting Initial Hearing Date without Disclosure

e. Canvassing only FCAA with respect to Witness Availability

[127] It is uncontroverted that the panel did set an initial hearing date without disclosure having been made by the FCAA to the appellants and without canvassing the availability of the appellants' witnesses. Rather, the panel consulted only the FCAA with respect to witness availability. Following the setting of that initial hearing date, the appellants applied to adjourn it and the panel granted that adjournment.

[128] Later, the panel apologized for setting the hearing without consultation and ordered disclosure.

[129] In my view, the panel denied procedural fairness by setting the initial hearing date when disclosure had not been made. That error was cured on October 25, 2010, by the panel setting

new dates and ordering that full disclosure be provided by the FCAA "as soon as practical, so that preparation for the hearing may commence". None of the appellants suffered any prejudice as a result of that error.

f. Directive Regarding Editorial Comments

[130] The panel has the power to control its own process. Part of that power includes the right to ensure participants in the hearing process are treated with respect and that the hearing focusses on the issues at hand. Editorial comments in any judicial or quasi-judicial forum are to be discouraged as they add nothing to the process. Rather, they serve to drag out the hearing and often heighten tensions between the parties.

[131] The fact the panel asked Mr. Pederson and not the FCAA prosecutor to refrain from making editorial comments is not evidence of procedural unfairness. The panel gave both sides considerable latitude. The record supports the fact Mr. Pederson editorialized on numerous occasions and the panel was not unfair in asking him to refrain from doing so.

g. Censoring Documents Released to the Media

[132] The appellants submit the panel unfairly "censored" the release of their testimony and evidence while permitting the release of all of the FCAA's testimony and evidence. In support of their position, the appellants refer to emails between a media member and the FCAA Registrar.

[133] The FCAA argues the emails referred to are fresh evidence and should not be accepted by this Court. Alternatively, the FCAA submits that even if the emails are considered by the Court, they do not support the conclusion that the panel acted inappropriately.

[134] The email dated January 27, 2014, is from a member of the media and is directed to the FCAA Registrar. The media member had sought copies of the parties' written arguments, Ms. Pastuch's written testimony-in-chief and an exhibit. On January 29, 2014, the FCAA Registrar responded to the request advising that a copy of the exhibit was available and that the request for a copy of the written arguments and Ms. Pastuch's written testimony-in-chief had been forwarded to the panel. The panel then considered what level of "redacting" was necessary.

The emails in question do not identify who authorized the release of information to the media though they do seem to suggest the decision rested with the panel.

[135] Of importance to the panel's response was the fact Ms. Pastuch had repeatedly raised privacy concerns before the panel. She had also opposed the publishing of any hearing materials online. In the circumstances, the appellants' complaint about the censoring of materials is unwarranted. In my view, the release of the requested information as part of a public process cannot, in this instance, be described as procedural unfairness.

h. Refusal to Issue Subpoenas

[136] The appellants assert the panel refused to issue subpoenas to their witnesses when requested. The appellants submit they had requested 27 subpoenas but that the panel only issued 3 of them.

[137] The record discloses that on December 10, 2012, the appellants brought a motion for 17 subpoenas. The panel responded to this request on December 13, 2012. It stated all but three of the witnesses had testified or would be testifying for the FCAA. As such, only three subpoenas were needed by the appellants. In the circumstances, there is no evidence of an unfair refusal to issue any subpoena.

i. False, Fraudulent and Misleading Statements

[138] The appellants contend the panel erred in finding Ms. Pastuch had attempted to directly contact S.B., one of the chair's law partners, regarding possible privacy and *Criminal Code* breaches by the chair (*Recusal Decision* at para 4). This allegation relates to a finding of fact, which is not subject to review by this Court. Even if the panel had erred in arriving at that conclusion, it would not have affected the outcome of the proceedings as it related to a peripheral matter, which was not essential to a determination of any of the issues before the panel.

[139] The appellants submit the chair intentionally and falsely accused Ms. Pastuch of not completing medical treatment and of forging a medical note. They also contend the chair fabricated a story regarding Ms. Pastuch's medical specialist. They point to the chair's April 3, 2013, letter to Ms. Pastuch in support of their argument.

[140] On January 25, 2013, Ms. Pastuch had been granted an adjournment for medical reasons based on a form completed by her doctor. In the April 3, 2013, letter, the chair reviewed the procedural history of the file regarding adjournments and the panel's request for medical information to justify those adjournments. In the letter, the chair stated that the FCAA's Registrar had contacted Ms. Pastuch's doctor to confirm he had signed the form and that its contents were accurate. The doctor responded by telephone as follows:

> … he advised that you [Ms. Pastuch] could have attended the hearing, and [Ms. Pastuch] had actually disappeared from the program shortly after he [the doctor] provided you with the signed form. …

[141] The chair's letter does not constitute a fabrication. Rather, it is a description of events that had unfolded to that date coupled with a request for medical verification. There is nothing improper in the panel asking for medical evidence verifying Ms. Pastuch's inability to proceed with the hearing. The granting of adjournments is a discretionary matter within the purview of the panel and it is up to the person requesting an adjournment to satisfy the panel that the adjournment is justified. In my view, there is no procedural unfairness in what occurred in this instance nor is there any evidence of bias.

j. Failure to Consider the Appellants' Evidence and Submissions

[142] The appellants contend the panel erred by finding the evidence of the appellants' former accountant, Mr. Garrett, and the evidence of the FCAA investigators – Ms. Stadnek, Ms. Novak and Mr. Rodonets – was credible and in relying on it. It is the appellants' position those witnesses committed perjury and that the FCAA prosecutor aided them to do so.

[143] The appellants contend their former accountant perjured himself when he stated he had not been involved in valuing the appellants' business. They maintain there was evidence he was the main author of the valuation.

[144] The appellants submit Ms. Stadnek perjured herself when she stated she and the appellants' former legal counsel had spoken frequently. They point to invoices from the lawyer that show they spoke only four times in 2008. The appellants also submit Ms. Novak falsely stated she was a certified financial planner and that she falsely presented the amounts paid back to investors by the appellants, leaving out a $12,000 payment to G.P. and an $8,000 payment to

C.K., in the flow chart prepared by her. They further contend Ms. Novak misled the panel with respect to payments made by the appellants to executive and staff and omitted payments for rent and to IT employees in considering the appellants' expenses. Finally, the appellants state Ms. Novak withheld from the panel that one of the investors had admitted to Ms. Novak that she had lied about Ms. Pastuch – a fact that was referenced by Ms. Novak in her investigative report.

[145] Finally, the appellants contend Mr. Rodonets falsely stated that $35,000 had been sent to Ms. Pastuch's personal account when the cash flow statement shows it went to her corporate account.

[146] The appellants complain the panel gave too much weight to this allegedly false evidence, particularly that of the appellants' former accountant.

[147] The panel heard firsthand the testimony of the witnesses in issue. In addition, the panel had before it all of the documentary evidence presented by both the FCAA and the appellants. It was the panel's task to make findings of credibility and to weigh the evidence. The panel could believe all, some or none of a witness's testimony. That the panel did not view the evidence as the appellants wished is not an error of law nor does it amount to procedural unfairness.

k. Disregarding Fresh Evidence

[148] The appellants argue the panel disregarded the fresh evidence they were allowed to file.

[149] A review of the record indicates that on January 13, 2014, Ms. Pastuch applied to submit fresh evidence before the panel. This application was made after final argument had been submitted with respect to the *Merits Decision*, but before the *Merits Decision* was rendered and before submissions were heard with respect to the issue of sanctions.

[150] On January 14, 2014, the panel chair wrote Ms. Pastuch advising her that the panel could not determine whether admitting the fresh evidence would be appropriate without reviewing that evidence. Ms. Pastuch was given an opportunity to submit the evidence for the panel's review. Ms. Pastuch requested additional time to do so and the panel granted an extra day.

[151] On January 20, 2014, Ms. Pastuch presented copies of the fresh evidence to the panel and provided written submissions. The evidence attached to her submissions and filed in this appeal included the affidavit of Mr. Garrett, sworn in response to written questions submitted by Ms. Pastuch on December 23, 2013, as part of a civil suit against Mr. Garrett. She also submitted affidavits by Ms. Novak and Mr. Rodonets with respect to disclosure that had already been filed with the panel.

[152] There is no indication whether the panel accepted the fresh evidence as it did not refer to it in either its *Merits Decision* or its *Sanctions Decision*. It thus appears the panel may have overlooked that evidence. Having said that, in my view, the evidence would not have affected the outcome of the hearing because it was not, when weighed with the other evidence presented, conclusive or potentially conclusive of any issue before the panel.

[153] While the appellants contend the affidavit of Mr. Garrett is evidence that he provided all his emails to the FCAA and that full disclosure of those emails was not made by the FCAA, in my view, that is not a conclusion that can necessarily be drawn from the evidence.

[154] It is useful to reproduce the relevant portions of Mr. Garrett's affidavit here:

> 3. Question: Sandy Novak and Ed Rodonets of the FCAA (formerly SFSC) asked you for copies of several different emails in relation to Pastuch and her companies such as but not limited to emails between you (Garrett) and her former legal counsel, between her and yourself in early 2009 (February through to June). Did you provide them with these emails?
>
>   Response: Yes.
>
> 4. Question: If yes is answered to question number 3, then which emails did you provide and to whom specifically from the FCAA (SFSC) did you forward these emails to:
>
>   Response: All emails were provided to Sandy Novak of SFSC.
>
> …
>
> 6. Question: Have you ever deleted any emails pertaining to Pastuch or her companies? If so, when and why?
>
>   Response: No emails have been deleted.
>
> 7. Question: You were served a summons by the SFSC (FCAA) to turn over all documents, emails, communications, etc in regards to Pastuch and her companies. Did you full and legally obey this summons and turn over everything listed [in] it to the SFSC (FCAA)?

