

DECISION OF A PANEL APPOINTED PURSUANT TO *THE FINANCIAL AND CONSUMER AFFAIRS AUTHORITY
OF SASKATCHEWAN ACT*

In the Matter of
The Securities Act, 1988

and

In the Matter of
Jack Louis Comeau
Pinnacle Wealth Brokers Inc.
and
Grasswood Property Finance Ltd.
(the Respondents)

DECISION OF THE HEARING PANEL CONCERNING STAFF'S MOTION
FOR LEAVE TO CALL WITNESSES

Motion Heard on: March 5, 2020

Before: Howard Crofts (Panel Chairperson)
Norman Halldorson (Panel Member)
Peter Carton (Panel Member)

Appearances: Sonne Udemgba and Nathaniel Day (Counsel for Staff of the Financial and
Consumer Affairs Authority of Saskatchewan) ("FCAA")

Simon Bieber and Julia Wilkes (Counsel for Respondents Jack Louis Comeau
("Mr. Comeau"), Pinnacle Wealth Brokers Inc. ("Pinnacle"))

No one appeared on behalf of the Respondent, Grasswood Property Finance
Ltd. ("Grasswood")

Date of Decision: March 31, 2020

BACKGROUND

1. On March 12, 2020, the Panel issued its written decision regarding Staff's Motion to Adjourn these proceedings. The background set out in that decision will not be reproduced here, but is adopted and carried forward in this decision.
2. With that said, the reasons that were provided in support of this Panel's decision on the Motion to Adjourn are important for this decision as many of those reasons either directly or indirectly support this decision of the Panel where we are considering Staff's Motion for Leave to Call Witnesses.

Therefore, the reasons for the decision on the Motion to Adjourn are reproduced in full now as additional background to this decision:

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(a) There was sufficient evidence that Mr. Comeau would suffer prejudice should the Hearing not proceed as originally scheduled, including that the subject matter underlying the proceedings dates back to nearly 8 years ago and memories are fading, Mr. Comeau's health issues, Mr. Comeau's window to meaningfully partake in the proceedings is closing, the substantial costs that have been incurred by Mr. Comeau in preparing for the hearing and under the expectation that it would proceed as scheduled, and the fact that Respondent's witnesses are available and ready to appear and might not be at a later date if the matter is adjourned;

(b) Mr. Comeau and his counsel worked diligently to ensure that the matter could proceed and were present and prepared to proceed;

(c) All disclosure issues, which involved Staff needing to remedy a few disclosure deficiencies, were resolved by early February 2020;

(d) Staff were aware of Ms. Smith's impending departure from the FCAA since November 2019 and therefore had more than three months to reassign carriage of the file to other Staff lawyers and prepare for the Hearing scheduled to commence on March 2, 2020;

(e) Staff lawyers that took carriage of the file after Ms. Smith resigned had been involved in the file at various times since the matter was initiated and so Staff lawyers that took carriage of the file came into things with a level of familiarity with the subject matter of the proceedings;

(f) After Ms. Smith tendered her resignation in November 2019, Staff had sufficient time to review the file and decide whether to file a Motion for Adjournment, if one was required, well before February 14, 2020 (the date the motion was actually filed); and

(g) The Hearing was not scheduled on short notice; to the contrary, the March 2020 Hearing dates were originally scheduled by the Panel on September 11, 2019, which gave the parties approximately six months of preparation time;

All things considered, it is the Panel's respectful view that each of the parties, including Staff, had adequate time to prepare for the Hearing. Further it is in the public interest to proceed with the hearing as originally scheduled in order for it to be conducted fairly and in accordance with the principles of natural justice.

