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

MK Futures
And
Maitlan Knoke
(collectively referred to as the "Respondents")

DECISION OF THE HEARING PANEL
CONCERNING JOINT APPLICATION THAT CERTAIN PORTIONS OF
THE SETTLEMENT AGREEMENT BE REDACTED FROM PUBLICATION

Motion Heard: May 11, 2023

Before: Karen Prisciak, K.C. (Chairperson)
Peter Carton (Panel Member)
Tracey Bakkeli (Panel Member)

Appearances: Mr. Connor Smith (Counsel for the Securities Division of the Financial and Consumer Affairs Authority, hereinafter "Counsel for the FCAA")

Mr. Michael Wright on behalf of MK Futures and Maitlan Knoke

Date of decision: October 2, 2023

1. This is a decision concerning redaction in response to the parties' Joint Application for an Order Approving a Settlement Agreement (the "Joint Application") which included the parties' request that certain portions of the Settlement Agreement be redacted from publication on the Financial and Consumer Affair Authority's (FCAA) website.

I. BACKGROUND

2. A Statement of Allegations against the Respondents, Maitlan Knoke (the 'Individual Respondent") and MK Futures (collectively "the Respondents") is dated December 6, 2021. Following several adjournment requests, the Merits Hearing was scheduled for May 10-12, 2023.

3. Prior to commencing the Merits Hearing, the Panel was advised that a Settlement Agreement dated May 5, 2023 had been reached addressing the merits of the allegations and the corresponding sanctions. The parties filed a Joint Application pursuant to Part 14 of the *Saskatchewan Local Policy Statement 12-602 Procedure for Hearing and Reviews ("Local Policy*"), an unredacted Settlement Agreement, a Draft Consent Order and a Memorandum of Argument in Support of the Settlement Agreement ("the Supporting Documents").

4. The Joint Application stated it was also an Application for the Redaction of Information pursuant to Parts 6 and 13 of the *Local Policy*. The parties indicated they would "further seek that particular personal information of the Individual Respondent be redacted from "any Settlement Agreement that is published online" (emphasis added). Nothing in the Supporting Documents provided any further information or discussion on the reasons for the redaction request.

5. On May 11, 2023, an open Settlement Approval Hearing occurred with oral submissions from both Counsel. With the support of the Counsel for the FCAA, Counsel for the Respondents requested a redaction of the Individual Respondent's work history, health and financial information. He also spoke to the Individual Respondent's inability to pay any administrative penalties or financial restitution to the Investors. The Panel indicated it was not possible to make a redaction order without knowing precisely the information the parties wanted redacted. Counsel for the Respondents indicated he would file a redacted Settlement Agreement and a crossed out redacted Settlement Agreement so the Panel could identify the redacted portions. The Panel received these redacted Settlement Agreements later the same morning.

6. In general terms, the Settlement Agreement indicated the Respondents solicited investments from three individuals on the basis that the Respondents had received "government tenders" which would provide the investors with returns from 60-150%. Three Investors paid the Respondents a cumulative total of $180,000. None of the Investors received a return of their capital nor any return on their respective investments.

7. The Respondents admitted to breaching certain sections of the Act:

(i) Section 27(2)(a) by engaging in the business of trading in securities while not being registered to do so;

(ii) Section 58(1) by failing to file a preliminary prospectus or prospectus; and

(iii) Section 55.1(b) by promising returns that they knew, or reasonably ought to have known, were overinflated and could not reasonably be achieved.

8. The Respondents admitted these violations perpetrated a fraud against the three Investors.

9. The Settlement Agreement appended a Draft Consent Order which itemized the sanctions agreed to by the Respondents. These sanctions included numerous permanent market access bans coupled with an administrative penalty of $40,000. The Settlement Agreement referred to the Individual Respondent's personal circumstances including his work history, health and his inability to pay the administrative penalty or restitution to the Investors.

10. The Settlement Agreement contained the following regarding confidentiality and publication of the Settlement Agreement:

> AND WHEREAS the Respondents and the Executive Director acknowledge that this Settlement Agreement is subject to the approval of the Authority and, **if approved by the Authority, will be published on the Authority's website**;
>
> …
>
> 11. The Respondents and the Executive Director hereby consent to the issuance of an order by the Authority, **in substantially the form attached hereto as Appendix 'A'**.
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> …
>
> 13. The terms of this Settlement Agreement shall be treated as confidential by the Respondents and the Executive Director and may not be disclosed to any person except with the consent of the Executive Director**, or as required by law, until such time as it is signed by all parties and approved by the Authority**.
>
> …
>
> 22. The parties will keep the terms of this Settlement Agreement confidential until the Authority approves this Settlement Agreement, **subject to the parties' need to make submissions at the public hearing on the application to approve this settlement**. [emphasis added]

11. Neither the Settlement Agreement nor the Draft Consent Order referred to redacting documents published online.

12. Given that the redacted Settlement Agreement was received after the Settlement Approval Hearing, the Panel communicated through the Registrar to both counsel requesting further submissions regarding the redaction of the Individual Respondent's work history. Both counsel replied by email.