Response: I provided to SFSC all emails and electronic documents in my possession. Pastuch had left a small box of accounting records that was examined by SFSC representatives. To my knowledge, none of the documents were removed from my office by SFSC representatives. Later, at the request of the Plaintiff, the documents were couriered to the law firm of MacPherson, Leslie & Tyerman, to the attention of Michael Tocher.

8. Question: To whom specifically did you turn over these documents to from the SFSC (FCAA). Provide a date, item turned over, to whom and provide any and all copies (emails, etc) that can confirm you did indeed turnover said documents to the FCAA (SFSC) entities:

   Response: All emails and documents were forwarded to SFSC **on approximately March 19, 2010.**

9. Question: If so, please provide a detailed list along with copies of all emails, written communications, documents that you provided to FCAA that were either authored by Pastuch or were pertaining to Pastuch or/her companies.

   Response: All emails and documents provided to SFSC have been included in the documents already disclosed in the Affidavit as to Documents.

10. Question: Did Garrett email or forward emails (pertaining to or authored by Pastuch and her companies to any staff member of the SFSC (now called FCAA)? Provide receipts (copies) of said emails:

    Response: **No documents were forwarded to SFSC apart from the documents referred to in question 8.**

(Emphasis added)

[155] Mr. Garrett's affidavit must be read in conjunction with the affidavit of documents referred to in it, the disclosure provided by the FCAA including Mr. Garrett's interview by the FCAA investigators, the testimony of the FCAA investigators, as well as the testimony of Mr. Garrett and Ms. Pastuch. Based on that evidence, Mr. Garrett forwarded "all emails" to Ms. Novak. The FCAA exhibit report shows only one communication from Mr. Garrett to Ms. Novak that being exhibit #905412, which, with its attachments, was discussed earlier in these reasons at paragraphs [64] to [72]. The description of exhibit #905412 does not identify all the documents included in that exhibit. Further, the evidence does not address whether the FCAA retained the emails or whether they were returned to Mr. Garrett in the envelope delivered to him in April 2011.[3] In short, the evidence does not undermine the panel's decision to believe the FCAA investigators who testified full disclosure had been made. In the circumstances, the panel's decision does not amount to procedural unfairness.

[3] Mr. Garrett testified he did not open the envelope, but rather forwarded it to Ms. Pastuch's lawyer at the time.

l. Curtailing Ms. Pastuch's Testimony

[156] The appellants contend that the panel curtailed Ms. Pastuch's testimony thus interfering with her right to provide full answer and defence and her right to a fair trial.

[157] The hearing record discloses that Ms. Pastuch was allowed to testify by telephone. She began her testimony on June 27, 2013, and continued testifying on June 28, 2013, following which the proceedings were adjourned to July 12, 2013.

[158] On July 12, 2013, the appellants' agent, Mr. Pederson, advised the panel that Ms. Pastuch, for health reasons, was unable to provide further oral testimony.

[159] Section 9(7) of the *Securities Act* provides that the legal or technical rules of evidence do not apply to hearings under its auspices. Further, s. 12.4(1) of the Policy Statement, which applies to such hearings, provides that a panel "may conduct any proceeding or part of a proceeding, including motions, by means of a written hearing".

[160] Ms. Pastuch agreed to present the remainder of her testimony-in-chief in writing. Accordingly, the hearing panel ordered her to do so by the end of the business day on July 22, 2013, with the intent that Ms. Pastuch would then be cross-examined.

[161] Some written testimony was filed by Ms. Pastuch on July 22, 2013, but at the same time she filed a request for an extension with a second written evidence package to be submitted on August 6, 2013, and a third and final evidence package to be submitted on August 16, 2013. Ms. Pastuch then requested four hours of oral testimony to finish her defence.

[162] The panel adjourned the hearing to September 10, 2013, and requested medical confirmation that Ms. Pastuch could not type or speak for extended periods of time. The panel wanted the medical specialist to advise what, if any, accommodation might be necessary to support Ms. Pastuch attending as a witness.

[163] On August 21, 2013, the FCAA Registrar advised Mr. Pederson that the hearing would proceed on September 10, 2013. It noted that Ms. Pastuch had not filed any further written testimony and the panel directed the remainder of her testimony be filed no later than close of

business on September 4, 2013. The panel indicated it would not accept any written testimony from Ms. Pastuch after that date.

[164] On September 6, 2013, the appellants brought another motion for an indefinite adjournment for medical reasons. The chair wrote Ms. Pastuch on that same date and requested documentary proof that she had medical appointments for the dates she had specified and that those appointments would prevent her from attending the hearing. He also requested confirmation that the two witnesses for whom subpoenas had been issued were served with those subpoenas and that those witnesses would be available to testify the following Tuesday morning.

[165] A response to the chair's September 6, 2013, letter was provided by the appellants' agent, Mr. Pederson, on September 8, 2013. As a result of that response, the hearing was adjourned *sine die* with an order that the panel be updated "at least every two weeks on when Ms. Pastuch is able to provide him [her agent] with instructions and/or assist him in the review of any documents and materials associated with this matter".

[166] An update was provided to the panel on September 24, 2013, and the panel requested, through the FCAA Registrar, that additional information be provided by Ms. Pastuch's physician, including a timeframe as to when Ms. Pastuch would be unavailable due to surgery.

[167] On October 21, 2013, the panel wrote Mr. Pederson indicating that Ms. Pastuch had not complied with the request for medical information. The panel stated:

> The Respondents have had the opportunity to lead evidence through the preliminary motions stage and through the formal hearing stage, with both verbal and written testimony. They have had the opportunity to cross-examine witnesses called in support of the allegations against them. They have had the opportunity to call additional witness through the use of subpoenas. Some of these opportunities have been seized but many have been refused or squandered. On the last date when evidence was presented before the Hearing Panel (July 12, 2013), the Respondents only had one remaining witness to complete – Ms. Pastuch. Ms. Pastuch has refused to submit the balance of her written testimony within both the initial time agreed upon by her representative, and within the extension period granted by the Hearing Panel. The medical documentation, provided by her doctor, confirmed that she would have been able to verbally participate in the hearing during the time period when she had been granted the extraordinary accommodation to provide written testimony, because the Hearing Panel had been advised by you and Ms. Pastuch that she could not talk for more than a few minutes at a time. The Hearing Panel granted her this extraordinary accommodation to provide her testimony-in-chief in writing, yet she refused to complete that task within an approximate six-week time frame.

> The Hearing Panel has reviewed the testimony from all of the witnesses that it has heard to date, both verbally and in writing. In particular, it has considered the verbal and written testimony of Ms. Pastuch and finds no value (for the purposes of this hearing) in a cross-examination of the limited written and verbal testimony she has provided.
>
> The refusal to provide medical updates and your (and/or Ms. Pastuch's) refusal to follow medical directives, combined with the squandered opportunities to present its case have led the panel to conclude that there is little to be gained by further delaying the hearing. Accordingly, the parties are directed to present written arguments on the basis of the evidence presented before the Hearing Panel in relation to the allegations contained in the Notice of Hearing. Thereafter, the Hearing Panel will consider the submitted written arguments in light of the evidence it has received to date and will advise the parties on the status of the hearing at that point. The written arguments should be considered closing arguments.

[168] In my view, the panel's decision to terminate Ms. Pastuch's evidence and proceed with written arguments did not constitute procedural unfairness. Ms. Pastuch was given significant accommodation so that she could complete her testimony-in-chief. She did not take advantage of that accommodation. The medical information provided to the panel did not support Ms. Pastuch's assertion that she was unable to provide testimony, either orally or in writing. The panel could not allow Ms. Pastuch to thwart the hearing process through unwarranted delay (unwarranted as it was not supported by medical evidence). Its decision to proceed with the hearing was supported by the medical evidence and thus cannot be viewed as procedurally unfair. Ms. Pastuch was the author of her own fate. She had two choices. She could have provided the panel with medical evidence to support her inability to testify or she could have completed her testimony-in-chief in writing. She did neither. In the circumstances, this complaint is also without merit.

m. Denial of Cross-Examination of FCAA Witnesses

[169] The appellants argue that the panel breached their right to procedural fairness by denying them the opportunity to cross-examine the FCAA's witnesses. The FCAA contends the appellants had that opportunity but chose not to take advantage of it.

[170] On December 5, 2012, when the panel was scheduled to begin hearing testimony Mr. Pederson brought a motion on behalf of the appellants requesting, among other things, disclosure and an adjournment. The panel dismissed the application and when it adjourned for a break, Mr. Pederson left the hearing and did not return. The hearing panel attempted

unsuccessfully to contact both Ms. Pastuch and Mr. Pederson. They left messages for both those individuals indicating the hearing would proceed in their absence. The panel, after waiting for more than 45 minutes, continued with the hearing. At the end of the day, the matter was adjourned to December 10, 2012. The appellants were given notice of that adjourned date.

[171] On December 10, 2012, Mr. Pederson was again in attendance. He apologized for his absence stating "unfortunately, I was needed for related matters and I wasn't able to be present for the remainder of the day". Mr. Pederson then read a statement from Ms. Pastuch that included the following:

> In closing, with respect to the cross-examination of any witnesses should this proceeding continue, neither I nor any agent on our behalf is able to cross-examine any Commission witness as we do not have full disclosure and we do not believe that the Commission, and in particular this panel, is impartial in these proceedings. This is our position throughout the balance of these proceedings as long as they continue before this tribunal and would be our answer to any and all Commission witnesses called.

[172] On the same date, J.M. testified for the FCAA. At the conclusion of her examination-in-chief, the panel chair offered Mr. Pederson the opportunity to cross-examine. Mr. Pederson refused. A recess was then called. Neither Mr. Pederson nor Ms. Pastuch, or in fact any representative of the appellants, returned to the hearing. Thereafter, the appellants absented themselves for the remainder of the FCAA's case, despite receiving notice of the hearing dates and being told the hearing would proceed in their absence.

[173] When it came time for the appellants to present their defence, they asked to "recall" the FCAA witnesses. That request was denied.

