Court of Appeal for Saskatchewan

Docket: CACV3232

Citation: *C2 Ventures Inc. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 53

Date: 2019-06-14

Between:

C2 Ventures Inc. and Monte Dobson

Appellants

And

Financial and Consumer Affairs Authority of Saskatchewan

Respondent

Before:	Ottenbreit, Caldwell and Schwann JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Mr. Justice Caldwell
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Madam Justice Schwann
On Appeal From:	Financial and Consumer Affairs Authority
Appeal Heard:	February 11, 2019
Counsel:	David G. MacKay for the Appellants Sonne Udemgba for the Respondent

Caldwell J.A.

I. INTRODUCTION

[1] C2 Ventures Inc. [C2] and Monte Dobson appeal against the decision of a hearing panel [Panel] of the Financial and Consumer Affairs Authority of Saskatchewan [FCAA] that awarded compensation [Compensation Orders] to four investors [Claimants] whom the Panel found had suffered financial losses that were caused in whole or in part by the appellants' breaches of *The Securities Act, 1988*, SS 1988-89, c S-42.2.

[2] The appellants assert four grounds of appeal, namely, that: (i) the Panel lacked jurisdiction; (ii) the Claimants' claims are statute barred; (iii) the losses had not been caused by the appellants' statutory breaches; and (iv) the decision is unreasonable because the Panel misapplied securities exemptions to two Claimants. For the reasons that follow, I would allow the appeal on the basis that the Panel had no jurisdiction to proceed with the compensation hearing and because the FCAA had failed to prove causation. I would set aside the Compensation Orders.

II. BACKGROUND

[3] By and large, the details of the investment scheme that gave rise to the proceedings against the appellants are not relevant to the issues in this appeal. However, in brief terms, on July 18, 2007, C2 sent a letter to several Saskatchewan residents seeking investments in a real estate development project in Regina, Saskatchewan. The idea was to pool funds to purchase and "condo-ise" apartment buildings. Eleven Saskatchewan residents [Investors] took up C2's offer. They invested about $900,000 in total. On August 8, 2007, C2 sent a letter to the Investors assuring them that, upon completion of the project, they would receive their principal investment back as well as a share of the net profit realized from the sale of the project. C2 said it had raised approximately $1.3 million to complete the project.

[4] Between October and May of 2009, Mr. Dobson, the president and a director of C2, sent emails to the Investors assuring them that their investments were safe and were secured and that they co-owned the project. Just seven months later, in December 2009, C2 informed the

Investors that the project had failed, that they did not co-own the project, and that their investments were not secured.

[5] On November 24, 2011, the director of the FCAA [Director] issued a notice of hearing [Notice of Hearing] alleging the solicitation of the Investors by the appellants had contravened Saskatchewan securities laws. The Notice of Hearing required them to attend before a panel of the FCAA to set a date for a contravention hearing to consider whether it was in the public interest to order the appellants, *inter alia*, to cease trading in securities and exchange contracts in Saskatchewan and, importantly, to "pay financial compensation of up to $100,000 to each person or company that has suffered a financial loss caused by [the appellants'] contravention of or failure to comply with Saskatchewan securities laws pursuant to section 135.6 of [*The Securities Act, 1988*]".

[6] It appears the appellants cooperated with the FCAA investigation. In an agreed statement of facts, dated July 31, 2013 [ASF], the appellants acknowledged they had not been registered to trade or to advise in securities in Saskatchewan and that, by trading or advising in the securities in question, they had contravened s. 27 of *The Securities Act, 1988*. They further acknowledged the fact the Director had not issued a receipt for a prospectus for the securities sold by C2 contravened the prospectus requirements under s. 58 of *The Securities Act, 1988*. By signing the ASF, the appellants also agreed they had made "potentially inaccurate statements" to the Investors. The ASF did not address the issue of financial compensation for the Investors.

[7] Subsequent negotiation between the parties led to a consent order, dated December 19, 2013 [Consent Order], which was endorsed by the chairperson of the Panel. The Consent Order contained most of the relief sought by the Director in the Notice of Hearing, namely, orders to cease trading and advising (s. 134(1)(a), (d), (d.1), (e), (h) and (h.1)), an order to pay a $20,000 administrative penalty (s. 135.1), and a $1,000 costs order (s. 161). The Consent Order did not, however, address the issue of financial compensation for the Investors (s. 135.6).

[8] Five months later, on May 18, 2014, the Director made a "request for orders pursuant to s. 135.6(2) of *The Securities Act, 1988*" [Request for Orders] in relation to the Claimants. The Request for Orders asked the Panel to make orders of financial compensation against the appellants pursuant to s. 135.6(4). Under it, the Director sought approximately $140,000 in

compensation from the appellants. This brought the matter before the Panel, whose members were appointed pursuant to *The Financial and Consumer Affairs Authority of Saskatchewan Act*, SS 2012, c F-13.5.