3. On the morning of March 3, 2020, during the Hearing, Staff handed Counsel for the Respondents a list containing the names of ten witnesses that Staff proposed to call in the Hearing to address the matters raised in the Amended Statement of Allegations dated August 30, 2019. Counsel for the Respondents received the list from Staff without taking a formal position on it during the Hearing.
4. At 1:08 pm CST on March 3, 2020, Counsel for the Respondents wrote to Staff by email to indicate that the Respondents opposed Staff's witness list and the ability of Staff to call witnesses in the proceedings because Staff did not comply with the timeframes for sending and filing witness lists set out in section 4.5 of the *Saskatchewan Policy Statement 12-602 Procedure for Hearings and Reviews* (the "Local Policy"). They further indicated that pursuant to section 4.5, if Staff intended on calling witnesses, Staff would need to apply for leave of the Panel by way of a written motion that complied with the Local Policy. Counsel also asked that they be provided with the order of the witnesses that Staff intended to call. Further, Counsel, indicated that the late delivery of the witness list caused Mr. Comeau prejudice. Finally, Counsel also asked for confirmation as to whether Staff intended to proceed with allegations against Grasswood.
5. After this communication took place, and still on March 3, 2020, Staff filed its Notice of Motion which was supported by an affidavit and also provided the order of the ten witnesses that they planned to call to testify. Due to the affidavit and attachments being filed late in the day on March 3, 2020, they were deemed to be filed with the Registrar on March 4, 2020.
6. On March 4, 2020, the Panel scheduled Staff's Motion for Leave to File a Witness List and Call Witnesses to be heard on March 5, 2020 at 9:00 am CST.
7. Also on March 4, 2020, at 10:36 am CST, Counsel for the Respondents filed materials in response to Staff's motion. The response included an affidavit from Counsel for the Respondents' law clerk and case law in support of their position that Staff should not be permitted to file a witness list or call witnesses.
8. At 12:04 pm the same day, Staff filed additional support for its motion, including an affidavit from a FCAA investigator and an email from a FCAA Deputy Director and Staff Counsel, Sonne Udemgba ("Mr. Udemgba"), that provided a summary of what witnesses identified as Pinnacle Clients 1, 16 and 20 would testify to.
9. Staff and Counsel for the Respondents both agreed to abridge the time limitations in Section 1.5 of the Local Policy in order to allow argument on the Motion to proceed by consent on March 5, 2020 at 9:00 am CST.

SUBMISSIONS BY STAFF

10. Staff submissions included the following arguments:
 - (a) the Respondents had received all disclosure, including an email dated September 3, 2019 that listed and identified the actual names of investors that were previously anonymized, and therefore

the Respondents should be familiar with the information of all witnesses from the interviews conducted with them and disclosed.

(b) it was reasonable to assume that all investors listed in the Amended Statement of Allegations should be allowed to testify.

(c) while the list of investors in the September 3, 2019 email did not include three names on the witness list – Mr. Comeau’s former assistant, the FCAA investigator involved in this matter, and a person later disclosed as a party associated with Pinnacle Client 16, the Respondents were familiar with these individuals and calling them to testify should not be an issue.

(d) Staff was prepared to proceed with calling witnesses and since the parties agreed to abridge the required amount of time to file the Motion, there is no need to delay proceeding.

(e) the Panel should rule that the Respondents waived the required notice for a witness list as set out in the Local Policy because Counsel for the Respondents accepted the witness list from Mr. Udgemba during the Hearing on March 2, 2020.

(f) the Panel has the discretion to decide the matters brought forward through the Motion.

SUBMISSIONS BY THE RESPONDENTS

11. Counsel for the Respondents responded to the Staff’s arguments with the following:

(a) Staff had failed to provide summaries of what all the witnesses in their witness list would be expected to testify to and what documents would be relied upon. Because of the volume of information in disclosure, described by Staff as being “massive”, it was unreasonable to expect the Counsel for the Respondents to have to sift through all the disclosure to determine what each witness’s testimony might be. To fulfill its disclosure obligations, Staff had a duty to “separate the wheat from the chaff” so that the Respondents could appropriately respond to the allegations made against them. In support of this argument, Counsel cited our Court of Appeal’s reasoning regarding Staff’s disclosure obligations in *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31 [*101115379 Saskatchewan Ltd.*] citing *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*] and *R v La*, [1997] 2 SCR 680 as well as *Biovail Corporation, et al.*, 2008 ONSEC 14.

(b) Staff elected not to provide a summary of what the FCAA investigator that was on the witness list might testify to, nor did they indicate what documents he might rely on. Since this was the lead investigator whose involvement in the matter was very broad, considering the size of the disclosure, it was impossible for the Respondents to know what he might testify to and/or rely upon without Staff first providing a summary and identifying documents.

(c) Staff did not have a good reason for failing to provide a witness list, especially considering that on February 21, 2020, the Panel directed the parties to be prepared to proceed with the Hearing in the event Staff's motion to adjourn was denied.

(d) Staff was asking the Panel to, for the sake of expediency and in a manner that simply suits Staff in the circumstances, ignore requirements in the Local Policy when these requirements were complied with by the Respondents and set legitimate expectations for the parties in the proceedings, when this position and argument was considered surprising by our Court of Appeal and was clearly rejected by the Court in the very recent case of *C2 Ventures Inc. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 53 [*C2 Ventures*] at paragraph 18.

(e) In the interest of procedural fairness, including the legitimate expectations of the parties, the Panel should not allow any of Staff's witnesses to be called to testify.