[174] The panel's ruling with respect to the request to recall FCAA witnesses was a procedural one. It was made against a backdrop where the appellants had an opportunity to cross-examine those witnesses but instead of doing so chose not to engage in the process. The appellants cannot now lay blame for the consequences of their decision at the feet of the panel. The appellants were not denied an opportunity to cross-examine the FCAA witnesses; they chose not to do so.

n. Loss of Jurisdiction from Breach of Privacy Rights

[175] The appellants contend the panel breached Ms. Pastuch's personal privacy rights contrary to *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 [*FIPPA*], *The Health Information Protection Act*, SS 1999, c H-0.021, and the FCAA's Policy Statement.

[176] The appellants identified the breaches as follows:

(a) the August 27, 2010, notice of hearing, which was published on the FCAA website, contained personal banking information with respect to the appellants;

(b) personal information pertaining to the appellants' bank accounts was presented at the hearing;

(c) personal information of third parties, who had no involvement in the proceedings (such as Ms. Pastuch's mother), was presented at the hearing; and

(d) the FCAA publicly discussed Ms. Pastuch's private and medical information.

[177] I begin by noting the Privacy Commissioner's report, which the appellants had included in their appeal book, was not part of the hearing record and accordingly, for the reasons provided earlier, will not be considered by this Court. The report did not deal with any complaints against the panel.

[178] The appellants' complaints with respect to privacy breaches make specific reference to the fact that the notice of hearing was published on the FCAA website.

[179] The notice of hearing was not prepared by the panel nor did the panel publish it on the FCAA website. The panel granted the appellants' application to remove the notice from the website. The other complaints relating to breaches of privacy involve the FCAA investigation, not the panel. The panel addressed those complaints and I see no error in the hearing panel's handling of those issues.

[180] The panel was alive to the privacy concerns surrounding the hearing and had asked the appellants to advise it if privacy issues arose. This is reflected, for example, in a May 27, 2013,

email from the FCAA Registrar to Ms. Pastuch, written in response to a May 23, 2013, motion by the appellants for a *carte blanche* publication ban:

> The Hearing Panel has already ruled on an earlier Motion for a *carte blanch*[*e*] publication ban on the proceedings. Securities Commission hearings are invariably public hearings. **The Hearing Panel was clear in its earlier ruling that it would be relying upon the Respondents to take steps to advise the Hearing Panel whenever testimony was moving in a direction that may be considered sensitive and/or unnecessarily invasive of an individual's privacy. The Respondents chose to be absent from the hearing without regard to the Hearing Panel['s] reliance upon their obligation to alert the Hearing Panel to developing testimony, or specific evidence that may have been deliberately or inadvertently disclosed, in order to protect their individual privacy interests.** The Motion submitted on May 23, 2013 now seeks to remedy their alleged privacy concerns retroactively, disregarding their decision to absent themselves at the appropriate time when the privacy concerns could have been raised and dealt with by the Hearing Panel. The request for a retroactive remedy is therefore denied.
>
> (Emphasis added)

[181] The receipt and disclosure of personal information in the course of a hearing is allowed in certain circumstances within the statutory framework. Section 29(2)(u) of *FIPPA* provides that "personal information in the possession or under the control of a government institution may be disclosed … as prescribed in the regulations". In accordance with the Appendix to *The Freedom of Information and Protection of Privacy Regulations*, RRS c F-22.01 Reg 1 [*FIPPA Regulations*], the FCAA is a government institution.

[182] Section 16 of the *FIPPA Regulations* provides:

> **16** For the purposes of clause 29(2)(u) of the Act, personal information may be disclosed:
>
> …
>
> (f) for the purpose of commencing or conducting a proceeding or possible proceeding before a court or tribunal;

In other words, the appellants' financial information and Ms. Pastuch's health information could be disclosed for the purpose of conducting the proceedings before the panel.

[183] One of the charges against the appellants was fraud. To establish that, detailed evidence of financial transactions was required. In addition, Ms. Pastuch put her health in issue when she requested adjournments for medical reasons.

[184] Further, pursuant to s. 9(13) of the *Securities Act*, hearings are "open to the public unless the Commission … considers it **in the public interest** to order otherwise" (emphasis added).

While a hearing or any part thereof may be held in camera, the decision to do so is a discretionary one, which should represent the exception not the rule. In a free and democratic country, the openness of judicial and quasi-judicial proceedings is a cornerstone of the rule of law and an important check on adjudicative authority.

[185] The panel was acutely aware of the appellants' privacy concerns and took appropriate steps to protect them. It asked the appellants to raise any privacy issues as the hearing proceeded. Even though the appellants decided not to participate in much of the hearing, the panel took steps to safeguard their privacy interests by going in camera and asking FCAA counsel to justify the admission of personal information. In the circumstances, this ground of appeal must fail.

o. Summary

[186] In my view, the appellants' grounds of appeal pertaining to procedural fairness are without merit.

B. Standard of Proof

[187] The appellants raised as a ground of appeal that the panel applied the wrong standard of proof. The appellants did not identify, either in their factum or oral argument, what this ground pertains to. In its *Merits Decision*, the panel indicated it had reached its conclusions by assessing the evidence on a balance of probabilities (*Merits Decision* at para 3). That was the correct standard of proof to be applied by the panel and a review of the record does not disclose the application of a different standard.

[188] In its December 4, 2012, *Preliminary Decision* dealing with disclosure, the hearing panel at page 4 stated:

> The Hearing Panel has concluded that there was insufficient evidence upon which to support these allegations about the failure to provide full disclosure and the spoliation of evidence. …

[189] It appears from this statement that the panel placed the onus of establishing that full disclosure had not been made on the appellants. This was an error as the burden of proof rested with the FCAA to establish full disclosure had been made (*Stinchcombe* at para 21). Having said that, given the panel had accepted the evidence of the FCAA investigators that full disclosure

had been made and that the panel was still prepared to address specific disclosure issues as they arose during the hearing, that error did not prejudice the appellants.

[190] This ground of appeal must also fail.

C. Bias and Reasonable Apprehension of Bias

[191] The appellants contend the chair and the hearing panel were either biased or that there was a reasonable apprehension of bias because the chair had an ongoing relationship with the law firm that had represented one of the appellants' investors, D.B. That investor testified on behalf of the FCAA.

1. The Law

[192] All administrative bodies, no matter their function, owe a duty of fairness to the regulated parties whose interest they must determine (*Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 (WL) at para 21 [*Newfoundland Telephone Co.*]; *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 at para 21, [2003] 1 SCR 884 [*Bell Canada*]; *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3 at para 82; *Baker* at paras 21–22; and *R v S.(R.D.)*, [1997] 3 SCR 484 at para 92 [*S.(R.D.)*] (Justice Cory's reasons on this point were accepted by the majority)).

[193] One aspect of procedural fairness is that decisions be made by impartial decision-makers. As stated by Cory J. in *Newfoundland Telephone Co.*:

> [22] Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. … The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. …

See also *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 2, [2003] 2 SCR 259 [*Wewaykum*].

[194] The right to an impartial decision-maker is enshrined in ss. 7 and 11(d) of the *Charter*. Section 11(d) provides that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an **independent and impartial tribunal**" (emphasis added).

[195] There is a presumption that judges will act impartially. In *Wewaykum*, the majority described that presumption in these terms:

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

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

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

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

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

[199] This test has been endorsed by the Supreme Court of Canada in numerous decisions including *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20, [2015] 2 SCR 282; *S.(R.D.)* at paras 11, 31 and 111; *Baker* at para 46;

Wewaykum at para 60; and *Bell Canada* at para 25. See also the decisions of this Court in *Aalbers v Aalbers*, 2013 SKCA 64 at para 75, 417 Sask R 69; and *Agrium Vanscoy Potash Operations v United Steel Workers Local 7552*, 2014 SKCA 79 at para 42, [2014] 8 WWR 629.

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

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

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

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

Chief Justice McLachlin and Bastarache J. went on at paragraph 19 of *Bell Canada* to indicate that a tribunal's independence pertains to its structure, not its "independence of thought".

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

[204] Where there are multiple decision-makers, the question becomes whether the disqualification on the bases of bias or a reasonable apprehension of bias of one panel member taints the entire panel.

[205] This issue was considered by the Supreme Court of Canada in *Wewaykum*. That case involved an allegation of apprehension of bias against one of the justices of the Court. In concluding the remainder of the panel was not tainted, the Court considered a number of factors including how decisions are made by the Court, the role of each judge on the panel, the number of judges involved and the fact it had been a unanimous decision as opposed to one where the "tainted judge" had cast the deciding vote.

[206] In *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 SCR 91, the Supreme Court of Canada stated:

> [15] … none of the judges who were scheduled to hear and have now heard the appeal were in any way involved in this case. No reasonable person would think, after Abella J. voluntarily recused herself, that her mere presence on the Court would impair the ability of the balance of its members to remain impartial. **If there is a duty on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the Court or compromises the integrity of the whole Court. To reach that conclusion would be to ascribe a singular fragility to the impartiality that a judge must necessarily show, and to the ability of judges to discharge the duties associated with impartiality in accordance with the traditions of our jurisprudence.** The Quebec Court of Appeal helpfully noted these principles in a recent decision dismissing a motion to stay proceedings in which bias was alleged against all the judges of the Quebec Superior Court (*Gillet v. Arthur*, [2005] R.J.Q. 42, *per* Robert C.J.Q. and Gendreau and Baudouin JJ.A.).
>
> (Emphasis added)

[207] This same reasoning has been adopted with respect to administrative tribunals. For example, the British Columbia Court of Appeal in *Bennett v British Columbia (Securities Commission)* (1992), 94 DLR (4th) 339 (WL), held:

> [22] … **Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear.** No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of

> real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.
>
> (Emphasis added)

[208] In *Telus Communications Inc. v Telecommunications Workers Union*, 2005 FCA 262, 257 DLR (4th) 19, the Federal Court of Appeal stated:

> [41] Neither the doctrine of corporate taint nor the subjection of the entire Board to a reasonable apprehension of bias as a result of the Chairperson's alleged comments, applies here. Painting the entire Board with bias as a result of the one board member's alleged comments undermines the presumption of impartiality and fairness that is attributed to each member and compromises the integrity of the entire Board. In *Mugesara*, the Supreme Court articulated the possible consequences if this proposition is adopted. At paragraph 15, it said:
>
>> [15] … If there is a duty on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the Court or compromises the integrity of the whole Court. To reach that conclusion would be to ascribe a singular fragility to the impartiality that a judge must necessarily show, and to the ability of judges to discharge the duties associated with impartiality in accordance with the traditions of our jurisprudence.