[9] When the matter of compensation came on for hearing before the Panel, the appellants brought a preliminary application to quash the proceeding on the grounds the Director had failed to follow the procedures laid out in *12-602 – Procedure on Hearings and Reviews Before the Commission (Local Policy)* [Policy 12-602], Part 13 of which states:

> **Part 13 – Financial Compensation Orders**
>
> **13.1 Procedure Where Request for Orders under Section 135.6**
>
> 13.1 The procedures set out in this Part apply when a Statement of Allegations by Staff on an application pursuant to section 134 of the Act includes a request for financial compensation orders pursuant to section 135.6 of the Act.
>
> **13.2 Hearing on the Statement of Allegations**
>
> 13.2(1) The Panel will conduct a hearing on the Statement of Allegations by the Staff against the respondents.
>
> (2) *Where the Panel issues a decision that includes a finding that a respondent has contravened Saskatchewan securities laws, the Panel will set a date in the decision by which the Director must apply for orders pursuant to section 135.6 of the Act*.[1]
>
> **13.3 Request by Director for Financial Compensation Orders**
>
> 13.3(1) Before the date set by the Panel in subsection 13.2(2), Staff will file a Request by the Director that the Panel make orders pursuant to section 135.6 of the Act that a respondent pay financial compensation to claimants for the financial loss caused by the respondent's contravention of Saskatchewan securities laws[.]
>
> (2) The Request by the Director will include:
>
> (a) the names of each claimant;
>
> (b) the amounts of each claimant[']s financial loss with documents to show that loss; and
>
> (c) a submission on how the claimant's financial loss was caused by the respondent's contravention of Saskatchewan securities laws.
>
> **13.4 Notice of Hearing on the Request**
>
> 13.4 When a Request by the Director has been filed by Staff, the Secretary will issue a Notice of Hearing on the Request forthwith.

[1] Interestingly, but of no import to this appeal, the FCAA has since amended s. 13.2(2) of Policy 12-602 to provide: "Where the Panel issues a decision that includes a finding, or approves a settlement agreement that includes an admission, that a respondent has contravened Saskatchewan securities laws, the Director *may, in his or her sole discretion*, request orders for financial compensation on behalf of claimants who have applied for such orders" (Emphasis added, <https://fcaa.gov.sk.ca/public/plugins/pdfs/2575/12_602_amended_july_13_2017.pdf> (23 May 2019)).

13.5 Service of the Notice of Hearing

13.5 Staff will promptly serve the Request by the Director and the Notice of Hearing on the parties.

(Emphasis added)

[10] The important aspect of Policy 12-602 is that, once a contravention hearing has been held and a panel has found a breach of securities laws, the panel is to set a date in its decision by which the Director *must* apply for financial compensation for all claimants. In this case, since no such date had been set in the Consent Order, the appellants argued the Panel lacked jurisdiction to hear the matter of compensation.

[11] In dismissing the appellants' preliminary objection to the compensation hearing, the Panel wrote:

Preliminary Matters

Counsel for the Respondent[s], brought an application before the panel to quash the hearing as they felt that the Director had failed to follow procedures laid out in 13.2(2) of the Saskatchewan Policy Statement, Procedure for Hearings and Reviews. This policy states that once a hearing is held and the respondents are found to have breach[ed] Securities laws, the panel will set a date in the decision by which the director must apply for compensation.

The panel also heard from Counsel of the FCAA on the matter.

The panel found that given there was no hearing conducted for this matter, the matter was consensual, there was therefore no date set for which the Director needed to comply with. The panel ruled the hearing into compensation should proceed.

[12] In its decision on the merits, the Panel identified its task as being "to determine whether the requirements for a Financial Compensation Order have been met." The Panel identified three such requirements under s. 135.6(4), namely, (i) a contravention or failure to comply with Saskatchewan securities laws by the appellants, (ii) evidence establishing the amount of financial loss suffered by each Claimant, and (iii) the appellants' contravention or failure to comply with Saskatchewan securities laws had caused the Claimants' financial losses in whole or in part. In the result, the Panel concluded the Director had met the onus and the burden of proof under s. 135.6(4) and, therefore, it was appropriate to order the appellants to pay compensation in the amounts of $20,164.41 to one Claimant and $40,328.82 to each of the other three Claimants.

III. STANDARD OF REVIEW

[13] *The Securities Act, 1988* sets out a limited right of appeal in respect of matters of law:

> **Appeals to Court of Appeal**
> **11**(1) A person or company directly affected by a decision of the Commission, other than an order pursuant to subsection 83(1), may, on matters of law only, appeal the decision to the Court of Appeal.