13. An Order issued on June 9, 2023 approved the Settlement Agreement, including the breaches and sanctions, and requested the parties provide further submissions in support of their request to redact certain portions of the Settlement Agreement within 2 weeks from the date of the Order. In particular, the Panel

requested the parties specifically address the Supreme Court of Canada's decision in *Sherman Estate v. Donavan* 2021 SCC 25 ("*Sherman*").

14. On June 22, 2023, Counsel for the FCAA submitted a Memorandum of Argument in support of the redaction (the "Redaction Memorandum"). Counsel for the Respondents did not submit a Memorandum. Neither party submitted Affidavits in support of the redaction request.

15. In the Redaction Memorandum, Counsel for the FCAA raised additional issues:

(i) Given the Panel's approval of the Settlement Agreement, he suggested the Panel was *functus officio* regarding the redaction issue.

(ii) Given the requested redactions were a part of the Settlement Agreement and the Panel's subsequent approval of the Settlement Agreement, he suggested the Panel is obligated to approve the requested redactions.

(iii) The requested redactions may have been an outcome specifically bargained for by the Respondents and therefore the Respondents may now be aggrieved because "their legitimate expectations" have not been met which may also undermine their consent to the Settlement Agreement.

(iv) The Panel's failure to approve the requested reactions will have the unintended consequences of undermining future respondents' confidence in the settlement approval process, and the public's confidence in the settlement approval process more generally, because there will be uncertainty whether all or part of the Settlement Agreement will be approved.

16. For the reasons that follow, the Panel unanimously agrees not to grant the Joint Request for redaction of the Settlement Agreement that will be published on the FCAA website.

II. REDACTION MEMORANDUM SUBMISSIONS BY COUNSEL FOR THE FCAA

17. Broadly cast, Counsel for the FCAA objects to the Panel's adjudication of the redaction issue on the following basis:

(i) The Panel is *functus officio* because it approved the Settlement Agreement.

(ii) The Panel is obligated to approve the redaction request because it approved the Settlement Agreement.

(iii) Alternatively, the Panel must approve the redactions because the redactions meet the legal test prescribed by the Supreme Court of Canada in *Sherman*.

III. LEGAL FRAMEWORK

18. The Panel's proceedings are governed by *The Financial and Consumer Affairs Authority of Saskatchewan Act, SS 2012, c F-13.5* (the *Act*). Pursuant to section 17, this Panel is appointed with full powers of Authority to hear this matter. Under Section 2(1)(e) of *The Securities Act,* 1988, SS 1988-89, C S-42.2 (the "*Securities Act*") the "Commission" means the Authority.

19. The Panel is directed to hold open hearings under section 9(13) of *the Securities Act* which is further elaborated on in section 9.1(2) of the *Local Policy*.

> 9(13) A hearing or review is open to the public unless the Commission, the Chairperson or Director, as the case may be, considers it in the public interest to order otherwise.
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> ……
>
> 9.1(2) Generally, in order for the Panel to find that it would be in the public interest to order the proceedings not be open to the public, the party seeking in camera proceedings would need to demonstrate with clear, cogent evidence that: (a) such an order is necessary in order to prevent serious risk to an important interest because reasonably alternative measures will not prevent the risk; and (b) the public interest in restricting access to the proceedings outweighs the public interest in open and accessible proceedings.

20. The Panel's general jurisdiction over the record of proceedings is addressed in sections 9(6) and 9(9) of the *Securities Act* which state:

> 9(6) In the case of a hearing or review, evidence shall be received that, in the opinion of the Commission, the Chairperson or the Director, as the case may be is relevant to the matter being heard.
>
> …
>
> 9(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.

21. The *Local Policy* section 6.1 contemplates that all documents filed in the proceedings will be available to the public.

6.1 Public Documents

Subject to section 6.2, all documents required to be filed or received in evidence in proceedings will be available to the public.

22. The process to approve a Settlement Agreement is mandated by the *Securities Act* and the *Local Policy*. Under section 135.3(1) of the *Securities Act* a Settlement Agreement and corresponding consent orders must be approved by a Panel to fully dispose of a matter. In addition to this requirement, the Panel's practices and procedures regarding approval of a Settlement Agreement are governed by Part 14 of the *Local Policy.*

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.

PART 14 – SETTLEMENT AGREEMENTS

14.1 Application to Panel for Approval of a Settlement Agreement

(1) If the parties to a proceeding governed by this Policy propose to enter into a settlement agreement to resolve the matters at issue they will apply to the Panel for approval of the settlement agreement.

(2) An application pursuant to subsection (1) will be filed jointly by the parties to the settlement no later than two days before the hearing.

(3) The application will be accompanied by:

(a) the settlement agreement signed by the settling parties, indicating the parties' consent to the draft order;

(b) a draft order; and

(c) a memorandum of argument as to why it is in the public interest to approve the settlement agreement.

23. Consistent with the open court principle, sections 14.3 and 14.4 of the *Local Policy* state that approval of the Settlement Agreement is open to the public and the order approving the Settlement Agreement will be posted on the Website unless otherwise ordered by the Panel.

14.3 Public Settlement Hearing

(1) The hearing of an application for approval of a settlement agreement is open to the public.