[209] In *Mountain Creeks Ranch Inc. v Yellowhead (County) Subdivision and Development Appeal Board*, 2006 ABCA 126, 48 Admin LR (4th) 130 [*Mountain Creeks*], the Court found that bias would be reasonably apprehended where a councillor had sat on the Subdivision and Development Appeal Board and had previously participated in matters involving the appellant. The Alberta Court of Appeal considered whether, as a result, all members of the Subdivision and Development Appeal Board should be disqualified. In finding they should, Ritter J.A., in an oral decision, stated:

> [8] The Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 239, 2003 SCC 45 at para. 2, held that allegations that a decision may be tainted by a reasonable apprehension of bias are to be dealt with as serious matters. Parties appearing before administrative tribunals or boards such as the SDAB are entitled to decision-makers who approach the matters before them free of interest. However, there is a presumption that tribunal members will act impartially in the absence of evidence to the contrary: Sara Blake, *Administrative Law in Canada*, 3d ed. (Markham, Ont.: Butterworths, 2001) at 106. The principle of impartiality is so fundamental to a fair hearing that if a single member of an administrative body is disqualified on the basis of bias or reasonable apprehension of bias, the whole proceeding is affected. As a result, the general rule is that the decision will be quashed, regardless of the fact that the biased member's vote may not have been a factor in the outcome: Frederick Laux, *Planning Law and Practice in Alberta*, 3d ed. (Edmonton: Juriliber, 2002) at §7.3(5).

[210] *Mountain Creeks* was distinguished by the Alberta Court of Appeal in *Boardwalk Reit LLP v Edmonton (City)*, 2008 ABCA 176, [2008] 8 WWR 251 [*Boardwalk Reit*], leave to appeal refused, 2008 CanLII 67835 (SCC). Justice Côté, writing for himself and O'Brien J.A., considered whether the disqualification of one appeal judge would result in the whole panel being disqualified. In finding it would not, Côté J.A. distinguished *Mountain Creeks* stating:

> [91] The assessor relies upon a proposition in Professor Laux's text which the Alberta Court of Appeal used in *Mtn. Creeks Ranch v. Yellowhead S.D.A.B.*, 2006 ABCA 126, 48 Admin L.R. (4th) 130. But that case is distinguishable here, because it was
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> > (a) about lay subdivision and development appeal boards, which often include elected politicians (and the textbook only mentions administrative tribunals),
> >
> > (b) about fixed opinions by a politician, and
> >
> > (c) contrary (as to courts) to the *Wewaykum* case, *supra*, which was decided after the passage was written in the textbook.
>
> The authorities cited by Professor Laux (including authorities which they cite) are all about administrative tribunals, not superior courts. One should recall the presumption from a judge's oath and need for cogent evidence, as discussed in Part B.3, *supra*. And recall that judges routinely hear information which they must then put out of their minds.

[211] Justice Côté also described seven dangers which arise where there are unnecessary recusals: (a) judge shopping; (b) delay and expense; (c) tarnished appearance; (d) producing insoluble problems; (e) preventing litigation by judges; (f) litigation over litigation and technicalities; and (g) that some connections are almost unavoidable.

[212] In *Beaverford v Thorhild (County No. 7)*, 2013 ABCA 6, 539 AR 373, the Alberta Court of Appeal again considered whether the entire Subdivision and Development Appeal Board was tainted because one of its members – an elected councillor – had expressed strong opinions on a matter under consideration. Referring to *Mountain Creeks*, the Court noted, at paragraph 32, that the "participation of a single person does not always taint a tribunal".

[213] In light of these authorities, I conclude that there is no hard and fast rule whether a panel of decision-makers – judicial or administrative – will be tainted by a finding of bias or apprehension of bias with respect to one of its members. Rather, as stated by the Supreme Court of Canada in *Wewaykum*, the answer to that question will depend on the decision-making process and the role played by the tainted decision-maker in arriving at the decision.

2. Application of Law to this Case

[214] The appellants allege the chair of the hearing panel, as well as the panel itself, was biased against them or alternatively that there was a reasonable apprehension of bias given the chair's relationship with one of the witnesses.

[215] The facts underpinning the appellants' allegation are that the chair is a partner in a law firm where another partner had represented D.B., an investor in Cryptguard, one of the corporate appellants. D.B., who testified at the hearing on behalf of the FCAA, is the brother of one of the chair's law partners. In addition, documents were prepared by the chair's law firm with respect to both D.B.'s investment in Cryptguard and with respect to loans made by D.B. to Ms. Pastuch personally. The documents admitted as exhibits at the merits hearing included a unanimous shareholder's agreement between Ms. Pastuch, D.B. and Cryptguard dated January 25, 2007; a memorandum of resolution of the directors of Cryptguard; an application for subscription of shares; share certificates for 28.5 shares in Cryptguard; two promissory notes signed by Ms. Pastuch in favour of D.B. dated February 15, 2007, and July 5, 2007, respectively; a March 17, 2008, letter from the law firm to D.B. regarding the sale of property to Ms. Pastuch including a statement of adjustments and an invoice for services rendered; emails from D.B. to the law firm dated March 17, 2008, enclosing emails from Ms. Pastuch; emails between the law firm and D.B. relating to Cryptguard dated July 28 and 29, 2009; correspondence dated December 3, 2008, from the law firm regarding the sale of property to Ms. Pastuch; and a full and final release signed by D.B.

[216] While the appellants allege actual bias, there is no evidence to support that allegation. As indicated, allegations of actual bias are difficult to prove because they require proof of an individual's state of mind. The facts as described do not support a finding of actual bias nor do the appellants' complaints relating to the chair or the panel's actions/decisions support such a finding. Those complaints include:

(a) that the panel made false, fraudulent and misleading statements against the appellants;

(b) that the panel failed to consider in a fair and unbiased manner the physical evidence and the defences presented by curtailing the proceedings about one-third of the way through the appellants' defence;

(c) that the appellants were not allowed to cross-examine the FCAA witnesses;

(d) that the appellants' testimony was censored and withheld from the media and public while full publication of the FCAA evidence was permitted;

(e) that false medical findings were fabricated by the panel regarding Ms. Pastuch with intent to "interfere with, and illegitimately lift, a standing medical adjournment";

(f) that the appellants' investors (FCAA witnesses) were wilfully misled and tainted through false information and lies, fraudulent statements, and defamation of the appellants;

(g) that the panel disregarded the January 2014 "fresh evidence" material, which showed FCAA staff – Mr. Rodonets, Ms. Novak and Sonne Udemgba – had withheld and/or destroyed key evidence; and

(h) that the panel repeatedly permitted violations by the FCAA of the appellants' statutory privacy rights.

[217] These allegations have already been addressed in some detail under the procedural fairness portion of this judgment. For the purposes of the bias and reasonable apprehension of bias analysis, it is sufficient to note that generally rulings of an administrative tribunal that are reasonable and supported by the evidence do not, on their own, establish either bias or a reasonable apprehension of bias. Just because an administrative tribunal does not view the evidence in the same way as a party or makes rulings contrary to a party's interest does not make the panel biased nor does it support a conclusion of a reasonable apprehension of bias.

[218] That brings me to the allegation of apprehension of bias based on the chair's relationship with D.B.

[219] Key to a determination of this issue are the circumstances giving rise to the allegation. Those circumstances are that the chair was a partner in the law firm that represented D.B. when he invested in Cryptguard, one of the appellate companies. Documents prepared by the law firm were admitted into evidence at the hearing. D.B. was also the brother of one of the chair's law partners and the firm had allegedly sued Cryptguard as a result of D.B.'s investment (what the appellants describe as continuing litigation).

[220] There are gaps in the factual scenario underpinning the appellants' allegation. The appellants did not lead any evidence either before the panel or this Court to substantiate their claim of continuing litigation between D.B. and Cryptguard. No statement of claim was produced and there was no evidence of any ongoing legal proceedings. Further, the appellants chose not to participate in the portion of the hearing where the FCAA called its evidence. This meant D.B. was never cross-examined on his relationship to the chair. This lack of evidence is significant because the burden of proof with respect to an allegation of a reasonable apprehension of bias rests with the appellants.

[221] The chair, at paragraphs 11–16 of the *Recusal Decision*, set out his relationship with the law firm and D.B. The appellants have not taken issue with any of the facts asserted in those paragraphs. While the appellants brought an application for fresh evidence before this Court, the evidence they sought to adduce did not address those facts. It is useful to summarize those facts here.

[222] D.B. invested in Cryptguard, lent money to Ms. Pastuch personally and sold her some real property. D.B. was represented in those transactions by the law firm in which the chair is now a partner. D.B. is the brother of one of the firm's partners.

[223] The law firm in issue has 44 partners located in three cities. The chair lives and works in Saskatoon. D.B. was represented by a partner in the Regina office where D.B.'s sibling practices.

[224] The chair has worked at the law firm since May 1, 2009. He did not become a partner until January 1, 2012, several years after D.B. had invested in Cryptguard. In fact, according to the evidence of D.B., he invested in Cryptguard in January 2007 and the documents prepared by the law firm are all dated as of January 2007 except D.B.'s final release, which was signed on

December 2, 2008. The sale of D.B.'s property to Ms. Pastuch occurred in January 2008. Thus, the chair was not even associated with the firm, let alone a partner, when D.B. invested in Cryptguard, lent money to Ms. Pastuch or sold her property.

[225] The chair had never acted for D.B. He had never seen D.B. prior to D.B. testifying at the hearing and he did not know D.B. was the brother of one of the law firm's Regina partners until Ms. Pastuch brought that to his attention. D.B. was not a party to the hearing though he was a witness and would benefit from the compensation awarded in the *Sanctions Decision*. The chair's law firm, however, did not represent D.B. at the hearing nor was it entitled to benefit in any way from the proceedings.