[14] Although the appellants' grounds and the parties' arguments in this matter are framed in terms both of appeal and of judicial review, the Supreme Court of Canada has previously applied the adjudicative framework of judicial review in circumstances such as these (see: *British Columbia (Securities Commission) v McLean*, 2013 SCC 67, [2013] 3 SCR 895 [*McLean*]). Indeed, this Court has proceeded, at least tentatively, in that manner in the past (see: *Euston Capital Corp. v Saskatchewan Financial Services Commission*, 2008 SKCA 22 at para 27, 307 Sask R 100). However, the question of the appropriate standard of review was not argued before us and, as I find it is not necessary to resolve that question to dispose of this appeal, I will leave it to another day.

IV. ANALYSIS

[15] As noted, the appellants advanced four arguments on appeal against the Compensation Orders. I find the first and third arguments, on questions of jurisdiction and causation, provide a complete answer to the appeal. As such, I have not addressed the two other grounds of appeal.

A. Jurisdiction

[16] Under the first ground, the appellants say the Panel erred by continuing with the compensation hearing despite the fact no date had been set in the Consent Order by which the Director had to apply for compensation. This, as the appellants note, is contrary to s. 13.2(2) of Policy 12-602. They observe the ASF and the Consent Order did not contain a single reference to financial compensation for the Investors, even though the Notice of Hearing had asserted that claim. In these circumstances, the appellants argue, the FCAA's failure to follow its own procedures as set out in Policy 12-602 was fatal to the Request for Orders. In some measure, the appellants' arguments may be taken as an assertion that the Consent Order had resolved all

outstanding matters between the appellants and the FCAA. In oral argument, the appellants took the position this ground invoked matters of procedural fairness or natural justice.

[17] The FCAA interprets the ASF and the Consent Order differently. It says the issue of financial compensation was left open and was outstanding. The FCAA says there was no need to set a date by which the Director had to request a financial compensation order because there had been no contravention hearing. That is, the FCAA says it did not fail to comply with its own procedures because s. 13.2(2) did not apply in the circumstances. Regardless, the FCAA submits Policy 12-602 does not carry the force of law, leaving us to draw the inference that it need not have been followed even if it had applied. With the same breath, the FCAA says that, if a date had been set in accordance with Policy 12-602, nothing would have changed because the FCAA would have simply complied with the deadline and the compensation hearing would have proceeded before the Panel in the way that it did. Given that conclusion, the FCAA asserts the appellants have suffered no prejudice from its failure to follow Policy 12-602. Lastly, in oral argument before us, the FCAA objected to the characterization of this ground as invoking issues of procedural fairness or natural justice, submitting the appellants were restricted to arguing jurisdictional error only.

[18] Frankly, I am somewhat surprised by the FCAA's arguments under this ground. If I understand its position correctly, the FCAA would have us accept that Policy 12-602 (which sets out in not inconsiderable detail procedural rules for applications, motions, disclosure, admissions, public access, pre-hearing conferences, adjournments, cooperation with other jurisdictions, settlement agreements, hearings and reviews) may simply be disregarded or cast aside as suits the FCAA in the expediency of the circumstances. That cannot be so. And, in fact, Policy 12-602 itself says otherwise. In s. 1.3(3), Policy 12-602 states, "[a] Panel may waive or vary any of this Policy in respect of any proceeding before it, if it is of the opinion that to do so would be in the public interest or that it would otherwise be advisable to secure the just and expeditious determination of the matters in issue." Notably, before a panel waives or varies any part of Policy 12-602, it must consider the public interest and the nature of the matter in issue (ss. 1.3(4)(a) and (d)). There is no evidence to show that that occurred in this case.

[19] Nonetheless, it remains to be seen whether the appellants' arguments for overturning the Panel's decision have any merit. As I interpret the appellants' arguments, there are two avenues to this "jurisdictional" ground of appeal. The first is that the failure to comply with Policy 12-602 constituted a breach of natural justice or procedural fairness—leaving the Panel with no jurisdiction. The second is that the Consent Order put an end to all proceedings between the appellants and the FCAA—leaving the Panel with no jurisdiction.

1. Procedural fairness

[20] On the facts of this matter and notwithstanding the opposing view of the FCAA, I find the jurisdictional issue raised by the appellants perforce invokes procedural fairness or natural justice concerns. First, I note that s. 1.2(2) of Policy 12-602 provides, "[t]his Policy should be construed to achieve the most expeditious and least expensive determination of every proceeding before a Panel, *consistent with the requirements of natural justice*" (emphasis added). Second, the courts have historically treated procedural fairness and natural justice as matters of jurisdiction (*Université du Quebéc à Trois-Rivières v Larocque*, [1993] 1 SCR 471. In *Canada (Attorney General) v Public Service Alliance of Canada*, [1993] 1 SCR 941 at 961, the Court said, in undertaking a judicial review, "courts must ensure first that the board has acted within its jurisdiction by following the rules of procedural fairness" (see also: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27–33, [2008] 1 SCR 190 [*Dunsmuir*]; *Cardinal v Kent Institution*, [1985] 2 SCR 643; *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809; *Service Employees' International Union, Local No. 333 v Nipawin District Staff Nurses Association*, [1975] 1 SCR 382 at 389; and *R v Electricity Commissioners*, [1924] 1 KB 171 at 204–205 per Lord Atkin).