14.4 Publication of Approved Settlement Agreement

The order approving the settlement agreement, the settlement agreement, and the Panel's reasons, if any, will be posted on the Website, unless otherwise ordered by the Panel.

24. These sections of the *Local Policy* ensure the Panel remains in control of what, if any, information is not posted on the Website.

25. Lastly, the *Local Policy* contemplates that an application for confidentiality may be made by one of the parties to the Panel. The Panel has discretion to determine whether there is restricted access, in full or in part, to a document which would include the Settlement Agreement.

6.2. Application for Confidentiality

(1) On application by any party or person, the Panel may order that any document filed with the Registrar or any document received in evidence or transcript of the proceeding be kept confidential.

(2) A party or person who makes an application pursuant to subsection (1) will advise the Panel of the reasons for the application.

(3) The Panel may, if it is of the opinion that there are valid reasons for restricting access to a document, declare the document confidential, in full or in part and make such other orders as it deems appropriate.

26. The cumulative impact of the provisions of the *Securities Act* and the Local Policy support the open court principle. With limited exceptions, the public has access to all documents filed during the hearing and may attend the hearing. Public trust in the hearing process is ensured by this transparency and accountability.

27. The applicability of the open court principle to a Panel's proceedings were discussed in *Re Godlien, 2022 CanLii 50903 (SKFCAA)* ("Godlien")

> 7. The joint requirements of the Act and Local Policy confirm that: hearings under the Act are presumptively open to the public, unless the public interest requires otherwise. While the parties are free to settle a securities matter via agreement those agreements must be approved by a Panel. The process for approving a settlement agreement is a joint application for a settlement hearing, which is also presumptively open to the public. This process is essentially the same as the common law process.

IV. ISSUES & ANALYSIS

Issue 1 – Is the Panel *Functus Officio?*

28. Counsel for the FCAA suggests the Panel is functus officio because it approved the Settlement Agreement and cannot now adjudicate the redaction request. The Redaction Memorandum does not refer to any case law in support of this proposition.

29. The redaction request limits the public's accessibility to certain information referred to in the Settlement Agreement which was discussed during the Settlement Approval Hearing. As such, it challenges the open court principle by precluding the public's accessibility to all the facts to assess whether the Panel's decision to approve the Settlement Agreement was fair, impartial and in the public interest. The suggestion the Panel has lost jurisdiction to consider the redaction request requires further elaboration.

30. The Supreme Court of Canada considered whether a court loses jurisdiction over issues of public access to court records after rendering a decision on the merits of the case in *Canadian Broadcasting Corp. v Manitoba,* 2021 SCC 33 ("Canadian Broadcasting Corp."). On the facts of this case, a 1987 murder conviction was referred back to the Court of Appeal by the Minister of Justice in 2014 after the discovery of new evidence. The Court of Appeal issued a publication ban on the accused's Affidavit which complained of the Crown's misconduct at the original trial. The CBC was denied access to the Affidavit and requested a rehearing of the original publication ban. The Court of Appeal stated the CBC should seek leave to the Supreme Court because it was functus officio.

31. The Supreme Court was clear that functus officio arises when a court has rendered its final decision on the merits of a case. Subject to a limited power to amend, a court cannot then return to a rehearing of the merits of the final decision because it has lost jurisdiction. The Supreme Court stated:

> [33] In its contemporary guise, functus officio indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision …. A court loses jurisdiction, and is thus said to be *functus officio,* once the formal judgment has been entered …. After this point, the court is understood

> only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error in expressing its manifest intention, or where the matter has not been heard on its merits …

32. After having finally decided the merits of the case, the court does not lose jurisdiction over its supervision of the court record given the court's ongoing obligation to protect the principle of court openness. The court retains its supervisory control of the court record. In the Supreme Court's own words:

> [36] It is useful to distinguish between jurisdiction over the merits lost by operation of the doctrine of functus officio and jurisdiction that exists to supervise the court record. As I will endeavour to explain, **even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter …**
>
> [37] Supervisory authority over the court record has long been recognized as a feature of the jurisdiction of all courts … As Goudge J.A. observed in *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region) (2002), 59 O.R. (3d) 18 (C.A.)*, "it is important to remember that the court's jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts" (para. 13). Specifically, courts must ensure compliance with the robust and constitutionally-protected principle of court openness, while also remaining responsive to "competing important public interests" that may be put at risk by that openness … [emphasis added]

33. In this manner, the balance between ensuring litigants have finality in courts' decisions and ensuring the courts maintain control over their proceedings after the final decision is maintained: (Canadian Broadcasting Corporation at para. 39).

34. Other Tribunals have addressed the issue of access to public records after a merits decision. In *L.B. v Toronto District School Board,* 2022 HRTO 1110 (CanLii) ("*L.B.*") a merits decision of a Human Rights Tribunal was appealed and judicially reviewed. After the file was closed, the Tribunal reviewed a request to access the file from a member of the public. The Tribunal did not accept it was functus officio and considered the request.

