Vehicle Sales Authority
of British Columbia

Hearing File No. 13-08-001
Investigation File No. 13-05-029

RE: THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316 and the *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT* S.B.C. 2004 C. 2

BETWEEN:

MOTOR DEALER COUNCIL OF BRITISH COLUMBIA *dba* MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

The "Authority"

AND:

AUTOCANADA NORTHTOWN AUTO GP INC., A GENERAL PARTNER OF NORTHTOWN AUTO LP *dba* NORTHLAND CHRYSLER JEEP DODGE (Dealer #30541)

Respondent

AND:

FREDERICK BRENT MARSHALL (Salesperson #106591)

Respondent

AND:

MURRAY LEONARD CARLSON (Salesperson #114413)

Respondent

Decision of the Registrar of Motor Dealers on a Request for Reconsideration

Date of Decision: January 12, 2016

Place of Decision: Surrey, British Columbia

Legal counsel for

The Authority	Robert Hrabinsky
The Respondent Frederick Brent Marshall	Douglas McLauchlan
The Respondent AutoCanada Northtown Auto GP Inc., a general partner of Northtown Auto LP *dba* Northland Chrysler Jeep Dodge	Paul M. Pulver

Introduction

[1] The Respondent, Frederick Brent Marshall, applied for reconsideration of the Compliance Order and Notice of Administrative Penalty (collectively the "Determinations") issued to him by Acting Registrar Baker on August 31, 2015. In support of that request, Mr. Marshall provided a statutory declaration with exhibits attached. That statutory declaration was delivered in a sealed box with directions that it not be opened until further order of the Registrar. Mr. Marshall's lawyer noted the information contained within the box included communications covered by solicitor-client privilege. The lawyer for the Respondent, AutoCanada Northtown Auto GP Inc., a general partner of Northtown Auto LP *dba* Northland Chrysler Jeep Dodge ("Northland"), wrote to the Registrar indicating they received a copy of the records and it was their view that the records contained communications over which Northland claimed solicitor-client privilege.

[2] In summary, Mr. Marshall's current lawyer says the grounds for reconsideration is that Mr. Marshall's former lawyer was in a conflict of interest when he was co-representing Mr. Marshall and Northland. Mr. Marshall argues that due to this conflict, he did not receive proper legal representation and that the Determinations should be set aside to prevent an injustice from occurring. Mr. Marshall relies on the reconsideration provisions found in sections 180-182 of the *Business Practices and Consumer Protection Act* S.B.C. 2004, c. 2 ("BPCPA") and the common law principles noted in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 (SCC).

[3] By way of letter dated October 8, 2015, I directed:

(a) Mr. Marshall to identify what other authorities, if any, he relies on in applying for reconsideration, and
(b) That a teleconference hearing be held to establish the process to review Mr. Marshall's request.

In that letter, I also stayed the Notices of Administrative Penalties and paragraphs 4 and 6 of the Compliance Order.

[4] On October 23, 2015, there was a teleconference hearing before me where I directed legal counsel for the Authority, Mr. Marshall and Northland to provide their arguments and authorities regarding:

(a) The authority of the Registrar to review a conflict of interest between a lawyer and their client, including the Registrar's authority to compel disclosure of communications covered by solicitor-client privilege, and

(b) Whether such a conflict is grounds for reconsideration.

I also directed Mr. Marshall to provide an affidavit regarding when these records submitted on reconsideration were discovered and how they were discovered.

[5] This process was completed on November 30, 2015. Mr. Marshall provided a heavily redacted statutory declaration that did not include any exhibits, although the declaration said there were attached exhibits. When I refer to Mr. Marshall's statutory declaration later in these reasons, I am referring to this redacted statutory declaration.

The Determinations

[6] On August 31, 2015, acting Registrar Baker issued a Compliance Order against the Respondents Marshall and Northland for which they were held jointly and severally liable to comply with.

[7] On August 31, 2015, acting Registrar Baker issued a Notice of Administrative Penalty totaling $3,550 to Mr. Marshall. Northland was issued a Notice of Administrative Penalty totaling $44,000. A review of Acting Registrar Baker's August 13, 2015, reasons (paragraph 70) shows that where Mr. Marshall was issued an administrative penalty for a specific breach of the legislation involving a specific issue, so too was Northland.