[21] There is no doubt that the FCAA owed the appellants a high order of procedural fairness in this case, given the nature of the decision being made, the closeness of the proceedings to the judicial process, the nature of the statutory scheme, the importance of the decision to the appellants, and the choices of procedure made by the FCAA itself, namely, Policy 12-602 (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 55, [2011] 2 SCR 504). On that last point, L'Heureux-Dubé J. in *Baker* concluded that, if a party has a legitimate expectation that a certain procedure will be followed, then that procedure will be required by the duty of fairness, writing:

> [26] Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.*), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. *If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness*: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration*), [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D.J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. *This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.*
>
> (Emphasis added)

[22] Given what the Policy itself says in s. 1.2(2), I have no hesitation concluding that Policy 12-602 shaped the duty of procedural fairness owed by the FCAA to the appellants. And, in that regard, s. 13.2(2) of the policy states quite plainly that, "[w]here the Panel issues a decision that includes a finding that a respondent has contravened Saskatchewan securities laws, the Panel will set a date in the decision by which the Director must apply for orders pursuant to section 135.6 of the Act."

[23] I am not persuaded the negotiation of the Consent Order and the circumstances of its issuance took this matter outside Policy 12-602; those facts merely obviated the need for a contravention hearing. To step outside Policy 12-602 (in the manner suggested by FCAA's arguments in this appeal), the Panel would have had to state in the Consent Order itself that, having considered the public interest and given the nature of the matters in issue, it was waiving or varying Policy 12-602 because it was "of the opinion that to do so would be in the public interest or that it would otherwise be advisable to secure the just and expeditious determination of the matters in issue" (see: s. 1.3(3)). But, as noted, that did not occur.

[24] Furthermore, nothing in Policy 12-602 precludes the application of s. 13.2(2) to circumstances where a negotiated consent order has supplanted the need for a full hearing of allegations of contravention. As I interpret it, even though its terms arose out of a negotiated agreement, the Consent Order was endorsed by the chairman of the Panel and it is therefore "a decision [issued by the Panel] that includes a finding that a respondent has contravened Saskatchewan securities laws". This reasoning is confirmed by s. 135.3 of *The Securities Act, 1988*, which provides:

> **Resolution of proceeding by consent**
>
> **135.3**(1) Notwithstanding any other provision of this Act, a proceeding pursuant to this Act may be disposed of by:
>
> (a) an agreement approved by the Commission;
>
> (b) a consent order made by the Commission;
>
> (c) a written undertaking made by a person or company to the Commission that has been accepted by the Commission; or
>
> (d) if the parties have waived the hearing or compliance with any requirement of this Act, a decision of the Commission made:
>
> (i) without a hearing; or
>
> (ii) without compliance with the other requirements of this Act.
>
> (2) An agreement, order, written undertaking or decision made, accepted or approved pursuant to subsection (1) may be enforced in the same manner as an agreement, order, written undertaking or decision made, accepted or approved pursuant to any other provision of this Act.

[25] To be clear, if the Consent Order were not "a decision" of the Panel, then it would have had no more force than that of an agreement between FCAA and the appellants and, in that circumstance, the Panel would clearly have had no jurisdiction to proceed with the compensation hearing—there being no *finding* of contravention.

[26] Further, I find the appellants had a legitimate expectation that the Panel would follow the clear, unambiguous and unqualified procedure set out in Policy 12-602. All that s. 13.2(2) required was a date in the Consent Order by which the Director had to request financial compensation. In that the FCAA says the appellants suffered no prejudice by this breach, its arguments are misplaced. In *Mavi*, the Supreme Court said proof of reliance is not necessary where a party invokes its legitimate expectations. That is, a claim based on a failure to afford procedural fairness does not depend on the existence of prejudice. Procedural fairness or natural

justice is a *duty* owed by the administrative body to the parties involved in the proceedings before it. The Court addressed this in *Saskatoon Co-operative Association Kunuted v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2016 SKCA 94, 484 Sask R 157, where it wrote *per curiam*:

> [34] In *Cardinal*, the Supreme Court considered whether a court could weigh prejudicial effect when considering the validity of a decision rendered as a result of a lack of procedural fairness. Justice Le Dain, speaking for the Court in *Cardinal*, affirmed that "the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision" (at 661). In *Hecla Mining Company of Canada v Cominco Ltd.* (1988), 116 NR 44 at para 3 (FCA) [*Hecla Mining*], the Federal Court of Appeal rejected a party's submission that "the Minister's breach was of little consequence and that even had the applicant been afforded an opportunity to reply or comment on the Mining Recorder's letter, there is nothing it could usefully have said or done," relying on the Supreme Court's affirmation in *Cardinal*.

