

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

In the Matter of
The Securities Act, 1988, ss 1988-89, c S-42.2

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 APPLICATION
FOR AN ORDER TO ALLOW PORTIONS OF MR. COMEAU'S MAY 10, 2018 INTERVIEW TRANSCRIPT
AS EVIDENCE AND FOR CLARIFICATION OF WHEN STAFF ARE DEEMED TO HAVE CLOSED THEIR CASE

Motion Heard: August 25, 2020

Panel: Howard Crofts (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 ("Staff"))

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

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

Date of Decision: September 18, 2020

I. BACKGROUND

1. Part of the background to this Decision is set out in previous Decisions of this Hearing Panel in this matter dated March 12, 2020, March 31, 2020, April 16, 2020 and June 9, 2020. The background in those motions and decisions will not be reproduced herein, but are adopted as background to this Decision from the perspective that they were brought forward to introduce witnesses and evidence throughout hearing this matter.

2. Staff filed an Application on July 17, 2020 seeking an order:
 - (a) Permitting it to enter into evidence portions of the transcript of an interview of Mr. Comeau by Investigator [REDACTED] completed on May 10, 2018; and
 - (b) Clarifying the Hearing Panel's interpretation of *Saskatchewan Policy Statements 12-602 Procedure for Hearings and Reviews* [Local Policy 12-602] as to when a party in a proceeding before it has closed their case, and how this should be placed on the record.
3. On September 3, 2020, the Panel communicated its oral decision addressing both items sought by Staff. The Panel's oral decision denied Staff leave to enter into evidence the portions of Mr. Comeau's interview by Investigator [REDACTED] and determined that Staff closed their case on March 12, 2020. This Decision is intended to provide additional background and context to the oral decision.
4. In arriving at its Decision, the Panel considered all the materials filed by the parties, their oral submissions, the relevant case law filed by the parties and the relevant provisions of *Local Policy 12-602*. The Panel's considered and weighed principles of procedural fairness and natural justice, the possibility of prejudice to Mr. Comeau should Staff's request be granted, and the public interest in applying *Local Policy 12-602*.
5. Staff cited the following cases in support of their Application: *Alberta (Securities Commission) v Brost*, 2008 ABCA 326, 440 AR 7; *British Columbia (Securities Commission) v Branch*, [1995] 2 SCR 3; *Law Society of Upper Canada v Abrahams*, 2015 ONLSTH 155 (CanLII) [Abrahams]; *Meharchand (Re)*, 2018 ONSEC 51; *Pezim v British Columbia (Superintendent of Insurance)*, [1994] 2 SCR 557; *Quaidoo v Edmonton (Police Service)*, 2015 ABCA 381, 609 AR 176; *R v G(S.G.)*, [1997] 2 SCR 716 [G(S.G.)]; *R v P(M.B.)*, [1994] 1 SCR 555 [P(M.B.)]; *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869; *R v Smith*, 2011 SKQB 324, 382 Sask R 150; *Re Rowan*, 2009 ONSEC 46; *Re York Rio Resources Inc.*, 2011 ONSEC 37; and *Stenner v British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 1690.
6. Mr. Comeau cited the following cases in his list of Authorities in response to the Application: *Foresight Capital Corporation, Re*, 2006 BCSECCOM 529; *Foresight Capital Corporation, Re*, 2006 BCSECCOM 531; *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983; *P(M.B.)*; *G(S.G.)*; and *R v Dionne* (1998), 169 Sask R 92.
7. In addition to the case law filed by the parties, the Panel also considered the following cases it considered relevant to the issues before it: *Jans v Jans*, 2015 SKQB 226, 479 Sask R 74 [Jans]; *Unifor Local 1-S v Saskatchewan Telecommunications Holding Corp.*, 2016 SKQB 62; *C.U.P.E., Local 1594 v Regina Public Library*, 2007 CarswellSask 160 (WL) [Regina Public Library]; and *Majestic Supply Co., Re*, 2013 ONSEC 5 [Majestic].

II. DID STAFF CLOSE ITS CASE ON MARCH 12, 2020?

8. The Panel is unanimously of the view that Staff “closed their case” as that phrase is typically understood in the litigation context when Staff finished calling their evidentiary case in chief on March 12, 2020.
9. At that time, Staff indicated they were done calling witnesses and that it was their understanding after conversations with counsel for Mr. Comeau that Mr. Comeau was ready to start presenting his case. Counsel for Mr. Comeau then verified with the Panel that Staff had closed its case. At no point during this exchange did Staff indicate that it had not closed its case. The exchange occurring on March 12, 2020 went as follows:

MR. UDEMGBA: I talked with my friend as of yesterday, and my understanding is that he’s prepared to start his case with his witnesses today. Please, confirm for me. Yes? Okay.

MR. BIEBER: So, thank you. So I take it we’re now at the point where Staff’s case is closed?

CHAIRPERSON: Yes.