History of the Proceedings

[8] In considering the arguments on this request for reconsideration, the following history of the proceedings are important:

February 26, 27, 28 and April 3, 2014	Hearing dates on the liability phase of the Hearing
May 23, 2014	Registrar's findings on the liability phase are released
August 12, 2014	Hearing date requesting that Acting Registrar Baker recuse herself
September 11, 2014	Reasons of Acting Registrar Baker declining to recuse herself
September 23, 2014	Acting Registrar Baker adjourned the Hearing dates of September 29 and 30 on the penalty phase, to allow Mr. Marshall's new lawyer time to review the material he received from Mr.

	Marshall's previous lawyer
May 26 and 27, 2015	Hearing dates on the penalty phase of the hearing
August 13, 2015	Acting Registrar Baker issues reasons for decision on the penalty phase
August 31, 2015	Acting Registrar Baker issues the Compliance Order and Notices of Administrative Penalties - the Determinations

[9] The hearings in this matter were split into two distinct phases. The first phase was to determine if there was any breach of the legislation – the liability phase. This phase was completed when Acting Registrar Baker issued her findings on liability on May 23, 2014. The second phase of the hearing – the penalty phase – was to determine what, if any, compliance action was necessary. The penalty phase did not commence until a year after the first phase on liability and eight months after Mr. Marshall's new lawyer asked for an adjournment of the hearing on the penalty phase.

Position of the Parties

(a) Mr. Marshall

[10] As noted, Mr. Marshall advances that there has been an injustice because of his former lawyer's conflict of interest. Mr. Marshall's position is set out in four letters submitted on this request for reconsideration. From those letters I summarize Mr. Marshall's position as follows:

(a) Due to the conflict of interest, Mr. Marshall was not properly represented amounting to an injustice, which is also a breach of procedural fairness.
(b) Mr. Marshall's lawyer notes that had there been no conflict of interest, Mr. Marshall could have settled the claims against him prior to the hearing, and provided evidence against Northland.
(c) The conflict of interest is evidenced by the documents over which privilege is claimed and by excerpts from the transcripts of proceeding.
(d) Mr. Marshall's lawyer states he became aware of the grounds and evidence for reconsideration in November of 2014 when he reviewed the solicitor's file from Mr. Marshall's previous lawyer. This is confirmed in Mr. Marshall's statutory declaration.
(e) The reconsideration provisions of the BPCPA are also engaged as the injustice and the additional privileged evidence is material and substantial to the Determinations. A reconsideration is akin to an appeal and the

process leading to the reasons for the Determinations must also form part of the reconsideration.

(f) The Registrar may review privileged documents in order to carry out his role and to ensure an injustice does not occur.

[11] In support of his position, Mr. Marshall relies on registrar decisions and the following cases:

Chandler v. Alberta [1989] 2 S.C.R. 848 (SCC)

MacDonald Estate v. Martin [1990] 3 S.C.R. 1235 (SCC)

R. v. Neil 2002 SCC 70, [2002] 3 SCR 631 (SCC)

Netupsky v. Canada (Customs and Revenue Agency) 2004 FCA 239 (Federal Court of Appeal)

R. v. Silvini (1991) 5 O.R. (3d) 545 (Ontario Court of Appeal)

R. v. Chi Man (Anthony) Li 1993 CanLII 1314 (BC Court of Appeal)

R. v. Widdifield (1995) 25 O.R. (3d) 161 (Ontario Court of Appeal)

Roeder v. B.C. Securities Commission 2005 BCCA 189 (BC Court of Appeal)

Bernard v. Lakehead University 2011 HRTO 977 (Ontario Human Rights Tribunal)

Law Society of Upper Canada v. Keasvan 2014 ONLSTA 17 (Ontario Law Society Tribunal Appeal Div.)

(b) Northland

[12] In summary, Northland takes the following position:

(a) There was no conflict of interest as the defense of Mr. Marshall was equally the defense of Northland.

(b) If there was a conflict, in so far as it may have affected the hearing, it was dealt with when Northland and Mr. Marshall obtained new separate lawyers before the penalty phase of the hearing commenced.

(c) The Registrar does not have the authority to compel disclosure of solicitor-client privileged communications nor does the Registrar have specialized expertise to determine if a lawyer is in a conflict of interest.

(d) Under the BPCPA, the evidence being advanced is not new and what Mr. Marshall is advancing is "untested allegations".

(e) The transcripts of proceedings do not disclose a conflict of interest.

(f) The fact that Mr. Marshall would now throw Northland "under the bus" is not a basis for a reconsideration under the common law or the BPCPA.