> [17] The initial issue I need to address is whether, at this stage, this Tribunal has any adjudicative jurisdiction under the Code to do what the applicant requests, which engages the functus officio principle.
>
> …

> [21] In my view, the reasoning of the Supreme Court applies equally to the question of the ongoing supervision of adjudicative records held by tribunals which, like lower courts, do not have inherent jurisdiction, and it would be unreasonable not to find an exception to the functus officio principle in this case, i.e., whether a discretionary confidentiality order should be issued in this case.

35. Given that this Panel has control over its proceedings through the Act, the *Securities Act* and the *Local Policy*, coupled with the guidance provided by the Supreme Court of Canada, it is not functus officio to consider the redaction request. The Panel's decision to approve the Settlement Agreement was its decision on the merits of the case. Its merits decision is final and subject to appeal in its present form. However, the redaction request limits the public's access to the record which adjudication remains firmly in the jurisdiction of the Panel as part of its proceedings. The Panel has not decided the redaction request (see *Lakeview School Division No. 142 (Board of Education) v Municipal Employees' Pension Commission,* 2008 SKCA 10, at para. 9*)* and specifically reserved on the redaction request in paragraph 2 of its Order approving the Settlement Agreement.

36. The Panel is not *functus officio* and accepts it has jurisdiction to adjudicate the redaction request.

Issue 2 – Must the Panel approve the Redaction Request because it approved the Settlement Agreement?

37. Counsel for the FCAA suggests that pursuant to Parts 1.3 and 6 of the *Local Policy*, the Panel must approve the redaction request because it approved the Settlement Agreement. These parts say:

> **1.3 Procedural Directions or Orders by a Panel**
> (1) A Panel may exercise any of its powers under this Policy on its own initiative or at the request of a party.
> (2) A Panel may issue procedural directions or orders with respect to the application of this Policy in respect of any proceeding before it, and may impose any conditions in the direction or order as it considers appropriate.
> (3) **A Panel may waive or vary any provision 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.
> (4) In considering a request to waive or vary any provision of this Policy, a Panel may consider factors including:
> (a) the nature of the matters in issue;

(b) whether adherence to the time periods set out in this Policy would be likely to cause undue delay or prejudice to any of the parties.

(c) costs; and

(d) any other factors a Panel considers relevant in the public interest.

PART 6 – PUBLIC ACCESS TO DOCUMENTS

(See also subsection 9(13) of the Act.)

6.1 Public Documents

Subject to section 6.2, **all documents required to be filed or received in evidence in proceedings will be available to the public**.

6.2. Application for Confidentiality

(1) On application by any party or person, the Panel may order that any document filed with the Registrar or any document received in evidence or transcript of the proceeding be kept confidential.

(2) A party or person who makes an application pursuant to subsection (1) will advise the Panel of the reasons for the application.

(3) **The Panel may, if it is of the opinion that there are valid reasons for restricting access to a document, declare the document confidential, in full or in part, and make such other orders as it deems appropriate**. [emphasis added]

38. The Saskatchewan Court of Kings Bench has recently considered whether the parties' agreement to limit public access is binding on the Court. Simply put, it is not. The supervisory power and jurisdiction of the Court to control its own process is unaffected by the parties' agreement as stated by Mr. Justice G. Mitchell in *A.G. v Saskatchewan,* 2022 SKQB 11 (CanLii).

> [24] The applicant's proposed draft order for an extensive sealing order and publication ban, the terms of which are reproduced at Appendix "A", met with little, if any, resistance from the other parties. Yet, it does not follow that this order should be made even when most, if not all, of the other parties are content to abide by its terms. This is because court proceedings are presumptively open to the public. Any limitation upon a judicial process is exceptional. … [internal citations omitted]
>
> [25] Thus, regardless of whether a sealing order is consented to or not, a court must exercise its over-arching supervisory authority to ensure court proceedings and processes are as open and transparent as possible, consistent with constitutional norms. … [internal citations omitted]

39. In a similar context to the case before this Panel, fidelity to the open court principle was recognized as a "fundamental principle of our law" which is entrenched in the governing legislation affecting the regulation of the financial sector (*Autorité des marches financiers c Technologies Timechain inc., 2022 QCTMF 74* ("*Timechain*"). The Tribunal's discretion to redact information available to the public must be based on the facts of the case with consideration to the applicable law: (*Timechain* para 11-13).

40. The Panel reviewed the caselaw referenced in the Redaction Memorandum. In each case the full text of the settlement agreement remained publicly available online and none of the cases referred to redacting any part of the settlement agreement *(Re HRU Mortgage Investment Corporation,* 2022 ONSEC 6*; Re Coinsquare Ltd., 2020 CarswellOnt 10820; Re Friesen,* 2021 CarswellMan 131*; Re MacKay,* 2023 CarswellMan 134*; Re Home Capital Group Inc.,* 2017 ONSEC 32*; Re Melnyk,* 2007 CarswellOnt 3558*; Re Rankin,* 2008 ONSEC 6*; and Re Leung,* 2008 CarswellOnt 5238). Accordingly, these cases provided no guidance to the Panel.