[226] The chair personally conducted an electronic "conflict search" with respect to his firm when he was appointed to the hearing panel. He then conducted a second search when the appellant raised the allegation of apprehension of bias. The chair found that at one point his law firm had represented a client in a matter involving Cryptguard, but that file had been closed prior to the issuing of the appellants' notice of hearing on August 27, 2010. The electronic searches conducted by the chair did not reveal the nature of the matter involving Cryptguard and the chair made no inquiries. The paper documents pertaining to the file were stored in Regina. The chair, who works in Saskatoon, has no electronic access to those Regina files.

[227] In my view, the factual context of this case would not raise a reasonable apprehension of bias in the mind of an informed person viewing the matter realistically and practically and having thought the matter through. I say this for a number of reasons.

[228] First, the chair had no direct relationship with D.B., who was a stranger to him. Traditionally, the fact a witness is a sibling to a partner in the decision-maker's law firm is not a close enough relationship to raise a reasonable apprehension of bias. In *Frambordeaux Developments Inc. v Romandale Farms Ltd.*, 2007 CanLII 49492, (Ont Sup Ct), Thorburn J. summarized the applicable law citing *G.W.L. Properties Ltd. v W.R. Grace & Co. of Canada Ltd.* (1992), 74 BCLR (2d) 283 (CA) [*G.W.L. Properties Ltd.*]:

> [18] The case law provides that while a lawyer should not appear in any court in which his father or mother is the judge, that rule has not been extended to include other relatives, such as husbands, wives, nieces and nephews where there is no pecuniary interest or other direct interest in the outcome of the proceeding before the judge.

> [19] In circumstances where a family member of a judge is a member or partner of a law firm appearing before the judge, but not directly involved in the matter before the court, the courts have held that no reasonable apprehension of bias exists.

See also: *Rollings v Gallant* (1983), 43 Nfld & PEIR 320 (PEISC (AD)); *G.W.L. Properties Ltd.*; *Makowsky v John Doe*, 2007 BCSC 1231, affirmed 2008 BCCA 112; *Fond du Lac Denesuline First Nation v Canada (Attorney General)*, 2010 FC 948, 377 FTR 50, affirmed 2012 FCA 73, 430 NR 190; *Cabana v Newfoundland and Labrador*, 2014 NLCA 34, 356 Nfld & PEIR 103; *Boardwalk Reit*.

[229] In *Boardwalk Reit*, Côté J.A. sounded a caution with respect to simply adopting "rules" of conflict such as treating partners in a law firm as though they are one person:

> [55] If one fell into the lazy use of such "rules" of deemed association, all the partners in all the bigger law firms in Alberta could be linked to each other. Under such "rules", most judges could only hear lawyers practising alone (not sharing office space with a firm), and those in very small firms. Many law firms could appear before only a handful of judges. See *Makowsky v. Doe*, *supra*.

[230] Justice Côté went on to state:

> [60] I see no reason whatever to bar a judge from hearing argument by (say) his brother-in-law's lawyer, or her lawyer's brother-in-law, if neither is involved or interested in the suit. And if a judge is married to a lawyer who is a partner in a large law firm, the judge can properly hear an unrelated trial where the litigant is the parent or the sibling of one of the partners in that law firm. Not all employment of a judge's relatives may bar a big law firm from appearing in the relevant courtroom.

[231] Second, D.B.'s sibling was not a party to the proceeding nor involved in any way.

[232] Third, the chair had no pecuniary interest in the outcome of the hearing. His law firm was not acting for D.B. and the chair would not benefit in any way from the outcome.

[233] Fourth, the chair's law firm had no current files with respect to D.B. and Cryptguard or any of the other appellants.

[234] Fifth, the chair was not a partner or even associated with the law firm when D.B. invested in Cryptguard.

[235] Sixth, a conflict of interest does not equate to a reasonable apprehension of bias. The distinction between those two concepts was explained by Pepall J.A. for the Ontario Court of

Appeal in *Terceira v Labourers International Union of North America*, 2014 ONCA 839, 122 OR (3d) 521:

> [27] The distinction between a claim of conflict of interest by a lawyer and reasonable apprehension of bias by an adjudicator is significant for a number of reasons. In *MacDonald Estate*, which addresses a lawyer's potential conflict of interest, the Supreme Court found, at p. 1260, that the imparting of confidential information is presumed to occur. In contrast, in *Wewaykum*, which addresses a claim of reasonable apprehension of bias of an adjudicator, the Supreme Court established, at para. 59, that impartiality of the adjudicator is presumed. Indeed, there is a strong presumption of judicial (or in this case adjudicative) impartiality and integrity: *Ontario Provincial Police v. MacDonald*, 2009 ONCA 805, 255 O.A.C. 376, at para 44.
>
> [28] **The rules governing a lawyer's conflict of interest stem, in part, from the existence of a fiduciary relationship and a duty of loyalty owed to the client: *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at paras. 19, 48; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at pp. 640-644 and *MacDonald Estate*, at pp. 1243-1246. In contrast, the adjudicator's duty is anchored in principles of procedural fairness including impartiality: *Wewaykum*, at paras. 57-59.**
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> [29] The distinction has important implications for the OLRB administrative function. In selecting its adjudicators, the OLRB draws upon the expertise of practitioners from within the labour and employment bar. A presumption of disqualification would operate to disregard this practical reality. As stated by Morden J. in *Re Marques and Dylex Ltd.*, at p. 70: "Most, if not all of those appointed [to the OLRB], are bound to have some prior association with parties coming before the Board." Having said that, there will of course be instances of adjudicative bias as, for instance, where a decision-maker has a material pecuniary interest in a proceeding.
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> (Emphasis added)

[236] The appellants have not met the test for establishing a reasonable apprehension of bias on the part of the chair and, accordingly, that ground of their appeal must fail.

[237] In my view, the conclusion there was no reasonable apprehension of bias with respect to the chair is determinative of the allegation of a reasonable apprehension of bias as it pertains to the panel as a whole. I say this because there was simply no evidence to suggest a reasonable apprehension of bias with respect to the other members of the panel. Nonetheless, I will address the issue briefly.

[238] Pursuant to s. 17 of *The Financial and Consumer Affairs Authority of Saskatchewan Act*, SS 2012, c F-13.5,[4] panel members, including the chair, are appointed by the chairperson of the FCAA from a list established by the Minister. Those panel members act independently in that they each hear all of the evidence and arrive at their own conclusions. In this case, the panel's decision was unanimous and, therefore, the chair's view did not tip the balance one way or another. While the chair wrote the decision, the other panel members concurred in the result. There is no suggestion the other two panel members had any type of relationship with D.B. or with any other witness. In the circumstances, there is no reason to believe those panel members would have been "tainted" by the chair's relationship to D.B. or his law firm. Thus, even if this Court agreed with the appellants that a reasonable apprehension of bias existed with respect to the chair, that apprehension would not extend to the other members of the panel. A reasonable person having full knowledge of the facts would not consider the entire panel tainted.

D. Witness Tampering

[239] The appellants argue the FCAA engaged in witness tampering and fraudulent misrepresentation. They assert Ms. Novak tampered with witnesses by encouraging them to communicate with one another and by handing out the names and contact information of investors to other investors. The appellants give the following examples of what they view as witness tampering:

(a) the investigation report of Mr. Rodonets dated October 28, 2009, reflects that when an investor, W.H., said Ms. Pastuch was one of the most trustworthy persons he had met, Mr. Rodonets "advised him that history has shown that people have been duped by family members in the past, Jones, Madoff, and others and it can happen";

(b) the investigation report of Ms. Novak dated June 16, 2010, wherein she spoke to an investor, J.C., who had recently spoke to an investor, J.K.;

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[4] The current *Financial Services Commission Act* came into effect on October 1, 2012. The applicable section was formerly s. 11 of *The Financial Services Commission Act*, SS 2002, c S-17.2, as amended.

(c) an email from an investor, D.W., dated October 20, 2012, stating "I have known G. for years but not well. He contacted us, I think he got our name from [the] commission??"; and

(d) an email from an investor, S.S., to Ms. Pastuch dated July 22, 2010, regarding her conversation with Ms. Novak. The email said Ms. Novak had told S.S. to contact "K.H.", that there were numerous people suing Ms. Pastuch and that another investor had given Ms. Novak her number.

[240] Witness tampering is the act of attempting to alter or prevent the testimony of witnesses. The incidents referred to by the appellants fall far short of establishing that. The appellants have not pointed to any circumstances where a witness failed to attend the hearing or altered their testimony as a result of anything said or done by the FCAA investigators.

[241] The fact some investors spoke to one another is not, in and of itself, evidence of witness tampering nor can an inference be drawn from the exchange of emails referred to by the appellants that Ms. Novak was encouraging investors to talk to one another. Hearsay comments, taken out of context, are not evidence.

[242] The appellants also argue the FCAA staff fraudulently misrepresented the situation when communicating with investors and witnesses by making disparaging comments and portraying Ms. Pastuch in an extremely negative light. They cite the following examples:

(a) an email from an investor, M.K., dated May 19, 2011, stating the FCAA were definitely "trying to make you [Ms. Pastuch] sound like you'd scammed us all out of our money", that Ms. Novak brought up court-ordered repayments, asked inappropriate questions regarding Ms. Pastuch's health, cosmetic surgery, uncles, her sister's health, etc., and that "as far as their investigation could tell there was no product"; and

(b) an email from M.K. dated April 19, 2012, stating that Ms. Novak had told him that "for the investors sake she hoped to find some form of product that might be sellable, but so far it didn't look good".

[243] The appellants assert Ms. Novak and Mr. Rodonets never investigated whether product existed and never asked the appellants to attend their offices to demonstrate the product.