[13] Northland cites the following cases in support of its position:

Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] 2 SCR 574, 2008 SCC 44

Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers, 2014 BCSC 903

Applewood Motors Inc. (April 13, 2010, BCSC, unreported)

Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia, 2014 BCSC 894

Harris v. Windmill Auto Sales Ltd. & Detailing Ltd. (Registrar, August 20, 2013, File 12-030)

(c) The Authority

[14] In summary, the Authority takes the following position:

(a) Mr. Marshall's argument that the evidence "may" show a "potential" conflict of interest means that the grounds for reconsideration are untested allegations.
(b) The ability to reconsider based on breaches of procedural fairness is based on the record before the tribunal and not based on untested allegations.
(c) A conflict between a lawyer and their client is not a breach of procedural fairness owed by the decision-maker under *Chandler*.
(d) A reconsideration under *Chandler* is not a review for the reasonableness of the decision, but to address a "true jurisdictional" concern so that the tribunal can complete its mandate.
(e) The transcripts do not show a conflict of interest.
(f) The evidence that is advanced is not new evidence within the meaning of the BPCPA.
(g) The Registrar does not have jurisdiction to review or compel the disclosure of privileged documents.

[15] The Authority relies on the following cases in its position:

Chandler v. Alberta Association of Architects, [1989] 2 SCR 848 (SCC)

Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] 2 SCR 574, 2008 SCC 44

Fraser Health Authority v. Workers' Compensation Appeal Tribunal, 2014 BCCA 499

University of Calgary v JR, 2015 ABCA 118

Bunyak v. Darryl's Best Buys Auto Sales Ltd. et al (Registrar, November 13, 2015)

Harris v. Windmill Auto Sales & Detailing Ltd. et al (Registrar, August 20, 2013, File 12-030) denying reconsideration of *Harris v. Windmill Auto Sales & Detailing Ltd. et al* (Registrar, April 10, 2013, File 12-030) and affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers,* 2014 BCSC 9033 (BCSC)

Issues

[16] The following are the issues to be decided:

(a) Can the Registrar review privileged communications, compel their disclosure and determine if a lawyer is in conflict of interest with their client?
(b) Are the pre-conditions met to reconsider the determinations under the BPCPA?
(c) Are there grounds to reconsider the determinations under *Chandler*?

Analysis

(a) Can the Registrar review privileged communications, compel their disclosure and determine if a lawyer is in conflict of interest with their client?

(i) The Law

[17] Solicitor-client privilege is a closely guarded right necessary to the proper functioning of the Canadian justice system. Interference with that right is interpreted restrictively emphasizing *"the paramountcy of the general rule whereby solicitor-client privilege is created and maintained as close to absolute as possible to ensure public confidence and retain relevance"*: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* (SCC) at paragraph 10.

[18] As statutory creatures, tribunals gain their authority from their enabling statutes. The common law may infer tribunals have ancillary powers necessary for them to carry out their primary statutory duties. However, the power to compel production of solicitor-client privileged communications cannot be inferred, it must be explicit. Statutes which grant a general power to compel disclosure of documents and records or compel witnesses to testify will be insufficient to also include the power to compel disclosure of privileged communications: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* (SCC) at paragraph 11. In *University of Calgary v JR,* the Alberta Court of Appeal applied *Blood Tribe Department of Health* noting:

> [48] These reasons, taken together, describe the rule of strict construction as demanding of statutory language the highest degree of clarity, explicitness and specificity in order to support a conclusion that it was intended to authorize infringements of solicitor-client privilege. That is, it requires language which is absolutely clear, such that the underlying legislative intent is completely explicit. This requires specific reference to solicitor-client privilege. Departing from this stricture would undermine the rationale for the rule of strict construction of statutory language in such cases – being solicitor-client privilege's central and (among all privileges recognized in law) unique importance to the proper functioning of the legal system. It is "extremely important, indeed constitutionally protected ... and can be lost only in narrowly defined circumstances": *Piikani Nation v Kostic*, 2015 ABCA 60 (CanLII) at para 1, [2015] AJ No 172 (QL). Those narrowly defined circumstances, so far as statutory abrogations of solicitor-client privilege are concerned, are not satisfied by statutory language which might, owing to its generality, reasonably bear more than one interpretation. Otherwise, there remains a risk that legislators did not intend that infringement. In other words, the driving concern for courts in such cases is whether the posited infringement of solicitor-client privilege was clearly intended. [emphasis added]

[19] The cases cited by Mr. Marshall's lawyer do not clearly address whether the Registrar, as a statutory tribunal, can compel disclosure of solicitor-client privileged records.