[27] As such, I find the Consent Order should have set out a date by which the Director had to issue the Request for Orders. The fact it did not amount to a breach of procedural fairness. Accordingly, I find the Panel erred in law when it determined it had jurisdiction to proceed with the compensation hearing in these circumstances. While the remedy for this breach would be to reset the matter so that the FCAA might comply with Policy 12-602, this is where the two avenues under the first ground of appeal cross, with the second leading to a different remedy.

2. Interpretation of the Consent Order

[28] The paths cross here because, if, as FCAA asserts, the matter of financial compensation had been left on the table, then, as I have just concluded, the Consent Order was deficient since no timelines had been imposed on the Director. Axiomatically, if everyone understood that compensation remained a live issue, then this circumstance would have left the appellants in limbo, entirely uncertain as to whether or when the matter would be at an end. This too is inconsistent with s. 13.2(2) of Policy 12-602 and with the appellants' legitimate expectations as well as the principles of natural justice, namely, the principle of finality and the right to a timely hearing.

[29] To be clear, there was nothing wrong with not setting a date by which the Director had to request compensation orders provided, of course, the Director had no intention of requesting financial compensation in the future. The representations made by the FCAA in s. 13.2(2) of

Policy 12-602 are procedural in nature and do not interfere with a panel's decision-making authority. Nonetheless, the purpose of that procedural requirement is undoubtedly to provide finality to proceedings where, following a decision on contravention, the issue of financial compensation is left open for another day. For that reason, to reiterate, as it appears the Director maintained an unexpressed intention to request compensation orders, the Consent Order should have reflected that intention and should have set forth a date by which the Director had to act on that intention. However, the failure to do so in these circumstances elevates that failure from a procedural oversight to an implicit recognition that the Consent Order resolved all statutory claims against the appellants, as discussed below.

[30] While *The Securities Act, 1988* affords the Director a right to seek compensation orders, neither the ASF nor the Consent Order refer to a claim for financial compensation or say a claim is outstanding, let alone preserve the right of the Director to request a compensation order at some point in the future. Juxtaposed to this silence is Policy 12-602, which establishes the procedure for exercising the right to seek compensation orders, expressly stating that a date must be set by which the Director has to exercise the right to seek compensation orders. Given s. 135.3(1) of *The Securities Act, 1988*, the silence of the Consent Order on the issue, the procedural requirements of Policy 12-602, and the resolution in the Consent Order of all other matters put at issue by the Notice of Hearing, it seems to me that a disinterested observer could reasonably have understood that all matters had been put to an end by the Consent Order.

[31] In response to this, the FCAA points to the ASF, saying it did preserve the Director's right to seek compensation. However, I am not persuaded including the following paragraph in the ASF fills the silence:

> 22. Nothing in this Agreed Statement of Facts shall prohibit the Director, Securities Division of the Financial and Consumer Affairs Authority of Saskatchewan (the Director) from considering and dealing with any matter not set out in the Agreed Statement of Facts or any new complaint brought to the Director's attention against the Respondents that is not related to or does not from part of the same transaction as set out in the Agreed Statement of Facts.

[32] While the ASF ultimately led to the Consent Order, the ASF merely sets out the facts upon which the parties had agreed. The ASF does not touch upon the appellants' liability to compensate the Investors for any losses they might have incurred. Nor does the ASF address the Director's right to request financial compensation for any losses caused by contraventions that a

panel might subsequently find based on the ASF. Further, the Director's right to request financial compensation orders is triggered by a *finding of contravention* by a panel in a *decision*, not by an agreement among the parties. Indeed, as we are given to understand, no Investors had even sought compensation at the time the parties entered the ASF—that is, the record indicates the Director sought out the Claimants *after* the Consent Order had issued. On this basis, I conclude the ASF does not address or preserve the Director's right to seek compensation. On the contrary, the objective evidence from the record indicates the Consent Order resolved all outstanding issues between the FCAA and the appellants.

[33] Furthermore, while there is little direct evidence on this point, the record also permits the appellants to argue that they would not have signed the ASF or have agreed to the Consent Order had they known financial compensation was still on the table. The FCAA disputes this assertion, but the FCAA has provided no evidence to contradict it and the record does not do anything to dispel it. Rather, as I read his testimony before the Panel, Mr. Dobson said enough to indicate that he thought the matter had ended when he negotiated the Consent Order.

[34] Admittedly, neither *The Securities Act, 1988* nor Policy 12-602 directly address the legal effect of a consent order in these circumstances; however, the preponderance of the evidence and the principles of natural justice discussed above persuasively support the conclusion that the Consent Order had put an end to the proceedings between the FCAA and the appellants, including as to the issue of compensation. While the FCAA's actions subsequent to the Consent Order show that it did not share the same understanding of the legal effect of the Consent Order as did the appellants, I would construe its legal effect against the FCAA in this case because the appellants' inference, even if it were mistaken, was reasonably drawn in the circumstances and arose out of the FCAA's failure to follow its own procedure.