[244] In their testimony, Ms. Novak and Mr. Rodonets both acknowledged they never investigated the appellants' products. They attested they never told anyone they had done so. The emails referred to by the appellants in support of their position are hearsay and are not generally admissible for the truth of their contents. The appellants should have called the investors as witnesses if they wanted to present this evidence or cross-examined them if they were called as witnesses on behalf of the FCAA. Even if admissible, at best the evidence goes to the investigators' credibility. It does not, however, establish what each investigator said or the context in which it was said, nor does it establish that the statements made were untrue. More importantly, the evidence has no bearing on the hearing panel's decision of guilt, which was supported by direct independent evidence aside from the testimony of Ms. Novak and Mr. Rodonets.

[245] Unfortunately, because the appellants decided not to cross-examine the FCAA witnesses, the panel did not have the benefit of a full and complete airing of the issues. The decision not to participate, however, was that of the appellants, not the panel.

[246] Finally, I note that as part of a preliminary motion by the appellants to dismiss the proceedings, the hearing panel heard *viva voce* evidence from two of the FCAA investigators, Ms. Novak and Mr. Rodonets, and considered whether those investigators had breached their duty of procedural fairness to the appellants. In rejecting the appellants' application, the panel stated:

> The evidence against the staff investigators included allegations concerning a refusal to accurately advise certain of the Respondents' investors that there was a statutory restriction in place on communications arising out of the investigation. It was clear that there was some confusion on what the restriction actually meant. There were further allegations of bullying, witness tampering, personal threats, perjury, lies, policy breaches, statutory breaches, defamatory comments, and privacy breaches. **Most of these allegations were refuted by the first two witnesses, or were not put to them. In the end, none of these allegations had a sufficient evidential foundation upon which to definitively conclude at this time that improprieties had taken place.** The Hearing Panel will remain alert to these allegations throughout the formal hearing.
>
> (Emphasis added)

[247] On this appeal, the appellants continued to rely on unsubstantiated hearsay evidence in support of their allegations. In the circumstances, I see no error in the hearing panel's conclusion.

[248] For the reasons set out herein, the appellants' appeal from the *Merits Decision* must be dismissed.

E. Sanctions Appeal

[249] The appellants' sanctions appeal reiterated many of the same grounds raised in their merits appeal pertaining to procedural fairness and bias or the reasonable apprehension of bias. Those matters have already been canvassed extensively in this decision and need not be repeated here.

[250] In rendering its *Sanctions Decision*, the panel found no mitigating factors existed and the appellants have not suggested otherwise. The amount of money obtained by the appellants from their investors was significant as were the number of people affected by the appellants' conduct. The appellants have identified no error of law with respect to the sanctions imposed.

[251] The appellants contend the panel erred in awarding the costs it did and, in particular, that the disbursements pertaining to those costs were inordinate. As already indicated, this ground of appeal does not raise a question of law. The amount of disbursements expended is a question of fact.

[252] Further, the expenses relating to the hearing appear to be reasonable on their face. There is no evidence they constitute an "unwarranted wasting of taxpayers dollars" or "an abuse of taxpayer funds" as alleged by the appellants. The appellants identified the cost of renting facilities for the hearing as supporting their allegation. As pointed out by the FCAA, even if the FCAA boardroom had been available, there was no evidence it was equipped to handle a hearing. In addition, there was no indication on the record that the appellants ever objected to the use of rented facilities in a neutral location as opposed to using the FCAA boardroom.

[253] The panel ordered the appellants to pay costs of the hearing, which they fixed at $46,638. This amount was significantly lower than the $71,178 sought by the FCAA. Costs fall within the discretion of the panel and their decision is entitled to deference by this Court. The panel found

as a fact that the proven costs were significantly larger than the amount assessed. However, the panel did not want to have the hearing costs negatively affect potential reimbursement to those who had suffered financial loss as a result of the appellants' conduct. That decision reveals no error of law and accordingly is not subject to review by this Court.

[254] The appellants' sanctions appeal must be dismissed.

IX. CONCLUSION

[255] In my view, the appellants have failed to establish procedural unfairness, bias or a reasonable apprehension of bias, that there was witness tampering or that there was an error of law that requires this Court's intervention. Accordingly, both the appellants' merits and sanctions appeals are dismissed.

[256] There shall be no order as to costs with respect to the appellants' application to adduce fresh evidence, the appellants' pre-appeal applications pertaining to the production of specific records and the amendment of their notices of appeal, which costs were reserved to the panel, or with respect to the appeal proper. Section 7 of *The Fee Waiver Act*, SS 2015, c F-13.1001, applies to this case. Taking into account the factors set out in s. 7(3), an order as to costs would not be appropriate.

"Ryan-Froslie J.A."
Ryan-Froslie J.A.

I concur. "Jackson J.A."
Jackson J.A.

I concur. "Whitmore J.A."
Whitmore J.A.

The following provides the procedural history of the matter before the Hearing Panel:[5]

Date	Document
2009	
November 2, 2009	Temporary Order requiring appellants to cease trading in securities up to and including November 16, 2009
November 16, 2009	Order extending Temporary Order to December 15, 2009
November 19, 2009	Application to Extend Temporary Order
December 15, 2009	Adjournment
2010	
February 11, 2010	Order extending Temporary Order until further order of Commission or Director
August 27, 2010	Notice of Hearing
October 25, 2010	Order setting hearing dates, requiring full disclosure, and setting December 1, 2010 as the cut-off date for raising preliminary matters
December 14, 2010	Ms. Pastuch and her counsel fail to appear at scheduled conference call; Order that appellants and counsel appear via telephone on December 16, 2010
2011	
January 4, 2011	Adjournment request by Ms. Pastuch because no counsel obtained
January 5, 2011	Order adjourning hearing *sine die* and scheduling case management call
February 1, 2011	Oral representations by Ms. Pastuch, Mr. Pederson and FCAA counsel to the Hearing Panel
February 2, 2011	Order rescheduling hearing to July 11, 2011, and requiring FCAA to provide disclosure
February 11, 2011	Affidavit of service (disclosure disc and exhibit ledgers)
February 15, 2011	Order setting disclosure terms and conditions; Management letter from Chair to Ms. Pastuch
February 22, 2011	Motion by Ms. Pastuch to remove Notice of Hearing from FCAA website
March 7, 2011	Management Letter from the chair to FCAA counsel
March 8, 2011	Management letter from the chair to Ms. Pastuch
March 16, 2011	Motion by Ms. Pastuch to extend time in which to provide submissions re: application to remove Notice of Hearing from FCAA website
March 17, 2011	Decision on March 16, 2011, Motion granting extension
March 21, 2011	Email request of Ms. Pastuch that her submissions re: removal of Notice of Hearing from FCAA website not be accessible to FCAA counsel or public
March 21, 2011	Management letter from the chair to Ms. Pastuch indicating conditions proposed in her March 21, 2011, email are unacceptable
March 22, 2011	Management letter from the chair to Ms. Pastuch re: process for removing Notice of Hearing; need for submissions

[5] This has been compiled from Appendix A of the Respondent's Factum on CACV2576 and from a review of the Appeal Books.

March 29, 2011	Management letter from the chair to Ms. Pastuch re: use of correspondence from her
March 31, 2011	Email from Ms. Pastuch to the chair re: how to request termination or investigation of FCAA staff; need full disclosure; will not pick up disclosure until permission to let other bodies review
April 8, 2011	Management letter from the chair to Ms. Pastuch re: March 31, 2011, email and process for disclosure issues
April 11, 2011	Reasons for Decision on Interim Motion regarding Notice of Hearing; Order issued requiring Notice of Hearing be removed from website
April 29, 2011	Motion by Ms. Pastuch requesting additional disclosure and to vary terms and conditions attached to disclosure (February 15, 2011, Order)
May 3, 2011	Management letter from the chair to Ms. Pastuch and FCAA counsel re: deadlines for submissions on April 29, 2011, Motion
May 12, 2011	Motion by Ms. Pastuch requesting investigation into conduct of investigation, termination of Sandy Novak, Ed Rodonets and Barbara Shourounis, and the investigation and removal of FCAA counsel
June 9, 2011	Teleconference with both parties; request for witnesses to appear via video-conference
June 20, 2011	Decision regarding the Motion of April 29, 2011, refusing to vary the terms of disclosure; Decision regarding the June 9, 2011, request to have witnesses appear via video-conference allowed with conditions; Decision regarding disclosure
June 20, 2011	Motion by Ms. Pastuch requesting stay of hearing
June 27, 2011	Decision Letter re: June 20, 2011, request for a stay; Hearing set for July 12–13 and September 12–16, 2011; Adjournment reflecting terms of Decision Letter
July 5, 2011	Motion by Ms. Pastuch requesting sworn statements by FCAA investigators and prosecutor re: disclosure; Decision email denying July 5, 2011, Motion
July 5, 2011	Email request by Ms. Pastuch for adjournment of hearing due to illness of a witness
July 6, 2011	Decision re: July 5, 2011, request for adjournment granted; July 13, 2011, date set for case management meeting
July 11, 2011	Adjournment of hearing to September 12–16, 2011
September 8, 2011	Hearing adjourned *sine die* at Ms. Pastuch's request for medical reasons
October 19, 2011	Decision re: request for indefinite adjournment on basis of medical note refused; Case management meeting set for November 10, 2011, and hearing date set for December 12, 2011
October 24, 2011	Decision re: request for additional information on the January 2011 hearing dates refused; Letter from Commission Secretary re: concerns for rescheduling hearing
November 14, 2011	Order setting hearing dates for December 12–16, 2011
November 17, 2011	Notice of Appeal filed at the Court of Appeal re: October 19, 2011, Decision and November 14, 2011, Decision (CACV2191)
December 12, 2011	Hearing adjourned *sine die*

