FINANCIAL AND CONSUMER SERVICES tribunal DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: *Edward Wagnies v. New Brunswick (Director of Consumer Affairs),* 2021 NBFCST 9

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *DIRECT SELLERS ACT*, S.N.B. 2011, c 141

Docket: CA-001-2021

BETWEEN

Edward Wagnies,

Appellant,

-and-

Director of Consumer Affairs,

Respondent.

DECISION

PANEL:	Mélanie McGrath, Tribunal Chair Chantal Thibodeau, Q.C., Tribunal Member Gerry Legere, Tribunal Member
DATE OF HEARING:	July 5 and 20, 2021
WRITTEN REASONS:	November 25, 2021
APPEARANCES :	Mark McElman, Financial and Consumer Services Commission Edward Wagnies, per se

I. DECISION

1. We allow Edward Wagnies' appeal and vacate the Director of Consumer Affairs' decision of January 12, 2021. Mr. Wagnies shall be granted a salesperson licence provided the conditions of subsection 4(3) of the *Direct Sellers Act,* S.N.B. 2011, c 141 [*Direct Sellers Act*] are met.

II. OVERVIEW

2. Mr. Wagnies has worked for approximately 20 years conducting door-to-door sales of driveway sealing in New Brunswick. In 2020, Mr. Wagnies left his long-time employer, Atlantic Sealers, and obtained employment as a salesperson with Advanced Asphalt Maintenance Inc., another driveway sealing and repair company. Upon learning that Mr. Wagnies did not have a salesperson's licence under the *Direct Sellers Act*, Advanced Asphalt required that he obtain a licence to continue in their employ. Mr. Wagnies filed an application for a salesperson licence with the Director of Consumer Affairs [Director]. On his application, Mr. Wagnies disclosed that he had been convicted of criminal offences for which he had not received a pardon or record suspension. After providing Mr. Wagnies with an opportunity to be heard, the Director denied Mr. Wagnies' application. Mr. Wagnies appeals the Director's decision to the Tribunal pursuant to subsection 21(1) of the *Direct Sellers Act*.

3. This is an appeal *de novo*; our role is to conduct a fresh analysis of the whole of the evidence to determine whether Mr. Wagnies should be granted a salesperson licence under the *Direct Sellers Act.*

III. ISSUES

4. The issues raised on this appeal are the following:

    a) What is the applicable standard of review?

    b) What is the scope of the Director's participatory rights in this appeal?

    c) Does the Director's *Statement of Position* respect the principle of bootstrapping?

    d) Was there a breach of procedural fairness in the opportunity to be heard before the Director?

    e) Should Edward Wagnies be granted a salesperson licence?

IV. ANALYSIS

A. What is the applicable standard of review?

5. For the reasons set out below, we find that the Legislature intended the Tribunal to conduct an appeal *de novo*, at the conclusion of which it determines the correctness of the Director's decision.

6. The Director contends that her decision should be reviewed on a reasonableness standard of review because she is best positioned to determine whether the licensing of a particular salesperson will advance the dual causes of consumer protection and confidence in the direct sales industry. The

Director relies on the following excerpt from author Sara Blake in *Administrative Law in Canada*, 5th ed. at p. 173:

> Regardless of how broad the scope of appeal appears to be from the wording of the appeal provision, the extent of deference shown by the appellate body to the decision of the lower tribunal may depend on a number of other factors, including the extent to which the issue under appeal is within the special expertise of the lower tribunal. These factors are more fully discussed in chapter 8. In appeals from lower tribunals to appellate tribunals, the greater expertise is often possessed by the lower tribunal because of its practical experience gained in its daily regulation in the field. For that reason, its exercise of discretion should be given deference by the appellate tribunal. This approach to determining the standard of review described in chapter 8 may be supplanted by a statutory test that the appeal tribunal must apply.

7. The Director further contends that in *Fredericton Police Association v New Brunswick (Superintendent of Pensions),* 2019 NBFCST 12 [*Fredericton Police Association*], the Tribunal considered the issue of greater expertise, but determined to proceed on a standard of correctness, given certain provisions of the *Pension Benefits Act*. The Director contends that because those provisions are not replicated in the *Direct Sellers Act*, a reasonableness standard should apply.