41. The Redaction Memorandum asserts the requested redactions form part of the Settlement Agreement which is binding on the Panel. This assertion is not born out by the specific provisions of the Settlement Agreement. Not only does the Settlement Agreement not refer to the redaction, the Settlement Agreement contemplates it will be published on the website without acknowledging any redaction:

> AND WHEREAS the Respondents and the Executive Director acknowledge that this Settlement Agreement is subject to the approval of the Authority and, **if approved by the Authority, will be published on the Authority's website**; [emphasis added]

42. The Draft Consent Order also does not disclose any relief for redaction or restriction from online publication - it refers to the entirety of the Settlement Agreement.

43. None of the Supporting Documents filed at the Settlement Approval Hearing addressed redaction except for the bare request in the Joint Application. The Panel does not accept the redaction request was part of the Settlement Agreement.

44. Counsel for the FCAA asserts the legitimate expectations of the Respondents will not be met should the Panel refuse the redaction request. No authority was provided for this assertion.

45. The Panel is guided by the Supreme Court of Canada *in Agraira v Canada (Public Safety and Emergency Preparedness*), [2013] 2 SCR 559, 2013 SCC 36 ("*Agraira*") which stated that the doctrine of legitimate expectation only applies to procedural rights and outcomes rather than substantive rights and outcomes. Legitimate expectation arises when a relevant public actor represents certain procedural practices to another party. According to the Supreme Court of Canada:

[94] … If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are …:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.
> …[citations omitted, emphasis removed]

[96] In *Mavi, Binnie J.* recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights … In other words, where the conditions for its application are satisfied, the Court may only grant appropriate procedural remedies to respond to the 'legitimate' expectation…
[internal citations, quotations, and square brackets omitted, emphasis in original]

46. The Panel is compelled to review the record for evidence that is "clear, unambiguous and unqualified" to give rise to the Respondents' reasonable expectation that the redaction request would be ordered. Again, none of the documents filed at the Settlement Approval Hearing can reasonably be interpreted to support this assertion. Neither the Settlement Agreement nor the Draft Consent Order speaks to the issue of redaction nor the Respondents' expectations. There was no Affidavit filed indicating the Respondents' agreement to the Settlement Agreement was predicated on the redaction being ordered nor that any public actor made representations regarding the redaction request. In fact, the terms of the Settlement Agreement directly contradict any expectation that the redaction request would be ordered. The Settlement Agreement expressly states that it would be published online if approved by the Panel along with the Draft Consent Order.

47. As previously discussed, it is within the Panel's discretion to decide any matter that infringes on the open court principle. The parties were provided with three opportunities to provide additional materials to support the doctrine of legitimate expectation – at the Settlement Approval Hearing, in the first email request and in paragraph 2 of the Order dated June 6, 2023. The Panel has nothing on the record to evidence a clear, unambiguous and unqualified representation that the redactions would form part of the Settlement Agreement. There is therefore no evidence of a breach of the Respondents' legitimate expectations.

48. Counsel for the FCAA also asserts the Panel's refusal to redact the Settlement Agreement will have a "chilling effect" on the settlement process by undermining future respondents' confidence, and the public's confidence, in the settlement approval process. There was no authority cited for this assertion.

49. The Panel finds no merit to this assertion. The *Securities Act* and the *Local Policy* are clear that any settlement reached between the parties is subject to the approval of the Panel. Approval of the Settlement Agreement and the redaction request are separate issues. None of the documents filed at the Settlement Approval Hearing referenced the redaction request except the Joint Application which contained no argument supporting the redaction. Redaction, by its nature, limits public accessibility to the Hearing documents. It is not for the parties to decide what facts should not be disclosed to the public. It is the Panel's discretionary decision arising in the context of the presumptive fundamental principle of an open court.

50. Approval of the Settlement Agreement requires the Panel to evaluate the allegations, the agreed facts and sanctions as well as the memorandum in support of the settlement. The onus is on the parties to satisfy the Panel that any Settlement Agreement is in the public interest. The parties' agreement does not abrogate the Panel's responsibilities such that a Settlement Agreement will automatically be approved by a Panel. Accordingly, the parties always face some uncertainty as to whether the Settlement Agreement will meet with the Panel's approval.

51. The *Local Policy* establishes the procedure by which confidentiality of information may be ordered. There is no provision that the parties' agreement will ensure confidentiality especially when the parties have chosen to make certain facts part of the record of the Settlement Approval Hearing. Limiting the public access to certain facts is within the Panel's discretion on a case-by-case basis in accordance with the *Local Policy* and the guiding principles stated by the Supreme Court of Canada.

52. Counsel for the FCAA suggested the public's confidence in the settlement approval process will be undermined if the redaction request is not ordered. It is the view of the Panel that the opposite is more probable. The public's confidence in the settlement approval process may be compromised if the public is precluded from assessing what facts were considered by the Panel in deciding the Settlement Agreement was in the public interest. A transparent and accountable process where all facts are publicly available increases the public's confidence that the Panel is discharging its responsibilities faithfully according to its legislative mandate.

53. The Panel finds it is not precluded from considering the redaction request after it approved the Settlement Agreement in its Order of June 9, 2023.

Issue 3 – Should the Panel redact the Settlement Agreement?