2012	
March 15, 2012	Decision re: request for stay of proceedings denied – hearing will proceed; Order that parties must advise the Commission Secretary of their availability in May and/or June 2012 within 7 days of the Order
April 12, 2012	Notice of Hearing indicating hearing will commence on June 13, 2012
April 25, 2012	Notice of venue and time of hearing for June 13 and 15, 2012, advising that if the parties do not attend, the hearing may proceed in their absence and that Saskatchewan Policy Statement 12-602 applies
May 18, 2012	Motion by Ms. Pastuch seeking an order compelling full and complete disclosure and adjourning the hearing until such disclosure is received
May 28, 2012	Decision re: May 18, 2012, Motion advising request for full disclosure be provided was filed on October 25, 2010; Adjournment refused
June 11, 2012	Court of Appeal grants a stay of execution pending the perfection of the appeal (CACV2191)
June 21, 2012	Order by Court of Appeal (Gerwing J.A.) that Ms. Pastuch perfect her appeal by the end of July 2012 (CACV2191)
September 5, 2012	Motion by Ms. Pastuch to dismiss proceedings based on lack of disclosure, abuse of process, spoliation of evidence, unreliable witnesses, biased panel and lack of independence/separation between Commission and Panel
September 13, 2012	Appeal dismissed by the Court of Appeal for want of prosecution (CACV2191)
September 20, 2012	Motion by Ms. Pastuch to recuse the chair
October 11, 2012	Notice of Motion to recuse on same basis as September 20, 2012, Motion
October 23, 2012	Notice of Hearing setting November 14, 2012, for hearing of Motions to dismiss and recuse
October 24, 2012	Letter from the chair to Ms. Pastuch requesting clarification on the September 5, 2012 and October 11, 2012 Motions
October 26, 2012	Letter from the chair to Ms. Pastuch re: her intention to file additional motions; Hearing Panel precludes her from bringing further motions on basis of abuse of process and to protect the integrity of the administration of justice
November 8, 2012	Motion by Ms. Pastuch requesting a closed hearing and a formal application for confidentiality based on Saskatchewan Policy Statement 12-602
November 16, 2012	Hearing regarding Motions commences [preliminary hearing]; Mr. Pederson is present representing Ms. Pastuch; Mr. Rodonets testifies; Mr. Pederson questions him regarding the Motions
November 19, 2012	Motion by Ms. Pastuch re: scheduling and requesting to recall FCAA witnesses; Preliminary hearing continues
November 21, 2012	Letter from the chair to Ms. Pastuch re: November 19, 2012, requests; Request to reschedule hearing dates refused and requests more information re: anticipated recalled witnesses
November 22, 2012	Letter from Mr. Pederson to the chair regarding letter of November 21, 2012

December 3, 2012	Notice of Appeal filed (CACV2351) of November 28, 2012, decision regarding Motion to Dismiss and Motion to Recuse (abandoned April 3, 2014)
December 3–4, 2012	Preliminary Hearing continues
December 4, 2012	Decision on September 5, 2012, and September 20, 2012, Motions both dismissed; Notice of Appeal to the Chair by Ms. Pastuch via email
December 5, 2012	Hearing commences; Ms. Stadnek testifies; Mr. Pederson requests an adjournment, among other things; Hearing Panel denies this request and takes a short recess; Mr. Pederson does not return; FCAA counsel calls Mr. Pederson's cell phone and leaves a voice mail; The chair makes two phone calls on the record, one to Mr. Pederson and one to Ms. Pastuch
December 6, 2012	Motion by Ms. Pastuch for Publication Ban
December 10, 2012	Hearing continues; Mr. Pederson apologizes for absence at last hearing; Mr. Pederson presents a statement on behalf of Ms. Pastuch; After a recess, Mr. Pederson does not return; Testimony of J.M., G.P. and M.K.
December 11, 2012	Motion by Ms. Pastuch requesting subpoenas
December 11, 2012	Chambers hearing re: Ms. Pastuch's application for interim stay of proceedings
December 12, 2012	Hearing continues; Ms. Pastuch and Mr. Pederson are not present; Testimony of Mr. Garrett; Testimony of Mr. Rodonets
December 13, 2012	Hearing continues; Ms. Pastuch and Mr. Pederson are not present; Testimony of K.K.
December 13, 2012	Decision re: December 11, 2012, Motion; Three subpoenas issued, others refused; Addresses Mr. Pederson's non-attendance at hearing dates
December 21, 2012	Motion by Ms. Pastuch requesting adjournment as she was in hospital
December 31, 2012	Queen's Bench Application for interim stay of proceedings denied
2013	
January 2, 2013	Letter to Ms. Pastuch from the chair re: requests for adjournment; Email from Ms. Pastuch to the Hearing Panel
January 3, 2013	Hearing continues; Mr. Pederson and Ms. Pastuch are not present; Testimony of K.H.; Testimony of Ms. Novak begins
January 4, 2013	Hearing continues; Letter from FCAA counsel to Ms. Pastuch providing cash flow reports; Letter from the chair to Ms. Pastuch re: matters raised in January 2, 2013, email and advises the Hearing will proceed January 10, 2013, and that failure to attend will result in the hearing moving to closing arguments
January 10, 2010	Hearing continues
January 25, 2013	Notice of Adjournment adjourning the hearing *sine die* for medical reasons pertaining to Ms. Pastuch
March 20, 2013	Notice of Resumption of Hearing on April 17, 2013, Notably, it provides that a failure to appear means the Hearing will continue in Ms. Pastuch's absence and that Saskatchewan Policy Statement 12-602 sets out the procedures

April 3, 2013	Letter from the chair to Ms. Pastuch requesting medical information in support of her request for an adjournment and her consent for the Hearing Panel to correspond with physicians
April 16, 2013	Notice of venue and time for Hearing set to commence May 29, 2013; Advises if the appellants do not appear, the hearing will proceed in their absence and that Saskatchewan Policy Statement 12-602 sets out the procedures; Hearing Panel requested to have Ms. Pastuch's physician meet with it regarding Ms. Pastuch's medical condition
April 17, 2013	Order adjourning hearing from April 17–19, 2013, to May 29–31, 2013
April 18, 2013	Ms. Pastuch's physician advises she is not willing to meet with the Hearing Panel without Ms. Pastuch's consent
May 9, 2013	Motion by Ms. Pastuch requesting video conference with a medical specialist in the USA
May 10, 2013	Letter from the chair to Ms. Pastuch denying May 9, 2013 request on the basis of relevance, rejecting Ms. Pastuch's physician's most recent note and ordering hearing dates in May; It states that if Ms. Pastuch or her counsel fail to appear, the Hearing will not be adjourned
May 13, 2013	Motion by Ms. Pastuch to adjourn the Hearing *sine die* and seeking an Order compelling an independent third-party investigation into the FCAA's handling of evidence, the issuing of subpoenas, removal of FCAA counsel, a third-party investigation into Mr. Rodonets and Ms. Novak (FCAA investigators), a publication ban, removal of everything online, *in camera* hearings and costs
May 14, 2013	Letter from the chair to Ms. Pastuch denying adjournment request and other motions
May 23, 2013	Motion by Ms. Pastuch for a publication ban, that everything be removed from the internet and any further proceedings be held *in camera*
May 27, 2013	Hearing Panel's May 23, 2013, Motion decision denying all Ms. Pastuch's requests
May 27, 2013	Ms. Pastuch brings emergency *ex parte* Motions to the Court of Queen's Bench
May 28, 2013	Queen's Bench emergency *ex parte* Motions dismissed, with Ms. Pastuch granted leave to serve and file Motion by June 3, 2013, returnable June 13, 2013
May 28, 2013	Hearing Panel adjourns proceedings to June 21, 2013
June 13, 2013	Queen's Bench Chambers judge dismissed Ms. Pastuch's motion requesting indefinite stay, subpoenas, a publication ban and disclosure
June 14, 2013	Motion by Ms. Pastuch requesting a closed hearing, a publication ban, no more online publication and apologies
June 14, 2013	Letter from the chair to Ms. Pastuch re: subpoenas, publication ban and disclosure
June 14, 2013	Ms. Pastuch files Notice of Appeal of May 28, 2013, decision; Ms. Pastuch applies for an interim stay of the Hearing (CACV2428)

June 20, 2013	Hearing Panel held conference call to address some of Ms. Pastuch's Motions, including removal of FCAA counsel and what is reported by media
June 21, 2013	Hearing continues; Mr. Pederson is present and testifies
June 24, 2013	Ms. Pastuch's application for an interim stay of the Hearing denied (CACV2428)
June 26, 2013	Hearing continues; Mr. Pederson testifies
June 27, 2013	Hearing continues; Mr. Pederson cross-examination; Ms. Pastuch testifies
June 28, 2013	Hearing continues; Ms. Pastuch testifies
July 12, 2013	Hearing continues; Ms. Pastuch is unable to testify orally; Hearing Panel suggests Ms. Pastuch put the rest of her testimony-in-chief in writing; Mr. Pederson reports Ms. Pastuch would prefer to give oral testimony but is agreeable to providing her testimony in writing; Deadline for written testimony-in-chief set for end of business day by July 22, 2013
July 22, 2013	Written testimony package filed; Motion by Ms. Pastuch for an extension to provide the rest of her written testimony and for an adjournment
July 23, 2013	Letter from the chair to Mr. Pederson requesting medical confirmation by August 15, 2013, that Ms. Pastuch is unable to provide testimony
July 24, 2013	Adjournment of Hearing to September 10, 11 and 13, 2013; Extension of written testimony to August 15, 2013 granted
August 3, 2013	Motion by Ms. Pastuch to have the chair recuse himself based on his partner's (S.B.) relationship with an FCAA witness and an ongoing civil suit
August 21, 2013	Letter from the Registrar to Mr. Pederson stating the Hearing will proceed on September 10, 2013, and giving Ms. Pastuch until September 4, 2013, to file the remainder of her written testimony
August 25, 2013	Motion by Ms. Pastuch requesting indefinite adjournment
September 4, 2013	Hearing Panel decision denying Ms. Pastuch's request for an indefinite adjournment, discussing witnesses, requesting information re: August 3, 2013, Motion and denying request for Hearing Panel to recuse itself
September 4, 2013	Motion by Ms. Pastuch for appeal of September 4, 2013, Decision
September 6, 2013	Motion by Ms. Pastuch for an indefinite adjournment; Letter from the chair to Ms. Pastuch re: motion to recuse and requesting medical information
September 8, 2013	Motion by Ms. Pastuch to recuse the chair and the Hearing Panel, to dismiss the case and impeach witnesses
September 9, 2013	Decision re: Motion to recuse; Motion denied
September 10, 2013	Email from FCAA Registrar to Ms. Pastuch adjourning the hearing *sine die*; Adjournment Order
September 25, 2013	Email from FCAA Registrar to Ms. Pastuch requesting additional medical information re: future update
October 8, 2013	Letter from Ms. Pastuch to the chair re: September 9, 2013, decision
October 15, 2013	Letter from Ms. Pastuch to the Hearing Panel regarding medical updates
October 21, 2013	Letter from the chair to Ms. Pastuch re: medical updates, setting dates for closing arguments and timelines