[20] In *Roeder*, the court appears to have been determining the existence of a lawyer's conflict based on affidavit evidence and the relationship of the parties. The decision does not indicate privileged communications were disclosed.

[21] In *Bernard v. Lakehead University*, the Human Rights Tribunal of Ontario found that the lawyers who authored a report to be placed in evidence would be in a conflict if they also acted as counsel for the University. The conflict arose because

the lawyers would eventually have to be called as witnesses. There was no need to review otherwise privileged communications. Further, the Human Rights Tribunal's ability to disqualify a lawyer was derived from section 23(1) of the *Statutory Powers Procedure Act of Ontario*: see *Bernard v. Lakehead University* at paragraph 42.

[22] In *Law Society of Upper Canada v. Keasvan*, Mr. Keasvan was challenging findings against him of misconduct as a lawyer involving mortgage fraud. One issue was a conflict of interest because the law firm of the lawyer for the Law Society had previously acted for Mr. Keasvan on an unrelated matter. The Tribunal's decision specifically says Mr. Keasvan chose not to waive privilege and did not produce privileged records for the tribunal to review, as was Mr. Keasvan's right: see paragraph 72. Therefore, the Tribunal was determining the existence of a conflict based on the relationship of the parties and evidence that was not covered by privilege.

(ii) Discussion

[23] The Registrar has been granted powers to compel the production of documents and the testimony of witnesses. Most significant are section 151 of the BPCPA (by virtue of section 8.1 of the MDA and section 29 of the *Motor Dealer Act Regulation*) and subsections 34(3) and (4) of the *Administrative Tribunals Act* (by virtue of section 7.1 of the MDA), which state:

> **BPCPA**
>
> **Inspection powers — additional powers of director [registrar]**
>
> **151** (1) For the purposes of an inspection, the director [registrar] has the same powers that the Supreme Court has for the trial of civil actions to do the following:
>
> (a) summon and enforce the attendance of witnesses;
>
> (b) compel witnesses to give evidence on oath or in any other manner;
>
> (c) compel witnesses to produce records and things.
>
> (2) When the director [registrar] exercises a power under subsection (1) a person who fails or refuses to do any of the following is liable, on application to the Supreme Court, to be committed for contempt as if in breach of an order or judgment of the Supreme Court:
>
> (a) attend;

(b) take an oath;

(c) answer questions;

(d) produce the records or things in the person's custody or possession.

(3) Section 34(5) *[non-compellability of financial institutions and officers of financial institutions]* of the *Evidence Act* does not apply to the exercise of powers of the director [registrar] under this section.

ATA

34 (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

(4) The tribunal may apply to the court for an order

(a) directing a person to comply with an order made by the tribunal under subsection (3), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).

[24] These provisions of the BPCPA and the ATA lack the requisite explicitness that the Registrar has the power to compel the disclosure of communications covered by solicitor-client privilege: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* (SCC) and *University of Calgary v JR* (Alberta Court of Appeal). Based on these cases, I find the legislative scheme does not allow the Registrar to compel disclosure of communications covered by such privilege.

[25] It is clear from the submissions of Mr. Marshall that the disclosure of the privileged communications is central to determining if there was in fact a conflict of interest depriving Mr. Marshall of adequate legal representation and, in his submission, amounted to an injustice and constitutes a breach of procedural fairness. As Mr. Marshall's lawyer and the lawyer for Northland both agree that privilege attaches to the redacted portions of Mr. Marshall's statutory declaration and to the withheld attached exhibits, there is effectively no new evidence for me to

consider Mr. Marshall's request for reconsideration; whether at common law or under the BPCPA.

[26] I do not find the transcript excerpts Mr. Marshall cites show a conflict of interest (pages 10-21 of the February 28, 2014 Hearing Transcript - liability phase). The Transcript excerpts indicate Mr. Marshall's state of knowledge of the Hearing Notices and how they were confusing to him. It also highlights a concern raised by Mr. Marshall's first lawyer that the questioning of Mr. Marshall looked as an attempt to obtain answers that were covered by privilege and that Mr. Marshall had not been advised of his right to claim privilege.

[27] As there is effectively no evidence for the Registrar to consider showing a conflict of interest affecting Mr. Marshall's rights amounting to an injustice or a breach of procedural fairness, whether under the BPCPA or the common law, Mr. Marshall's request for reconsideration would have to be denied on this basis alone.