[35] In sum, in the circumstances of this matter, I would find that either the FCAA breached the duty of fairness it owed to the appellants or the Consent Order brought an end to all proceedings against the appellants and, therefore and in either case, that the Panel had no jurisdiction to proceed with the compensation hearing. While I might have set aside the Compensation Orders on this basis alone, there is another, more compelling reason for doing so.

B. Causation

[36] Before a panel may order financial compensation, it must be satisfied on the evidence adduced that a contravention or failure under *The Securities Act, 1988* has *caused* financial loss to a claimant in whole or in part (s. 135.6(4)(c)). In this case, the Panel correctly identified this legal requirement in its reasons and, when it came to its analysis and conclusion on the question of causation, the Panel wrote (at 6–7):

> **Analysis**
> As set out before, the requirements for a compensation order must meet a three pronged test.
>
> 1. **A breach of the Act must have occurred –** in this instance the [appellants] have admitted to same in an agreed statement of facts dated July 31, 2013.
>
> 2. **The amount of financial loss suffered by the claimant must be backed by evidence** – All four claimants in this request provided evidence of their loss. The investigator for the FCAA verified the same and documentation was provided to the panel during his sworn testimony.
>
> 3. **The [appellants] contravention or failure caused the claimants financial loss in whole or in part** – The [appellants] failed to comply with registration requirement in section 27 of the Act. If they had been registered, they would have had to have met the requisite education, experience and other requirements for registrants. If this were the case, it is doubtful that the [appellants] would have sold these securities to the claimants.
>
> Further, the [appellants] failed to comply with prospectus requirement in section 58 of the Act. If the [appellants] had complied with prospectus requirements under the Act, they would have set out full, true and plain disclosure of all material facts. If the [appellants] had given the claimants full, true and plain disclosure of the true state of affairs (for example that the investment was not secured by the real estate project as stated, and investor would not receive the full return of their investments if the project failed), the claimants would likely not have invested.
>
> The [appellants] have admitted that no exemptions from the registration or prospectus requirements were available for the trades with Froh or Nordlund. The panel was provided no evidence at the hearing that any exemptions were available for Murphy or Trenaman and therefore concludes there were none.
>
> **Conclusion**
> The panel finds that the [appellants] have been negligent in their actions which in turn led to the loss of the investors monies in question.
>
> The panel hereby orders that that the Authority issue orders pursuant to section 135.6 of the Act, ordering the [appellants] to pay compensation to each of:
>
> 1. Janet Trenaman of Victoria, British Columbia, in the amount of $20,164.41;
>
> 2. Dr. Paul Murphy Medical Corp. of Saskatoon, Saskatchewan, in the amount of $40,328.82;
>
> 3. Loretta Froh of Regina, Saskatchewan, in the amount of $40,328.82; and
>
> 4. Shirley Nordlund of Martensville, Saskatchewan, in the amount of $40,328.82.

This is the unanimous decision of the panel.

[37] The appellants assert the Panel's finding on causation results from one or more errors of law. In *Housen v Nikolaisen*, 2002 SCC 33 at paras 70 and 159, [2002] 2 SCR 235, the majority and minority judges all agreed that a trier of fact's conclusion on causation is a finding of fact. However, as noted above, both parties approached the issues in this case from the perspective of a true appeal as well as under the judicial review framework for tribunal decisions, leaving open the question of the appropriate standard of appellate review. Nonetheless, I find the appellants' allegations raise questions of law and that their allegations of error have merit, whether addressed under the standard of reasonableness, correctness, or palpable and overriding error.

[38] In brief terms, under reasonableness, the Panel's decision on causation does not fall within the range of possible, acceptable outcomes that are defensible in respect of the facts and law because there was simply no evidence before the Panel upon which it could make a finding that the appellants' contraventions had, in whole or in part, caused the Claimants' losses (*Dunsmuir* at para 47). The finding of fact on causation falls on a review for its correctness for the same reason, i.e., because there was no evidence as to causation before the Panel, the finding gives rise to an error of law that invites appellate intervention (*P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 at paras 67–68, 302 Sask R 161). Lastly, the Panel's finding on causation is palpably in error because no evidence existed to support it (*Housen v Nikolaisen* at para 22) and the error overrides the result in this case because causation is a mandatory precondition to the issuance of a compensation order (s. 135.6(4)(c)). The full explanation of this is more protracted, chiefly because it is difficult to articulate a negative—i.e., an absence of evidence.

[39] It is important to understand that *causation* is the last of three preconditions to the making of a compensation order but also that it is the lynchpin of s. 135.6(4). The first two preconditions are (i) a finding of contravention or failure to comply with *The Securities Act, 1988* and (ii) quantification of the claimant's financial loss. The third, that the "contravention or failure caused the financial loss in whole or in part", must obviously follow from the first two because it links them together, thereby triggering a panel's authority to order the person who committed the contravention to pay compensation to the claimant. The requirement of proof of a causal connection between a contravention (s. 135.6(4)(a)) and a loss (s. 135.6(4)(b)) is

necessary because civil liability is generally imposed by the state only in accordance with the principle that individuals who cause harm to others must take responsibility for their actions. In that regard, it is important to have a clear understanding of the actions of the appellants that were at issue in the compensation hearing and, just as importantly, those that were not.