October 29, 2013	Motion for mistrial by Ms. Pastuch; Formal appeal of October 21, 2013, Decision filed by Ms. Pastuch; Motion by Ms. Pastuch for indefinite stay of proceedings
November 15, 2013	Application for publication ban to Court of Appeal dismissed (CACV2486, see 2013 SKCA 122)
December 13, 2013	Application for stay dismissed (CACV2486, see 2013 SKCA 134)
December 16, 2013	Hearing Panel grants extension to Mr. Pederson and FCAA counsel re: filing of written arguments; Written arguments to be filed by January 3, 2014, with Mr. Pederson receiving one week to file rebuttal (January 10, 2014) and FCAA counsel having one further week (January 17, 2014)
December 31, 2013	Letter from the chair to Ms. Pastuch reiterating that further motions are prohibited
2014	
January 3, 2014	Closing submissions filed by Ms. Pastuch and FCAA counsel
January 6, 2014	Motion by Ms. Pastuch for more time to submit rebuttal arguments; Email from FCAA Registrar to Ms. Pastuch stating the Hearing Panel has granted a one-week extension for rebuttal
January 13, 2014	Motion by Ms. Pastuch to submit fresh evidence
January 14, 2014	Letter from the chair to Ms. Pastuch re: fresh evidence
January 15, 2014	Motion by Ms. Pastuch requesting additional time for submitting fresh evidence; Email from FCAA Registrar to Ms. Pastuch stating the Hearing Panel has granted one additional day for submitting the fresh evidence
January 17, 2014	Rebuttal argument filed by Ms. Pastuch
January 20, 2014	Fresh Evidence submissions by Ms. Pastuch filed
January 24, 2014	Rebuttal argument filed by FCAA counsel
March 28, 2014	Investigation Report F-2014-002 from the Office of the Information and Privacy Commissioner issued
April 3, 2014	Appellants file Notice of Abandonment regarding CACV2351
April 14, 2014	Letter from Ms. Pastuch to the Hearing Panel requesting a complete publication ban based on the Investigation Report
July 23, 2014	Merits Decision rendered, concluding the appellants had breached certain provisions of *The Securities Act*
August 5, 2014	Letter from Ms. Pastuch to the Secretary to the Commission giving notice of a formal application to review the Merits Decision and requesting an immediate stay of the Merits Decision
August 7, 2014	Notice of Appeal of Merits Decision filed by Ms. Pastuch
August 13, 2014	Supplementary submissions filed by Ms. Pastuch
September 12, 2014	Hearing held by video conference for August 5, 2014, Motion
December 18, 2014	Sanctions Decision rendered
December 19, 2014	Different Hearing Panel rejects August 5, 2014, Motion
January 2, 2015	Notice of Appeal of Sanctions Decision filed by Ms. Pastuch

Fresh evidence contained in the appellants' appeal book

The FCAA, in its memorandum of law dated March 8, 2018, asserts the following documents contained in the appellants' appeal books constitute "fresh evidence":

(a) Saskatchewan Information and Privacy Commissioner, "Preliminary Analysis", undated (appeal book at 2465);

(b) Saskatchewan Office of the Information and Privacy Commissioner, "Investigation Report", File No. 2012/027, dated March 28, 2014 (appeal book at 2467–2504);

(c) Oath or Declaration of Office of Sonne Udemgba, sworn September 27, 2010 (appeal book at 2512);

(d) Oath or Declaration of Office of Kenneth Edward Rodonets, sworn March 20, 2006 (appeal book at 2513);

(e) Financial and Consumer Affairs Authority of Saskatchewan, "Member Code of Conduct and Conflict of Interest Guidelines", dated May 8, 2014 (amended version of June 1, 2013 original) (appeal book at 2514–2522), with accompanying acknowledgements and undertakings of the panel chair and panel members dated September 18, 2013 (appeal book at 2525–2541);

(f) Page 3 of an invoice from MLT LLP dated December 16, 2009 (appeal book at 2567);

(g) Invoice from McKercher LLP to 101114386 Saskatchewan Ltd. dated January 31, 2009 (appeal book at 2568–2570);

(h) Remittance copy of invoice from McKercher LLP for StrikeBack Ltd. dated January 31, 2009 (appeal book at 2571);

(i) Invoice from McKercher LLP to 101115379 Saskatchewan Ltd. dated March 10, 2009 (appeal book at 2572–2573);

(j) Invoice from McKercher LLP to 101114386 Saskatchewan Ltd. dated June 18, 2009 (appeal book at 2574–2576);

(k) Remittance copy of invoice from McKercher LLP to Idendego Inc. dated September 18, 2009 (appeal book at 2577);

(l) Remittance copies of invoices from McKercher LLP to Ms. Pastuch, 101114386 Saskatchewan Ltd., Teamworx Productions Ltd. and Idendego Inc. dated September 18, 2009 (appeal book at 2578–2581);

(m) Remittance copy of invoice from McKercher LLP to 101114386 Saskatchewan Ltd. dated November 26, 2009 (appeal book at 2582);

(n) Remittance copy of invoice from McKercher LLP to Idendego Inc. dated November 27, 2009 (appeal book at 2583);

(o) Incoming Branch Confirmation of Wire Payment Services for Toronto Dominion Bank from Greenberg Traurig LLP to Idendego Inc. dated 09/10/19 (appeal book at 2584);

(p) Page 2 of an account from Greenberg Traurig LLP dated April 2, 2010 (appeal book at 2585);

(q) Certificate of Amendment for Industry Canada signed by R.S. for StrikeBack Ltd. on August 4, 2009, wherein "StrikeBack Ltd." became "Indendego Inc." (appeal book at 2588–2589);

(r) Certificate of Amendment for Industry Canada signed by R.S. for Idendego Inc. on August 20, 2009, wherein "Indendego Inc." became "Idendego Inc." (appeal book at 2586–2587);

(s) Certificate of Incorporation of Strikeback Ltd. signed by R.S. on October 24, 2008 (appeal book at 2590–2591);

(t) TD Canada Trust EasyWeb Payments and Transfers page for a Personal Payee, “Brian” showing payments between July 2, 2009, and September 2, 2009 (appeal book at 2602);

(u) TD CanadaTrust EasyWeb Account Activity showing transactions on “Select Service – 6313354” between August 6–29, 2008; September 12 to October 1, 2008; October 1–31, 2008; October 31 to December 1, 2008; December 1 to December 31, 2008; January 2–30, 2009; January 29 to February 27, 2009; March 19 to April 1, 2009; April 1 to May 1, 2009; May 19 to June 1, 2009; June 1 to June 30, 2009; July 8 to July 31, 2009; and July 2 to October 1, 2009 (appeal book at 2603–2618);

(v) Email from TD Canada Trust to Ms. Pastuch dated October 1, 2010, stating her INTERAC Email Money Transfer for $600.00 to A.P. was accepted (appeal book at 2621);

(w) Email from TD Canada Trust to Ms. Pastuch dated October 16, 2010, stating her INTERAC Email Money Transfer for $190.00 to A.P. was accepted (appeal book at 2622);

(x) Email from TD Canada Trust to Ms. Pastuch dated October 18, 2010, stating her INTERAC Email Money Transfer for $250.00 to A.P. was accepted (appeal book at 2623);

(y) Email from TD Canada Trust to Ms. Pastuch dated December 1, 2010, stating her INTERAC Email Money Transfer for $2,100.00 to A.P. was accepted (appeal book at 2624);

(z) Email from Linda Rickman to Ms. Pastuch regarding expected wire transfer of returned funds from Greenberg Traurig and discussing the receipt of her cheque for $35,000.00 on September 29, 2009 (appeal book at 2718–2719);

(aa) Memorandum to File by "Barry" dated October 26, 2010, regarding his discussion with FCAA counsel on October 25, 2010, about dates and trust conditions for disclosure (appeal book at 2737)

(bb) Email from Ms. Pastuch's lawyer to her dated November 5, 2010, regarding the Commission's process being highly unusual, that setting a hearing date before receiving disclosure is unheard of, the chair has a possible conflict and a potential application to the Court of Queen's Bench (appeal book at 2738);

(cc) Emails between a media member and FCAA dated January 27, 29, 30, February 3, 20 and March 5, 2014 (appeal book at 2756–2758);

(dd) Oath or Declaration of Office of Sandy Novak taken and subscribed January 11, 2002 (appeal book at 3394 (Tab BB*));

(ee) FCAA Boardroom availability schedules for December 12–16, 2011; June 13–15, 2012; December 4–6, 2012; December 11–13, 2012; January 3–4, 2013; and January 9–11, 2013 (appeal book at 3458–3476 (Tab EE*));

(ff) Emails between a media member and FCAA dated July 12, 24, October 1, 2, November 5, 12, 19 and 20, 2013 (appeal book at 3477–3488 (Tab FF*));

Emails between a media member and FCAA regarding media inquiries dated January 27, 29, 30, February 3, 20, 2014, and January 6, 2015 (appeal book at 3489–3492 (Tab GG*)); and

(gg) Saskatchewan Office of the Information and Privacy Commissioner, "Review Report F-2014-001", File 2012/008, dated January 29, 2014 (appeal book at 3493–3636 (Tab HH*)).

* These documents were part of the appellants' application to adduce fresh evidence.