(b) Reconsideration under the BPCPA

(i) The Legislation

[28] The BPCPA allows for the reconsideration of "determinations" as defined in section 180, and the pertinent items here are compliance orders and a notice imposing an administrative penalty.

> **180** In this Division, **"determination"** means
>
> (a) a decision, order or ruling in respect of a matter that relates to a compensation fund,
>
> (b) a decision under section 146 *[actions by director respecting licence]*,
>
> **(c) a compliance order,**
>
> (d) a direct sales prohibition order, or
>
> **(e) a notice imposing an administrative penalty**

[29] In order to cancel or vary a compliance order or notice of administrative penalty, subsection 182(2) of the BPCPA must be satisfied. That is, there must be "new evidence" as that term is defined in that subsection, that is material and substantial to the Determinations: *Bunyak*.

[30] As I noted in *Bunyak*, the purpose of the reconsideration provisions of the BPCPA are to allow the Registrar to revisit a determination where there is a change of circumstances. This is in recognition that regulatory bodies, such as the Registrar, are in constant oversight of the industry they regulate and may need to adjust their orders in order to carry out their regulatory mandate. It is also in recognition of the statutory right of a person subject to a notice of administrative penalty to provide evidence that they acted with due diligence even though they breached the BPCPA, in order to have the notice of administrative penalty cancelled.

[31] A reconsideration under the BPCPA is not an appeal or a judicial review of the original determinations to assess their reasonableness: *Roeder v. B.C. Securities Commission* (BCCA) at paragraphs 57-58; and *Fraser Health Authority v. Workers' Compensation Appeal Tribunal* (BCCA) at paragraphs 141 – 142.

(ii) Discussion

[32] Mr. Marshall's request for reconsideration under the BPCPA must fail for two reasons.

[33] First, as noted above, the only evidence being advanced that "may" be substantial to the Determinations is covered by solicitor-client privilege. As I cannot compel the disclosure of such evidence, there is effectively no new evidence for me to review. I have already noted that the Transcript excerpts cited by Mr. Marshall (February 28, 2014, pages 10-21) do not in some way prove a conflict existed. Also, transcripts are not new evidence but record existing oral evidence: *Bunyak.*

[34] Second, Mr. Marshall's lawyer states he became aware of the potential conflict of interest and the potential for reconsideration in November of 2014, after reviewing the solicitor's file. This is confirmed by Mr. Marshall in his statutory declaration. In November of 2014, there were no "determinations" to reconsider. While Acting Registrar Baker had made findings of fact on liability by that time, she had not made any findings on the penalty phase and had not made any "determinations". The hearing had not yet reached its final conclusion and Acting Registrar Baker had not made a final decision and therefore, she was not *functus officio*: *Chandler* (SCC) at page 861.

[35] From November 2014, until the compliance order and notice of administrative penalty were issued on August 31, 2015, Acting Registrar Baker was not *functus officio* and could have considered the concerns Mr. Marshall now raises. This includes the transcript references Mr. Marshall now relies on. Even if the

Registrar could compel disclosure of the privileged communications, they still would not be "new evidence" as defined by subsection 182(2) of the BPCPA.

(iii) Grounds for Reconsideration

[36] The main ground for reconsideration is that an "injustice" occurred because Mr. Marshall was not permitted to meaningfully participate in settlement discussions. Mr. Marshall argues, but for the conflict of interest, he would have settled the case without the findings of fact made by Acting Registrar Baker and he would have provided evidence against Northland. The law and principles relied on by Mr. Marshall regarding an "injustice" are found in the various criminal cases he cites.

[37] This argument is speculative. It is always easy to say after a decision is made, that one would have run a different "defence" or would have settled the case. The speculative nature of this ground is highlighted in the written decision of Acting Registrar Baker of August 13, 2015, where Acting Registrar Baker noted:

> [11] In September 2014 Mr. Marshall sent a series of broadcast emails to people in the industry in which he commented negatively and with very colourful language on the investigation conducted by the Motor Vehicle Sales Authority ("MVSA"), and the actions of the MVSA employees Mr. Dunn and Mr. Walker, including stating numerous times that the proceeding was an abuse of process and suggesting that the conduct at issue should have been resolved with a warning or a ticket. [emphasis added]