[40] As noted, the proceedings started with the Notice of Hearing, which set forth the securities laws the FCAA alleged the appellants had contravened. Those laws included ss. 27 and 58 of *The Securities Act, 1988*. But, the Notice of Hearing also set out detailed allegations that the appellants had made "misleading and untrue statements" to the Investors and had thereby contravened s. 55.11(1) of *The Securities Act, 1988*. Nonetheless, under the ASF, the appellants and the FCAA agreed that the appellants had only made "potentially inaccurate statements" to the Investors, which would seem not to contravene s. 55.11(1). Furthermore, the Consent Order, which incorporated the ASF as an appendix, does not address misleading or untrue statements or s. 55.11(1) at all. Although the Request for Orders mentions the allegation (i.e., that the appellants had made misleading and untrue statements), it does so only as part of the procedural background. More pointedly, the Request for Orders does not allege the appellants had contravened s. 55.11(1). The only contraventions put forward in the Request for Orders relate to ss. 27 and 58 of *The Securities Act, 1988*.

[41] To close the circle around s. 135.6(4)(a), i.e., the requirement of a contravention or failure under securities laws, a breach of s. 55.11(1) of *The Securities Act, 1988* was not before the Panel. The ASF was the only evidence of a contravention or failure and, as the appellants had only admitted therein to contraventions of ss. 27 and 58 of *The Securities Act, 1988*, their admissions were the only evidence that satisfied s. 135.6(4)(a). Therefore, in terms of the evidence that was before the Panel, this circumstance meant there was no finding, and no evidence upon which the Panel could conclude, the appellants had misled or wrongfully induced the Investors to invest in the project.

[42] On the matter of quantification of financial loss, the Request for Orders stated the amounts of each Claimant's investment as well as the fact the Claimants' claims of financial loss were supported by documentation, which documentation was adduced into evidence through the affidavit of an FCAA investigator. On this basis, the Panel was easily "able to determine the

amount of financial loss" of each Claimant, thereby satisfying s. 135.6(4)(b). At this point, all that remained for the Panel was to find a link between the contraventions under ss. 27 and 58 and the financial losses of the Claimants.

[43] In the Request for Orders, the Director addressed the issue of causation in this way:

> **Contraventions by the [appellants]**
> The [appellants] failed to comply with registration requirement in section 27 of the Act. If they had been registered, they would have had to have met the requisite education, experience and integrity requirements for registrants. If this were the case, it is doubtful that the [appellants] would have sold these securities to the claimants.
>
> Further, the [appellants] failed to comply with prospectus requirement in section 58 of the Act. If the [appellants] had complied with prospectus requirements under the Act, they would have set out full, true and plain disclosure of all material facts. If the [appellants] had given the claimants full, true and plain disclosure of the true state of affairs (for example that the investment was not secured by the real estate project as stated, and investor would not receive the full return of their investments if the project failed), the claimants would likely not have invested.
>
> The [appellants] have admitted that no exemptions from the registration or prospectus requirements were available for the trades with Froh or Nordlund.
>
> The Director takes the position that no exemptions from the registration or prospectus requirements were available for the trades with Trenaman or Dr. Murphy, and puts the [appellants] to strict proof thereof.

[44] As is readily apparent, the Request for Orders states its arguments on causation in almost exactly the same language as the Panel's analysis of that issue. Importantly, however, the documentation supporting the Request for Orders had contained no evidence on the issue of causation. Further, when the Panel summarised the Director's arguments in its reasons, it wrote (at 6):

> **Arguments of the Parties**
> Legal counsel for the FCAA argued that the agreed statement of facts signed by the [appellants], dated July 31, 2017, proved that they contravened the Securities Act of Saskatchewan. The documentation provided by the investors and verified by the FCAA investigator Kenneth Foster, was a true reflection of the claimant's loss. *The company and Mr. Dobson's activities resulted in the failure of the enterprise and caused the loss.*
>
> (Emphasis added)

[45] It is unclear whether the Panel accepted the Director's argument in this regard. Nonetheless, it is important to understand that the argument itself does not address the preconditions for a compensation order. As noted, s. 135.6(4) requires a contravention, a loss and a causal connection between the two. The foregoing statement proposes that the appellants' *activities* caused the business venture to fail, which, in turn, caused the Claimants' losses. That

may well be true, but it is not relevant because it says nothing about the appellants' contravention of the registration and prospectus requirements of *The Securities Act, 1988*, which was the basis for the Request for Orders. Furthermore, on the record in this case, I am unable to see how a failure to register or to file a prospectus could cause the business venture to fail.