(f) However, and in the alternative, Counsel for the Respondents suggested that if the Panel was of the view that it was in the interests of justice to have some witnesses testify, an alternative approach that the Panel could take that would be fair to the Respondents would be to grant Staff leave to call three witnesses from their list of ten - Pinnacle Client numbers 1, 11 and 20. Counsel suggested that these witnesses could be appropriate witnesses on the basis that:

- the Respondents could rely on the witnesses' interview transcripts provided in the disclosure in substitution for the summaries Staff was supposed to provide;
- the Respondents could rely on the documents that were made exhibits in the witnesses' interviews in substitution for the documents Staff was supposed to identify as documents that would be relied upon; and
- the Respondents could rely on the Amended Statement of Allegations for particulars in relation to the allegations made by Staff in respect to these three witnesses.

Counsel stated that these three bases would address the disclosure shortcomings by Staff and help make the Hearing moving forward with procedural fairness and the principles of natural justice. More formally, Counsel for the Respondents asked that if leave was granted in respect to the three witnesses identified above, the following three conditions be imposed for those three witnesses:

- i. the witnesses be allowed to testify only to what is in the transcripts from matters raised through their interviews with Staff;
- ii. the witnesses be allowed to testify to documents discussed during interviews with Staff and that were marked as exhibits to those interviews; and
- iii. Staff provide Counsel for the Respondents with the order in which the three witnesses would be called to allow them to adequately prepare for them.

ANALYSIS AND DECISION

12. In making its decision on this Motion, the Panel considered the grounds indicated in the Motion, all submissions made by Staff and the Respondents, and all the documents filed in support of, and in opposition to, the Motion. The Panel is also cognizant of the need to ensure procedural fairness and the protection of the public interest. In addition, the Panel understands that it has discretion in respect to the subject matter of this motion as set out in the Local Policy, particularly sections 1.3(2) through 1.3(4). These sections allow the Panel to waive or vary any requirement(s) of the Local Policy when the Panel is of the opinion that doing so is in the public interest or would be otherwise advisable to secure the just and expeditious determination of the matters in issue.
13. Given the foregoing, and after considering all the circumstances, the decision of the Panel is to grant Staff leave to proceed with witnesses identified as Pinnacle Client numbers 1, 11 and 20 under the following conditions:
- (a) witnesses be allowed to testify only to what is in the transcripts from matters raised during their interviews with Staff;
 - (b) witnesses be allowed to testify to documents discussed during their interviews with Staff and marked as exhibits to those interviews; and
 - (c) Staff are to provide the Respondents with the order that the three witnesses will be called at the Hearing.
14. The reasons for the Panel's decision are:
- (a) procedural fairness, including through consideration of the legitimate expectations of the parties, is important, as is compliance with the Local Policy. In this regard, the Panel is mindful of Staff's disclosure obligations as helpfully outlined by our Court of Appeal in *101115379 Saskatchewan Ltd.* with reliance on *Stinchcombe*, including the need to provide witness lists in accordance with the Local Policy. The Panel was also mindful of the Court of Appeal's decision in *C2 Ventures*, including its reaffirmation that a high order of procedural fairness is owed in securities proceedings brought pursuant to the *Securities Act, 1988* which includes considerations of legitimate expectations;
 - (b) the public expects that the Local Policy will be adhered to unless there is a good reason, in the interests of justice, to so depart. To ensure the public confidence in this regulatory body for the purpose of maintaining faith in and protection of the public markets in Saskatchewan, the Local Rules should be complied with by all parties, including by Staff;
 - (c) Staff's reason for not complying with the Local Policy by preparing a witness list and sending it to the Respondents within the required timeframes was that Staff expected that its Motion to Adjourn would be granted by the Panel. The Panel does not consider this to be an appropriate reason, especially when all parties were directed by the Panel in writing on February 21, 2020 that they were to be prepared to proceed with the Hearing if Staff's motion was denied. As such, Staff

was unable to provide an appropriate reason for not following the Local Policy and it is not in the interests of justice to countenance this behavior. Also in this regard, the Panel considered the recent decision of our Court of Appeal in *C2 Ventures*, a decision that is binding upon this Panel, and how the approach taken by Staff in this case in respect to the requirements of the Local Policy seemed to track the approach that the Court of Appeal criticized and rejected; and

(d) by granting Staff leave for the three witnesses to testify, the matter can proceed in a manner that is procedurally fair and in the public interest.

15. This is a unanimous decision of the Hearing Panel.

Dated at the City of Regina this 31st day of March, 2020.



Howard Crofts (Chairperson)



Norman Halldorson (Panel Member)



Peter Carton (Panel Member)