54. As previously mentioned, the open court principle applies to the Panel pursuant to the *Securities Act*, the *Local Policy* and caselaw. Any restriction to public access by redacting and limiting publication on the website limits the open court principle.

55. The open court principle ensures the independence and impartiality of the courts, public confidence, an understanding of the courts' work and the legitimacy of the process: (*Sherman* at para. 39). These principles apply equally to quasi-judicial proceedings as stated by the Saskatchewan Court of Appeal in *1011 Sask*, *infra*:

> **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.

56. In *Sherman* the Supreme Court imposed a three-part discretionary test to determine if the open court principle should be circumscribed in any given case. The onus is on the requesting party to establish that:

> (1) court openness poses a serious risk to an important public interest;
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. [*Sherman* at para. 38]

57. The disclosure of personal information in open court proceedings may be a source of discomfort or embarrassment. However, this is not sufficient to overcome the fundamental presumption of an open court. The existence of the open court principle necessarily limits privacy of personal information.

> 58 … [T]he open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc., 2001 SCC 51, [2001] 2 S.C.R. 743*, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize -- in stating that openness is the rule and covertness the exception -- that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified. [*Sherman]*

58. The Supreme Court was mindful that an individual's privacy is important to the individual and that protection of that privacy is in the interests of society as a whole (*Sherman* at para. 5). But that is not enough. It is only where an individual's privacy overlaps with an important public interest and creates a serious risk that the exception to the open court principle will be justified. This is a narrower dimension of privacy "being the public interest in protecting human dignity" (*Sherman at* para. 7). Put another way, it is where the individual's embarrassment and discomfort amount to an affront to a person's dignity such that the important public interest in privacy is at serious risk.

59. The quality of the personal information must be so sensitive and private that it affects the biographical core of the individual. As stated in *Sherman* at paragraph 94:

> Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it **goes to the biographical core of the affected individual**

> **is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy**. [emphasis added]

60. The Panel is instructed by *Sherman* to determine the important public interest in the first part of the test. This examination may be done in the abstract in consideration of general principles that extend beyond the parties' dispute. In contrast, the examination of a "serious risk" in the first part of the test is a fact-based exploration unique to the circumstances of each case:

> 42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in Sierra Club, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). **Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle**. [emphasis added]

61. The Panel recognizes the *Local Policy* Part 6.2(3) could be interpreted to set a lower bar than *Sherman* to justify an exception to the open court principle. The Panel may restrict access to a document when there are "valid reasons". However, Part 6.2(3) must be interpreted consistently with the remainder of Part 6 of the *Local Policy* as well as the *Securities Act.* Under Part 6.1 "…all documents required to be filed or received in evidence in proceedings will be available to the public." Part 6 of the *Local Policy* references section 9(13) of the *Securities Act.* Section 9(10) requires that hearings be open to the public unless it is in the public interest to do otherwise. This section has been interpreted by the Saskatchewan Cout of Appeal to be consistent with the open court principle. In this broader legislative and legal context, the "valid reasons" referenced in Part 6.2(3) of the *Local Policy* signify an exception to the general rule of openness. The three-part test ratified by the Supreme Court imposes a high standard to ensure the exception to the open court principle involves a rigorous evaluation of the circumstances of each case. It is within the framework of *Sherman* that the Panel will assess the validity of the reasons for the redaction request.

62. This interpretation is consistent with the Panel's decision in *Godlien.* It is also consistent with the approach endorsed by the British Columbia Court of Appeal in *British Columbia (Securities Commission) v BridgeMark Financial Corp*., [2020] BCJ No 1727. 2020 BCCA 301 especially at para. 48 and 51, leave to appeal to the SCC refused 2021 Canlii 15595 (SCC).

63. At the Settlement Approval Hearing, the Settlement Agreement contained personal information regarding the Individual Respondent. The parties requested the Panel redact portions of the Settlement Agreement referring to the Individual Respondent's age, work history, medical condition arising from a motor vehicle accident, income sources and amounts, and his current inability to pay the administrative penalty or restitution to the Investors. This unredacted information was in the Settlement Agreement and put on the record for the Panel to consider, in part, whether the Settlement Agreement was within the range of reasonable outcomes.

64. After receiving the redacted Settlement Agreement, the Panel first requested the parties provide further information as to why the Individual Respondent's work history was redacted. After the parties replied, the Panel subsequently ordered the parties to make further written submissions given that the Memorandum filed in support of the Settlement Agreement did not specifically address specific reasons for each redaction requested. Although the Joint Application requested redaction, there was no discussion of the legal basis for each requested redaction. In paragraph 2 of the Panel's Order, it also requested that the parties' address the *Sherman* decision of the Supreme Court of Canada:

> Order 2. The Panel reserves jurisdiction over the Application for Redaction. The Settlement Agreement will not be attached to this Order pending receipt of a joint Memorandum in support of, and/or Affidavit(s) in support of, the Application for Redaction. The said joint Memorandum and/or Affidavits shall specifically address the application of the Supreme Court of Canada's decision *in Sherman Estate v Donovan*, 2021 SCC 25, and the rationale as to why specific redactions are necessary in the public interest. If the joint Memorandum in Support and/or Affidavits are not received within 2 weeks of the date of this Order, the Panel will render its decision on the Application for Redaction without further submissions.