[38] By September 2014, Mr. Marshall knew what findings were substantiated against him. He felt the findings deserved nothing more than a warning or a ticket. Paragraph 17 of the August 13, 2015, reasons highlight the significant administrative penalties the Authority suggested should be applied. Mr. Marshall's view of the proper outcome of Acting Registrar Baker's findings and the views of the Authority were very far apart. Instead of issuing a warning or a ticket, Acting Registrar Baker issued the above noted Compliance Order and Administrative Penalties. At paragraph 70(g) of the August 13, 2015, reasons, Acting Registrar Baker reasoned that a $2,000 administrative penalty against Mr. Marshall and a $20,000 administrative penalty against Northland were necessary to address "*general conduct calculated to deceive and mislead customers...*"

[39] Based on these passages from Acting Registrar Baker's August 13, 2015, reasons, it is very speculative to say that Mr. Marshall would have settled before the hearing commenced in February of 2014. There was also no reason Mr. Marshall could not have come forward prior to the May 2015 hearing dates on the penalty

phase to try and settle this matter on better terms than ultimately ordered in the Determinations. It is also important to note that a settlement for breaches of the BPCPA occurs by way of an Undertaking pursuant to section 154 of that Act. Undertakings, which are published public documents, include the allegations or agreed facts for which the Undertaking is made as required by subsection 154(1) and to ensure transparency, intelligibility and justification for the Undertaking.

[40] In the criminal cases cited by Mr. Marshall regarding a review of a conflict amounting to an injustice, such speculative settlement arguments have generally been dismissed. The Ontario Court of Appeal in *Widdifield* noted:

> ...The concern on appeal must be with what happened and not with what might have happened. It makes no more sense to find ineffective representation based on the possibility of a conflict of interest, than it does to find ineffective representation based on the mere possibility of incompetent representation...
>
> I am satisfied that a standard which would require appellate reversal of a conviction whenever it could be said that there was an appearance of a conflict of interests, could do significant harm to the criminal justice system. If that standard were adopted, it would either virtually eliminate the joint representation of co-accused, or it would permit accused to avail themselves of the advantages of joint representation at trial, secure in the knowledge that if the verdict went against them, reversal on appeal was a virtual certainty. [emphasis added]

This passage was applied in *Law Society of Upper Canada v. Keasvan*, a case supplied by Mr. Marshall.

[41] Mr. Marshall also cites *R. v. Li* at paragraph 43:

> 43 While it is not necessary to decide the question in this case, it seems to me that the accused would be entitled to a judicial stay of proceedings if the accused did show in a specific way that he was deprived of the opportunity to benefit from cooperating with the prosecution because of his lawyer's conflict. That opportunity no longer exists, and a new trial would be a hollow remedy in such circumstances. [emphasis added]

[42] Important is the preceding paragraphs of *R. v. Li* for context:

> 40 In either case, however, the accused has a burden to show more than a mere theoretical possibility of prejudice when the question arises for the first time on appeal. In this case, the accused relies only on the facts that there was no attempt to make a deal (which opportunity the accused had three times

already declined to explore), and that there was no cross-examination about what the police saw at the East 7th Ave. premises.

> 41 It would be too easy, in my view, for the accused at this stage to raise the question and expect a new trial to be ordered automatically. He should, at least, verify that he had, and was willing to furnish, evidence that would assist the prosecution. He should also give particulars, or persuade us that the absence of cross-examination on the other question raises a realistic possibility of a miscarriage of justice. [emphasis added]

[43] As noted, there is no evidence to consider on this point. The evidence is not new evidence under the BPCPA, and it is protected by privilege for which the Registrar is not empowered to compel its disclosure. I find that settlement was speculative at best, given Mr. Marshall's views in September 2014 and how far away they were from the views of the Authority and the ultimate Determinations by Acting Registrar Baker. I would also note that these criminal cases cited by Mr. Marshall involve powers given to the appellate court (not a power given to the trial court to review its own decision) within the *Criminal Code* of Canada: see for example *R v. Li* at paragraph 21. Applying those criminal law provisions to an administrative tribunal's authority to reconsider its own decision under a different statutory and regulatory scheme is problematic as different considerations (such as ensuring procedural fairness versus preventing an injustice because liberty is at stake) are involved: *Roeder* (BC Court of Appeal) at paragraphs 52-59.