8. Mr. Wagnies did not a take a position with respect to the standard of review.

9. We agree that the Director has greater expertise than the Tribunal in the direct sales sector given the Tribunal's multi-disciplinary jurisdiction which encompasses fifteen statutes. However, the Director's position that this expertise, on its own, justifies the application of a reasonableness standard of review is not supported by the caselaw nor the legislative scheme.

10. Multiple courts have recognized that the caselaw dealing with the determination of the standard of review in an appeal from a decision of an administrative tribunal to a superior court is not applicable to an appeal from the decision of an administrative decision-maker to an appellate administrative tribunal: *Paul v British Columbia (Forest Appeals Commission*), 2003 SCC 55; *British Columbia (Chicken Marketing Board) v British Columbia (Marketing Board),* 2002 BCCA 473; *Djossou v Canada (Citizenship and Immigration*), 2014 FC 1080; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93; and *City Centre Equities Inc. v Regina (City)*, 2018 SKCA 43.

11. Recent decisions have espoused the approach that whether an administrative appellate tribunal should apply a standard of review depends on the applicable legislative scheme. In the recent decision of *City Centre Equities Inc. v Regina (City)*, 2018 SKCA 43, Whitmore, J.A., writing for the Saskatchewan Court of Appeal, conducted an exhaustive review of the different approaches in the Canadian caselaw and concluded that the determination of the applicable standard of review is a matter of statutory interpretation.

12. It is trite law that in seeking to give effect to the legislator's intent, we must resort to the modern

method of interpretation by looking at the broad and specific context, the object of the statute and a consideration of the legislative text in its grammatical and ordinary sense: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

13. We turn to our analysis of the legislative scheme. The *Direct Sellers Act* does not set out its purpose, nor are we aware of any New Brunswick caselaw discussing the purpose of this statute. In *Preston v Consumer Protection Saskatchewan Justice*, 2006 SKQB 86 [*Preston*], the Saskatchewan Court of Queen's Bench considered the purpose of direct sales legislation in the context of a refusal of a licence. The Court stated the purpose as follows:

> [6] The purpose of the Act is to protect the public from an unscrupulous or dishonest persons who intend to go from house to house selling or soliciting orders for the future delivery of goods. Here, Preston has nine convictions under the Criminal Code involving dishonest behaviour (fraud and theft) and has not completed serving the conditional sentences imposed. The conviction on each count was entered on June 8, 2005 and was for a period of 23 months…

14. In the case of *Insul Pac (Canada) Ltd. v Newfoundland (Registrar, Direct Sellers),* 1981 CarswellNfld 80, the Newfoundland Supreme Court found the purpose of their direct sales legislation to be to enable the minister to supervise the activities of direct sellers so that persons who deal with them will not be cheated.

15. Section 21 of the *Direct Sellers Act* is the only provision that deals with an appeal of a decision of the Director to the Tribunal. It stipulates:

> **Appeal**
> 21(1) A person who is directly affected by a decision made under section 4, 17, 19 or 28 may appeal it to the Tribunal within 30 days after the date of the decision.
>
> 21(1.1) Despite subsection (1), the Tribunal may extend the period for appealing a decision, before or after the expiration of the time, if it is satisfied that there are reasonable grounds for an extension.

16. Section 21 does not set out a standard of review.

17. The words "may appeal" in section 21 provide no guidance as to the applicable standard of review. In *Estabrooks v New-Brunswick (Director of Consumer Affairs)*, 2017 NBFCST 2 [*Estabrooks*], the Tribunal found that the words "may appeal" in the *Real Estate Agents Act* cannot be read in isolation and must be considered in the broader context of financial and consumer services legislation. Similarly, in *Fredericton Police Association*, the Tribunal concluded that the words "may appeal" found in section 73 of the *Pension Benefits Act* provide no indication as to the applicable standard of review, if any. The Tribunal reiterated that the words "may appeal" cannot be read in isolation from the rest of the statutory scheme.

18. The statutory scheme includes the *Financial and Consumer Services Commission Act*, which is the Tribunal's enabling statute. This statute sets out the Tribunal's hearing powers across financial and consumer services legislation. The term "financial and consumer services legislation" is defined in section 1 as comprising 21 statutes, including the *Direct Sellers Act.* The *Financial and Consumer Services Commission Act* sets out the broader context applicable to the interpretation of financial and consumer services legislation. The purposes of the *Financial and Consumer Services Commission Act* are stated in section 2 as follows:

> **Purposes of the Act**
>
> **2.** The purposes of the Act are to
>
> (a) enable the Commission to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors, and
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> (b) enable the Commission to disseminate knowledge and promote understanding of the regulated sectors and develop and conduct educational programs.