65. The Panel was mindful of its obligation to follow the *Local Policy* which specifically directs that a Memorandum in Support or Affidavit must be filed in support of the requested relief. The Panel's obligation was reinforced by the Saskatchewan Court of Appeal *in C2 Ventures Inc. v Saskatchewan (Financial and Consumer Affairs Authority*), 2019 SKCA 53 (CanLii) wherein a Panel's decision was overturned, in part, for not following the *Local Policy*.

66. The redaction request is outside the normal process whereby all documents are available for public scrutiny (*Local Policy* Part 6.1). Redaction of portions of the Settlement Agreement restricts the public's

right to know the basis upon which the Panel considered the Settlement Agreement to be within the range of reasonable outcomes. By redacting the Settlement Agreement, or other documents, the Panel's decision is less transparent and less accountable – two principles that are essential to earning and maintaining the public's trust in its processes. Therefore, the onus remains with the parties to persuade the Panel why the public should be limited in its access to specific facts in the Settlement Agreement that will be published on the FCAA's website.

(a) Redaction of Work History Information

67. Counsel for the FCAA referred to a case cited within *Sherman* which redacted the name of a woman involved in "stigmatized work". In *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario,* 2021 ONSC 1100, the Court redacted the name of a stripper who provided an Affidavit on a court application. The Court considered expert evidence of the stigma associated with this employment as well as the present and future risks to the individual involved in this employment.

68. In our case, the Panel is asked to remove any reference to the Individual Respondent's involvement in "building renovations" for Investor #1 as referred to in paragraph 1(e) of the Settlement Agreement. The Panel was not asked to redact paragraph 1(r) which referred to the Individual Respondent performing "basement renovations" for Investor #3. No rationale was provided as to why paragraph 1(e) should be redacted but not paragraph 1(r) when both referred to the Individual Respondent performing renovations.

69. Both counsels were specifically asked to comment on the reason for redaction of the Individual Respondent's work history prior to the Order of June 9, 2023. In an email to the Registrar dated May 16, 2023, Counsel for the Individual Respondent stated:

> I don't think that it is relevant to maintain Mr. Knoke's privacy. That being said, the FCAA does not regulate building renovations or contractors, so in that regard, the section should be removed because it is irrelevant and beyond that scope of the authority of the FCAA.

70. The Panel disagrees with the suggestion that the Individual Respondent's work history is beyond the scope of its authority and is irrelevant because the Panel is not a regulator of contractors. The Panel is not attempting to regulate building renovators or contractors but rather inform the public of the circumstances giving rise to the Respondents' fraud. The Individual Respondent's work as a renovation contractor put him in direct contact with his Investors. His presence in his customers' homes provided him with direct and personal access to the people who became his Investors and allowed the Respondents to advance their fraud.

71. It is the Panel's opinion that members of the public would benefit from being aware of the Individual Respondent's work history to alert them to the potential for fraud in similar circumstances. The Panel finds it incongruent, and lacking any discernable rationale, to disclose the manner of Individual Respondent's contact with Investor #3 and shield it regarding Investor #1 when the circumstances of access to the Investors were the same.

72. The Panel agrees that revealing the Individual Respondent's work history is not "relevant" to maintain his privacy. The parties have not identified any other potential important public interest that would justify an exception to the open court principle. The request for redaction of the Individual Respondent's work history information fails on the first part of the Sherman test. Not only is there no identifiable important public interest, there is no evidence of a serious risk. There is therefore no valid reason to redact that information from the Settlement Agreement.

73. It is the Panel's decision not to redact this portion of the Settlement Agreement – specifically paragraph 1(e) referring to the Individual Respondent's work history.

(b) Redaction of Health Information

74. In Saskatchewan there is legislation regarding disclosure of private health information. The Saskatchewan Court of Appeal considered whether the FCAA's disclosure of an individual's health and financial information could be disclosed *in 101114386 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority*), [2019] SJ No 106, 2019 SKCA 31 ("*1011 Sask*"). The Court allowed the disclosure and referred to the provisions of 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:

> **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.
>
> …
>
> **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.

75. In *1011 Sask* the Court noted the individual put her health in issue when she requested adjournments for medical reasons (para. 183). In this case, the Individual Respondent requested adjournments for medical reasons which were granted by this Panel. He also included health information in the jointly filed Settlement Agreement. As such, he also chose to put his health in issue.

76. Counsel for the FCAA referred to a case within *Sherman* that redacted "stigmatized medical conditions". In *A.B. v Canada (Minister of Citizenship and Immigration),* [2017] FCJ No 655 a woman contracted HIV during a genital mutilation/female circumcision as a child. She applied for permanent resident status in Canada on humanitarian and compassionate grounds because her common-law partner's family intended to circumcise her daughters. She had not publicly disclosed her HIV status. Her name was anonymized from the reported case. This case predated the *Sherman* test but is instructive in that it identifies the characteristics of a medical condition requiring anonymity.