(iv) Comments on Netupsky v. Canada (Customs and Revenue Agency)

[44] I fail to see the relevance of Mr. Marshall's reliance on paragraph 16 of *Netupsky v. Canada (Customs and Revenue Agency)*, 2004 FCA 239 (Federal Court of Appeal), to argue that I am somehow compelled to review the proposed new evidence before I make a decision on the request for reconsideration. That case involved an application by Mr. Netupsky to reconsider the Federal Court of Appeal's dismissal of his appeal due to his failure to follow the Rules. Specifically, he failed to file the required record from the trial court, and other documents required by the Rules. The Court highlighted these failures:

> [2] Within 30 days after filing his notice of appeal, that is, by July 7, 2003, Mr. Netupsky should have filed an agreement as to the contents of the appeal book (Rule 343). Within 30 days after filing the agreement (that is, by August 6, 2003), he should have prepared, served and filed the appeal books (Rule 345). Within a further 30 days (that is, by September 5, 2003), he should have served and filed a memorandum of fact and law (Rule 346). Finally, he should have served and filed a requisition for hearing within 20

days of being served with the Crown's memorandum of fact and law, or within 20 days of the deadline for filing the Crown's memorandum of fact in law, whichever was earlier (Rule 347).

[4] Instead, Mr. Netupsky did nothing after filing his notice of appeal. His inaction stalled all preparations for the hearing of the appeal. Mr. Netupsky did not advise the Court of any particular problems in preparing his appeal for hearing, or seek leave for an extension of time to take any of the steps required to prepare his appeal for hearing.

[45] It is in this context that the Federal Court of Appeal stated:

[16] The proper consideration of an appeal requires more than simply a consideration of the appellant's legal arguments. An appeal also requires, at least, consideration of the order under appeal, the reasons for the order, the pleadings in the court below, and the documentary evidence considered in the court below. That is why an appeal book is required before the parties are required to file their memoranda of fact and law (for the required contents of an appeal book, see Rule 344).

[18] ...I am unable to conclude that Mr. Netupsky has justified the delay in preparing this matter for hearing.

[19] I would dismiss this motion for reconsideration on the basis that Mr. Netupsky has failed to provide a satisfactory response to the notice of status review.

[46] In paragraph 16 of *Neptusky*, the Federal Court of Appeal is simply stating that a reviewing court must have what amounts to "the record" of the trial court if it is going to undertake a review of the trial court's decision. That is not an issue in this case. The issue is Mr. Marshall now wants to supplement the record with evidence which (a) was available to him during the hearing before Acting Registrar Baker, and (b) is covered by solicitor-client privilege.

(c) Reconsideration under the principles in Chandler

(i) The Law

[47] As I noted in *Bunyak*, *Chandler* stands for the proposition that the principle of *functus officio* applies to administrative tribunals, but its application is more flexible to allow tribunals to complete their statutory mandate. There are specific times a tribunal may reconsider its decision under *Chandler* as I summarized in *Bunyak*:

> [6] Once an administrative tribunal has rendered a decision, it is *functus officio* (its jurisdiction has been spent) and it may only revisit its decision:
>
> (a) To correct a slip in drawing up the order (such as typographical errors);
> (b) To correct an error in expressing the manifest intention of the court or tribunal (clarifying the decision and not changing the decision);
> (c) Where a tribunal is empowered by their enabling statute to reconsider their decisions, and to the extent allowed by that statute;
> (d) Where the tribunal has failed to dispose of a mater properly before it; and
> (e) To rehear a matter afresh where the tribunal has not provided procedural fairness.

[48] A reconsideration for a failure to provide procedural fairness is not one that is based on new evidence and on untested allegations, as I noted in *Windmill*.

> [20] The case law does not support tribunals having a wide ranging ability to review for a breach of procedural fairness. If a tribunal could review all its decisions for any claim of a breach for procedural fairness, then the *functus officio* general rule would become the exception. The case law supports that it is when the tribunal itself discovers on the face of the record that procedural fairness was not provided, that it may reconsider its decision afresh.

[49] This view is consistent with the decision of a five person panel BC Court of Appeal in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal:*

> [141] On the authority of *Chandler*, the power to reopen a proceeding at common law is limited to non-substantive slips and to errors which result in the tribunal not exercising the jurisdiction given to it. In my view, it is apparent from a reading of *Chandler* that the authority of a tribunal to reopen a proceeding is an exception to finality and to the principle of *functus officio*. It flows out of the limited review of administrative decisions and the obligation on administrative tribunals to fulfill the task given to them. It does not flow to errors made within jurisdiction, which is what a review for reasonableness is all about.
>
> ...
>
> [149] The issue in the present case is not about the scope of the Court's authority on judicial review or any undermining of the characterizing of errors that involve an excess or loss of jurisdiction as jurisdictional. It also is not about narrowing the constitutional principle of jurisdiction underlying *Crevier*. It is about the scope of the common law authority of an

administrative tribunal to reopen a proceeding to correct errors of jurisdiction as defined in the jurisprudence.