19. The *Financial and Consumer Services Commission Act* does not set out a standard of review applicable to appeals of regulators' decisions to the Tribunal. However, section 1, which sets out the definitions applicable to the entirety of the *Financial and Consumer Services Commission Act*, contains the following definition:

> "hearing" includes a review or an appeal. (*audience)*

20. Section 38 of the *Financial and Consumer Services Commission Act* sets out the Tribunal's powers regarding "hearings" under financial and consumer services legislation, including the *Direct Sellers Act*. The relevant portions are reproduced below:

> **38**(1) With respect to the following matters, when the Tribunal holds a hearing under financial and consumer services legislation, the Tribunal has the same power that the Court of Queen's Bench has for the trial of civil actions:
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> (a) summoning and enforcing the attendance of witnesses;
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> (b) compelling witnesses to give evidence under oath or in any other manner; and
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> (c) compelling witnesses to produce books, records, documents and things or classes of books, records, documents and things.
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> **38**(5) The Tribunal may decide all questions of fact or law arising in the course of a hearing.

> **38**(6) The Tribunal may receive in evidence any statement, document, record, information or thing that, in the opinion of the Tribunal, is relevant to the matter before it, regardless of whether the statement, document, record, information or thing is given or produced under oath or would be admissible as evidence in a court of law.

21. Given the definition of "hearing" which includes an appeal, we conclude that the powers in section 38 apply to appeals. These powers are typical of first instance proceedings. In *Estabrooks* and *Fredericton Police Association*, this Tribunal concluded that the *Financial and Consumer Services Commission Act* grants it *de novo* powers when hearing an appeal of a regulator's decision. These decisions remain good law. The Court of Appeal recently affirmed the Tribunal's conclusion regarding the standard of review in *The City of Fredericton et al. v. Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America et al*., 2021 NBCA 30 at para 107.

22. In conclusion, we could find no intent in either the *Financial and Consumer Services Commission Act* nor the *Direct Sellers Act* that the Tribunal is to apply a reasonableness standard of review in an appeal of a Director's decision. We conclude that the intent of the Legislature was to have appeals under the *Direct Sellers Act* conducted in a *de novo* manner with no deference to the Director's decision.

B. What is the scope of the Director's participatory rights in this appeal?

23. We conclude that the Director's participatory rights in this appeal are limited to presenting written and oral arguments as detailed below.

24. At the start of the July 5, 2021 hearing, the Director raised issues regarding her participatory rights. The Director submits that in a *de novo* appeal, she should have the same participatory rights as the appellant, which includes testifying and bringing witnesses to testify, cross-examining witnesses, eliciting her own evidence, and making submissions with respect to the evidence and the law.

25. Mr. Wagnies did not provide a position regarding the Director's argument.

26. We are unable to reconcile the Director's position with the law as it disregards the fact that she is an administrative decision-maker whose decision is under appeal.

27. The scope of the Director's participatory rights is an issue of standing. The leading case on standing of an administrative decision-maker on appeal of its decision is *Ontario (Energy Board) v Ontario Power Generation Inc*., 2015 SCC 44 [*Ontario Power Generation*]. As explained by Rothstein, J., writing for the majority, at para. 63, "[t]he standing issue concerns what types of argument a tribunal may make, i.e. jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments". After canvassing the caselaw, Rothstein, J., states that two common law restrictions impact the scope of a tribunal's standing on appeal of its own decision:

> [49] In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.
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> [50] The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

28. Rothstein, J., recognizes at paragraphs 55 and 56 that administrative tribunals occupy many different roles and that concerns regarding partiality may vary depending on the particular case and the tribunal's structure and statutory mandate. He recognizes a distinction between regulatory tribunals and tribunals that adjudicate individual conflicts between two or more parties. For these latter tribunals, he notes the impartiality concerns dealing with « the importance of fairness, real and perceived, weighs more heavily against tribunal standing ».

29. Rothstein, J., states that in determining standing the court must look first to the statute to determine whether standing is granted, and if so, the extent of that standing. He adds that in the absence of a statutory provision specifying the extent of an administrative decision-maker's participation on appeal of its decision, a discretionary and contextual approach, based on a non-exhaustive list of factors, should be applied to determine standing:

> [52] […] A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.
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> […]
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> [57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required

> to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.
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> […]
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> [59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:
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> > (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
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> > (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
> >
> > (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

30. In our view, this approach to determining standing can also be applied by an appellate administrative tribunal in determining whether the first instance administrative decision-maker has standing on appeal of its decision.