[46] The appellants, on the other hand, had adduced evidence pointing to things other than their own contraventions as causing the Claimants' losses. In this appeal, the appellants argue the Panel erred because it overlooked or disregarded their evidence relevant to causation. However, I find this was not so. In their reasons, the Panel clearly considered the possibility raised by the appellants that market conditions and the principal person behind the investment project had caused the Claimants' losses (at 6):

> Counsel for the [appellants] argued that Mr. Dobson and all the investors took a loss. Mr. Dobson's Alberta partner, Dedric Robinson, was the real mastermind of the real estate development, he [Mr. Dobson] was acting as an agent. The panel heard that he formed C2 Ventures Inc. to invest in Real estate, met Robinson through a seminar. He was offered increased percentages in the project by Robinson if he could raise more funds finding investors for the development. Robinson provided all the documentation that was used. As a result of changing markets and a rejected development permit the venture failed in 2010. He claimed not to have actively sought out these four investors [i.e., the Claimants]. Counsel argued that the market and Mr. Robinson had caused the loss, it was a business failure and the investors did not lose their monies as a result of Dobson's activities.

While the Panel clearly addressed and rejected it, I find the appellants' evidence was the only evidence of causation before the Panel.

[47] The absence of any other evidence as to causation is apparent from the record and from the Panel's causation analysis. As noted, when considering the appellants' failure to comply with registration requirement under s. 27, the Panel adopted the Director's argument that "[i]f [the appellants] had been registered, they would have had to have met the requisite education, experience and other requirements for registrants." While plainly correct statements about the fact of the appellants' failure to register and about the statutory prerequisites to registration, the statements themselves have nothing to do with causation. They do not draw the required link between the contravention and the Claimants' losses. In fact, they do nothing to inform the question of whether the appellants' failure to register or their failure to meet the requisite education, experience and other requirements of registrants had any effect whatsoever on any Claimant's decision to invest with the appellants.

[48] Turning to the contravention of the prospectus requirement under s. 58 of *The Securities Act, 1988*, the Panel again adopted the Director's argument and found that, had the appellants met that requirement, the Claimants "*would likely* not have invested" (emphasis added) because they would have received a full, true and plain disclosure of all material facts. While this suggests some assessment by the Panel of the mindset of the Claimants, that could not have been the case. The statement was speculative at best because there was simply *no* evidence from the Claimants to that effect before the Panel.

[49] None of the Claimants testified before the Panel or provided affidavits. The FCAA investigator, who did testify, did not provide any evidence in either his affidavit or his testimony that shed any light on what the Claimants might have done had the appellants not contravened ss. 27 and 58 of *The Securities Act, 1988*. That is, none of the evidence before the Panel supported a finding that any of the four Claimants "would likely not have" invested with the appellants but for the contraventions of ss. 27 and 58. In fairness, some of the FCAA investigator's testimony did suggest the principal reason one of the Claimants had invested was because another Investor had introduced her to Mr. Dobson. The investigator's evidence also suggests other Investors had invested because they either knew Mr. Dobson or they knew someone else who had invested. Whatever their reasons were, the evidence before the Panel did not link the appellants' contraventions of ss. 27 and 58 with the Claimants' decisions to invest.

[50] A link is easily drawn where a person has admitted to making (or been found to have made) misleading or untrue statements to a claimant that induced them to invest (i.e., a contravention of s. 55.11(1) of *The Securities Act, 1988*), but those are not the facts of this case. Here, there was simply no evidence going to show how or why the contraventions of ss. 27 and 58 might be said to have caused the Claimants' financial losses.

[51] This brings the matter to the Panel's concluding statement, where it said the appellants had "been negligent in their actions which in turn led to the loss of the investors [*sic*] monies in question." This is a conclusion based plainly on an error of law. To reiterate, a panel's authority to make a compensation order under s. 135.6(4) is predicated on a contravention of Saskatchewan securities laws that leads to a quantifiable loss. Certainly, a person may contravene or fail to comply with a securities law through a negligent act or omission, but the

person's negligence would not itself trigger a panel's authority under s. 135.6(4). Where the negligent act or omission results in a contravention or failure under Saskatchewan securities laws, it is the *contravention* that must *cause* the *loss* complained of. But, as I have found, there was no evidence of that nature before the Panel.

[52] Accordingly, I would allow the appeal and set aside the Compensation Orders as they were made without proof of causation. Given the circumstances, I would make clear that this decision puts an end to the proceedings against the appellants because the FCAA did not make its case on the evidence for the issuance of compensation orders.

V. CONCLUSION

[53] I would allow the appeal, set aside the Compensation Orders, and order that the appellants have their costs in the compensation hearing and one set of costs in this appeal, paid by the FCAA.

"Caldwell J.A."

Caldwell J.A.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Schwann J.A."

Schwann J.A.