[150] I repeat the comments of Sopinka J. in *Chandler*:

> [23] ... if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task.

and those of the majority in *Dunsmuir*:

> [59] ... "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry.
>
> [Emphasis added.]

[50] The common law power to reconsider a decision based on a breach of procedural fairness is based on the failure of the tribunal, the Registrar in this case, to fairly complete its task. This includes things like: (a) not giving proper notice to the person affected so they know the case to meet, (b) not providing a person an opportunity to be heard, or (c) failing to complete its task as directed by the legislative scheme: *Windmill.* That common law power to reconsider does not extend to an assessment of evidence that is not on the record, in order to determine if a person's lawyer may have been in a conflict of interest and which conflict may have affected the reasonableness of the decision. Those are untested allegations: *Windmill.* As with the various criminal cases such as *R. v. Li* where a mere allegation of a conflict does not automatically mean there is an injustice, the mere allegation of a conflict of interest between a lawyer and their client does not mean the Registrar's decision is unreasonable or the Registrar failed to provide procedural fairness.

(ii) Discussion

[51] In this case, once Mr. Marshall declared that his first lawyer may be in a conflict of interest, Mr. Marshall and Northland obtained new lawyers. Importantly, Acting Registrar Baker granted an adjournment of the penalty phase of the hearing to allow Mr. Marshall's and Northland's new lawyers time to review the solicitor's file. The penalty phase portion of the hearing was reconvened some eight months after the adjournment was granted. Mr. Marshall does not indicate that during that time he made Acting Registrar Baker aware of the concerns he now raises, even though he was aware of them by November of 2014. Acting Registrar Baker was not made aware of any concerns requiring her to intervene in order to protect the fairness of the Registrar's process. Acting Registrar Baker did grant the adjournment to provide fairness to the parties, and thereafter completed the

Registrar's task under the legislative scheme. To now seek to review the relationship between Mr. Marshall and his first lawyer to see if it impacted the reasonableness of the Determinations, is not an exception to the principle of *functus officio*: *Chandler* (SCC) and *Fraser Health Authority v. Workers' Compensation Appeal Tribunal* (BCCA).

Decision

[52] For the above reasons, Mr. Marshall's request for reconsideration is denied as:

(a) The evidence Mr. Marshall seeks to admit that may be substantial to the Determinations is covered by solicitor-client privilege and the Registrar is without authority to compel its disclosure.

(b) Even if the Registrar could compel the disclosure of the communications covered by solicitor-client privilege, they were available during the hearing before Acting Registrar Baker, and Mr. Marshall could have sought their admission during or before the penalty phase of the hearing. Therefore, they are not new evidence as defined by subsection 182(2) of the BPCPA.

(c) There being no new evidence of a substantial nature for the Registrar to consider, the preconditions of sub-section 182(2) of the BPCPA are not met and the Registrar could not cancel or vary the Determinations under that Act, even if a reconsideration was completed.

(d) The common law authority of the Registrar to reconsider its decision for a breach of procedural fairness is limited to when the Registrar has not fairly completed its task. It does not include a review of a decision to determine if a conflict between a lawyer and their client may have affected the reasonableness of the decision. It also does not extend to a consideration of whether an "injustice" occurred as that term has been applied under the *Criminal Code* of Canada.

The Determinations

[53] The Compliance Order and the Notices of Administrative Penalties issued by Acting Registrar Baker on August 31, 2015, are re-instated in their entirety. The Compliance Order is effective immediately while the Administrative Penalties are due and payable within 30 days of this decision being served on Mr. Marshall and Northland: subsection 167(b) of the BPCPA.

Acting Registrar Baker's directions on costs

[54] In Acting Registrar Baker's decision of August 13, 2015, and in the Compliance Order of August 31, 2015, Acting Registrar Baker allowed the parties some time to come to an agreement on costs or otherwise seek a hearing before Acting Registrar Baker to settle costs. That time had not expired before Mr. Marshall applied for reconsideration. I would direct that the parties have until February 26, 2016, to come to an agreement on costs or otherwise seek a hearing before Acting Registrar Baker to settle the issue of costs.

Further Reconsiderations

[55] No reconsideration may be made of this decision: subsection 182(6) of the BPCPA. Subsection 7.1(t) of the MDA and section 57 of the *Administrative Tribunals Act* set a time limit of 60 days to apply for judicial review from the date this decision is issued.

Dated: January 12, 2016

Ian Christman, Registrar