10. Shortly after this exchange, counsel for Mr. Comeau indicated his intention to bring a Motion for Non-Suit in respect to some, though not all, of the allegations brought by Staff against Mr. Comeau. The timing of this motion was proper in context, being immediately after Staff closed its case and prior to Mr. Comeau presenting evidence. The Panel notes that Staff also did not indicate that it had not yet closed its case when the Motion for Non-Suit was first raised. In fact, it was not until Staff filed its response materials to Mr. Comeau’s Motion for Non-Suit on April 30, 2020 that Staff first put forth the position that they did not yet close their case. In the Panel’s view, Staff’s position in this regard is without merit.
11. Staff did not provide the Panel with any case in support of the contention that, in these circumstances, they have not closed their case, nor could this Panel locate any case that would suggest the same. Instead, cases dealing with litigation procedure, including the cases referred to above, support the Panel’s view that Staff closed their case on March 12, 2020 when they finished calling their evidentiary case in chief. Moreover, a review of *Local Policy 12-602*, and in particular section 11.4 that sets out the general order of proceedings, further supports the view that each party presents its ‘case’ in an evidentiary sense before moving to final arguments, with Staff presenting their evidence first through their witnesses. Once Staff is finished presenting their case, it then becomes the respondent’s turn to present her or his ‘case’.

12. As cited above, Staff expressly acknowledged that in their discussions with counsel for Mr. Comeau, it was Staff's understanding that Mr. Comeau would as of March 12, 2020 "start his case", a process that generally occurs only once Staff has finished presenting, or once Staff has 'closed', their case. With respect, for Staff to now argue that their case remains open would seem to misapprehend the notion of closing a case, the general procedure in section 11.4 of *Local Policy 12-602*, and the actual process that transpired.
13. In the end, after reviewing *Local Policy 12-602* (specifically section 11.4) as well as relevant portions of the hearing transcript, the Panel is of the view that the materials make clear Staff closed its case in accordance with procedures outlined in section 11.4 of *Local Policy 12-602*, i.e. finished calling their evidence in chief, just prior to (and indeed resulting in) Mr. Comeau bringing his Motion for Non-Suit.

III. SHOULD STAFF BE PERMITTED TO REOPEN THEIR CASE TO ENTER INTO EVIDENCE PORTIONS OF A TRANSCRIPT OF A COMPELLED INTERVIEW OF MR. COMEAU?

a. Submissions by Staff

14. Staff's submissions included the following:
 - (a) Compelled evidence from a respondent, while hearsay evidence, is admissible in an administrative proceeding (a point conceded by Mr. Comeau).
 - (b) While much of the jurisprudence regarding re-opening a case comes from the criminal law context, the Panel should not wholly adopt that approach as this is an administrative proceeding which garners different consideration. Staff suggested that for administrative proceedings, a more relaxed standard should be applied.
 - (c) Staff are only asking for a small portion of the transcript to be entered into evidence, that being 32 pages of the original 253 pages of Mr. Comeau's interview transcript.
 - (d) The 32 pages contain information that is relevant.
 - (e) If the 32 pages were allowed to be read in, Mr. Comeau would have an opportunity to correct or clarify what was said during the interview which would address some of the potential prejudice.
 - (f) Mr. Comeau's interview transcript was provided in the disclosure and so there should be no surprises in respect to this evidence.
 - (g) It is in the public interest for the Panel to hear what Mr. Comeau had to say in response to questions posed to him during the May 10, 2018 interview with Investigator [REDACTED].

b. Submissions by Mr. Comeau

15. Counsel for Mr. Comeau argued that:

- (a) Staff did not at any time prior to closing its case identify to the Respondent or the Panel that it intended on leading the transcript evidence and it should therefore not be allowed to be read in.
- (b) Staff closed its case on March 12, 2020 and is trying to change the rules mid-way through this hearing to plug holes in their case that were identified by Mr. Comeau's Motion for Non-Suit. To allow this evidence to be read in amongst this context would be procedurally unfair.
- (c) Staff has already brought a number of motions to bring in evidence and therefore had opportunities prior to closing its case on March 12, 2020 to introduce the 32 pages of transcript, but chose not to.
- (d) Some of the transcript evidence was not relevant.
- (e) Staff did not provide any reason or explanation as to why the transcript evidence was not brought forward when it should have been, prior to Staff closing their case.
- (f) The threshold to reopen a case is a high one and Staff has failed to meet that threshold here.
- (g) Mr. Comeau would suffer prejudice because of additional delay in dealing with this matter and would incur additional legal costs. In addition, since Mr. Comeau was not given notice prior to the hearing that Staff intended to introduce the transcript evidence as part of their case, which is typically the procedure when Staff intends to read-in compelled statements, introduction of the transcript now would create prejudice for Mr. Comeau as he proceeded with the hearing to date, including in his cross-examinations of witnesses, on an understanding that Staff would not seek to introduce this evidence.

i. Decision regarding Staff's request to reopen their case

- 16. The Panel's decision is to deny Staff's motion to reopen its case so that it can introduce into evidence portions of Mr. Comeau's compelled interview.
- 17. As indicated above, in reaching this decision, the Panel considered and weighed principles of procedural fairness and natural justice, the possibility and existence of prejudice to Mr. Comeau should Staff's request be granted, and the public interest in applying *Local Policy 12-602*.