77. In our case, the Panel is asked to remove reference to the Individual Respondent's age and medical condition arising from a motor vehicle collision. Neither counsel suggested that Individual Respondent's medical condition should be considered a "stigmatized medical condition".

78. A proceeding intruding on an individual's privacy is not enough to limit the open court principle (*Sherman* para. 46). The embarrassment and discomfort arising from disclosure of personal information must be so sensitive that it rises to the level of being an affront to the individual's dignity that would be intolerable to the public. Where an individual's dignity is so affronted then an important public interest is engaged to protect that dignity. It is the dignity characterization of the private information that suspends dissemination of the personal information. The question in every case is "whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences (*Sherman* para 45). An example of such personally sensitive information that would pose a serious risk to the person's dignity is sexual assault or harassment (*Sherman* para. 77):

> There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts

> have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., A.B., at para. 9), stigmatized work (see, e.g., *Work Safe v. Her Majesty the Queen in Right of Ontario,* 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87 88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown,* 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

79. Another example is a minor's sensitive information involving domestic violence and allegations of sexual abuse (*S.T. v. The Co-Operators General Insurance Company* 2023 CanLII 72647 (Ont. LAT).

80. Aside from the question of whether the Individual Respondent's medical condition arising from the motor vehicle collision rises to the level of the dignity characterization, the first part of *Sherman* compels an assessment of whether there is a serious risk. In our case, there was no concrete evidence of any risk. There was no Affidavit(s) asserting disclosure of the Individual Respondent's health information put him at any risk – be it physical or psychological or other. Similarly, there is no objective facts to ground an inference of any risk arising from these circumstances (*Sherman* para. 97). Any risk to the Individual Respondent is speculative which is insufficient to satisfy the first part of the Sherman test.

81. In conclusion, the Panel declines to redact the Individual Respondent's age and health information from the Settlement Agreement in paragraphs 8 (iv), (v), (vi), (viii) and (ix). The Panel finds the Individual Respondent put his health in issue by requesting adjournments on the basis of his health and by agreeing to include this information in the jointly filed Settlement Agreement. The Panel finds the parties have not discharged their onus to demonstrate a serious risk to an important public interest as required by *Sherman.* There is no valid reason to redact this information.

(c) Redaction of Income Sources and Amounts

82. The Panel is asked to redact the Individual Respondent's income sources and amounts disclosed in the approved Settlement Agreement because this is personal information.

83. As required by *Sherman*, the onus is on the applicant to show the personal information strikes at the biographical core of the individual such that there is a serious risk of affront to his/her/their dignity.

> …Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity [para. 35]

84. As with the other redaction requests, this onus has not been discharged. Neither counsel identified an important public interest other than a general interest in protecting the privacy of the Individual Respondent. Rather the Individual Respondent put his information in issue by including it in the jointly filed Settlement Agreement. Nor has a serious risk been identified based on the particular facts of this case. The Panel has been provided with no evidence to identify any risk nor any evidence to assess the gravity of any risk. The first part of the *Sherman* test remains unsatisfied.

85. The Individual Respondent's sources and amounts of income were mitigating factors for the Panel to consider in deciding whether the sanctions agreed to between the parties were within a reasonable range of outcomes. Aside from the permanent market access bans, the Panel considered whether the $40,000 administrative penalty is appropriate. As well, the Panel considered whether the parties' agreement not to reimburse the Investors their $180,000 was appropriate.

86. Members of the public may be interested in the amount of the administrative penalty. The Investors may be particularly interested in why the Respondents were not ordered to pay restitution for their defrauded investments. Without information as to the Individual Respondent's current income sources and amounts, the Panel's approval of the Settlement Agreement monetary penalty has no context. The reported background of the Individual Respondent's challenging medical status arising from a motor vehicle accident along with his disability payments inform the public the reasons for his inability to secure an income to satisfy a larger penalty. These factors also justify the parties' agreement in not promoting a restitution payment to the defrauded Investors. The Panel's support of the sanctions of the Settlement Agreement are now defensible when viewed in the context of this personal information.

87. The Panel is also mindful that pursuant to Section 158(3) of the Act, it may revoke or vary a previous Order due to a change in circumstances. Without public disclosure of the relevant factors considered in approving the sanctions, the public will not be privy to any change in circumstances.

88. The Panel declines to redact from publication the references to the Individual Respondent's income sources and amounts as disclosed in paragraphs 8(vii) and (x)of the Settlement Agreement.

V. CONCLUSION

88. The Panel declines to redact the Individual Respondent's personal information disclosed in the Settlement Agreement from publication on the FCAA's website. Publication of the totality of the Settlement Agreement exposes the Panel's decision to public scrutiny ensuring the decision is fair and holds the Panel accountable to its legislative mandate.

89. This decision will be held in abeyance for 15 days being the period during which the Respondents must seek leave to appeal of this decision in accordance with section 11(1) of the *Securities Act* and section 9(3) of *The Court of Appeal Act,* 2000, SS 2000 c C-42.1.

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

Dated at Regina, Saskatchewan this 2nd day of October, 2023.

Karen Prisciak, K.C., Hearing Panel Chairperson

Peter Carton

Tracey Bakkeli