18. The Panel also considered whether there was a sufficient reason why Staff did not bring forward the transcript evidence when Staff first should have, prior to closing their case.
19. In considering all the materials before it and the applicable legal principles, the Panel notes that:
 - (a) Principles of fairness require balancing the reasons for the request to reopen a case as well as the impact on and prejudice to the responding party with a desire to have a matter resolved on the basis of as much relevant evidence as possible (*Regina Public Library* at paras 23-24 and the authority cited therein).
 - (b) Staff's Application to reopen their case was brought very shortly after Staff closed its case. While this Application was brought in the face of a Non-Suit motion, Mr. Comeau has yet to begin calling evidence. The case law suggests that decision makers may be more willing to allow a party to reopen their case in such circumstances than if the request is made deeper into the proceedings (*Regina Public Library* at paras 23-24 and the authority cited therein; *Abrahams* at paras 14-18; *Jans* at paras 48-50).
 - (c) In this case, the transcript evidence is not evidence that was recently discovered by Staff or that was unknown to Staff prior to Staff closing their case. To the contrary, Staff was well-aware of the transcript evidence prior to commencing their evidentiary case. A perhaps somewhat similar, though certainly not identical, situation occurred in *Majestic*, where the panel there denied a request by staff to reopen their case when the evidence sought to be introduced was either available or discoverable through reasonable diligence before staff closed their case. While the Panel recognizes that in the present case Staff has brought its Application to reopen prior to Mr. Comeau calling evidence, which seems to provide this Panel with increased flexibility compared to that in *Majestic*, it is still the case that Staff was well aware of the transcript evidence but chose not to introduce it prior to closing their case. In addition, Staff's present Application is brought in the face of Mr. Comeau's Motion for Non-Suit in attempt to defeat that Motion for Non-Suit by plugging holes identified by that Motion for Non-Suit and that arose based on strategic decisions made by the parties throughout this hearing to date. To allow the transcript evidence in at this point risks permitting Staff to engage in problematic case splitting that would result in unfairness and prejudice.
 - (d) Staff did not provide any reason as to why the transcript evidence was not brought forward prior to Staff closing its case.
 - (e) Mr. Comeau and/or his counsel did not do anything, directly or indirectly, that would have resulted in or contributed to Staff's failure to bring forward the transcript evidence prior to Staff closing their case (compare the situation in *Abraham* where the respondent failed to bring forth the documents that were at issue when he had a positive obligation to do so and so the panel held that the respondent was not responding with clean hands).

- (f) The only apparent reason from the context of the proceedings as to why Staff has brought this Application seems to be that Staff is attempting to plug a hole or holes in its case which came to Staff's attention when Mr. Comeau started answering the case against him by filing a Motion for Non-Suit. Authorities cited to the Panel indicate that this is not likely a sufficient reason on its own to justify reopening a case (see e.g. *P(M.B.)* at para 42; *Jans* at paras 48-50).
- (g) Staff previously brought numerous motions to introduce evidence and call witnesses in these proceedings, yet those motions did not raise the transcript evidence. In general, parties must bring forward all their evidence when they are first called upon to do so. The repeated evidentiary applications, including the present one that has come in the face of a non-suit motion after Staff closed its case and without a sufficient reason, creates both efficiency and fairness concerns. While there are certainly situations where a Panel may decide to exercise its discretion to allow a party to reopen her or his case, in general, parties appearing before this body, including Staff, should not be permitted to litigate on an instalment plan.
- (h) If the transcript evidence is let in, the parties will for the third time need to amend materials on Mr. Comeau's Motion for Non-Suit, a fact conceded by Staff in their materials and during argument on this Application. Mr. Comeau will be forced to incur additional costs as well as have some of the costs he has already incurred to date wasted.
20. In considering all the foregoing and weighing the various interest, the Panel's decision is to deny Staff's Application. In arriving at its decision, the Panel is aware that it is the master of its own house and enjoys discretion in these circumstances so long as it exercises that discretion judicially, fairly and in the interests of justice. The Panel is of the unanimous view that this decision meets those principles.
21. The Panel also notes that this decision should not be taken as an indication that parties appearing before this body should never be permitted to reopen their case to introduce new evidence. This issue in future cases will turn on the facts of those individual cases. In this case, based on its own unique procedural history, set of facts, and circumstances, the Panel has decided to exercise its discretion to not allow Staff's Application.
22. The foregoing represents our unanimous decision on the order sought by Staff in the Notice of Application dated July 17, 2020.

Dated at the City of Regina this 18th day of September, 2020.


Howard Crofts, Chairperson


Norman Halldorson, Panel Member

7


Peter Carton, Panel Member