31. The Director submits that in a hybrid appeal or in an appeal *de novo*, the appellate administrative tribunal should consider the record and any new evidence presented, regardless of the source. She relies on the decisions of *Millett v Nova Scotia (Minister of Agriculture),* 2015 NSSC 21 and *Nova Scotia (Minister of Agriculture) v Millett,* 2017 NSCA 2, *Anna Pyasetsky,* 2013 ONSEC 14, *Hacik Istanbul*, 2008 ONSEC 7, and *Sanjiv Sawh et al.*, 2012 ONSEC 27 in support of this argument.

32. In *Millett v Nova Scotia (Minister of Agriculture),* 2015 NSSC 21, Justice Moir held at paragraph 114 that the Minister, in conducting a review of an inspector's decision, "was required by the legislature to consider the inspector's decision, the information before the inspector, and new information given to the Deputy Minister. His obligation was to decide, on old and new evidence, whether Rocky Top Farm is a fit person to care for the cattle." The Court of Appeal agreed with this analysis: *Nova Scotia (Minister of Agriculture) v Millett,* 2017 NSCA 2 at para 51.

33. In our view, the *Millett* decisions are distinguishable from the within matter. We note, at the outset,

that neither the Supreme Court nor the Court of Appeal in *Milett* explicitly found that this new evidence included evidence provided by the inspector, whose decision was under review. We are of the view that these decisions do not stand for the general proposition that in an appeal *de novo,* the decision-maker whose decision is under appeal or review may present new evidence in support of its decision.

34. The *Millett* decisions can be explained by the statutory and situational context in which the initial decision was taken by the inspector.

35. The facts, briefly, in *Millett* were the following. An inspector from the Nova Scotia Department of Agriculture seized a herd of cattle from Rocky Top Farm. The inspector determined not to return the herd to Rocky Top Farm and gave a notice to that effect under the *Animal Protection Act*. Rocky Top Farm exercised its right to have the Minister of Agriculture review the inspector's decision.

36. Section 16(1) of the *Animal Protection Act* states that "the Minister is responsible for all investigations of farm animals in distress". Pursuant to section 17, the Minister may appoint a Provincial Inspector and inspectors for the purpose of inspecting farm animals. The *Act* grants to the Minister or his inspectors, broad powers to investigate, enter premises, inspect the premises, and take into custody animals in distress (the decision). The *Animal Protection Act* provides that an owner can request a review, by the Minister, of the decision of the Provincial Inspector or an inspector to take into custody an animal. The legislation was silent as to the scope of the Minister's statutory review and did not offer any description of the process to follow in completing a review.

37. As noted by Moir, J. in *Millett v Nova Scotia (Minister of Agriculture),* 2015 NSSC 21 at para 111, the review by the Minister "allows for timely reflection, after a decision necessarily made in haste [by the inspector]".

38. Saunders, J.A., writing for the Court of Appeal in *Nova Scotia (Minister of Agriculture) v Millett,* 2017 NSCA 2 further comments on the situational context in which an inspector makes decisions and stresses that when a complaint is received about animals in distress and an inspector is dispatched, the decision taken by the inspector to remove animals is made quickly:

> [76] Rather, here we are concerned with living, breathing "non-human vertebrates" (s. 2(1)(a) of the Act) whose very health and existence is in peril. Saving them is the immediate concern. Time is of the essence. Reasonable steps in the field to identify the owner and obtain that owner's co-operation is all that is required. The niceties of an owner's responses, or proposals to provide for the future relief of the animals, when given too late, can be sorted out later.
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> […]
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> [81] The owner of any animal seen to be in distress may, for good reason, wish to remain mute in the face of questioning, or delay any thoughts of responding until legal advice is obtained. But that cannot and does not mean that the inspector in

> the field is obliged to wait around until that legal advice is received and the owner then agrees to answer the inspector's questions. Time is of the essence. Providing for the health and safety of the animals is the priority. Any slower calibrated inquiry into statutory compliance can and should wait until later. [Our emphasis]

39. Saunders, J.A., states, at paragraph 88, that under the statutory scheme it is the Minister's ultimate responsibility to decide whether the owner is a fit person capable of caring for the animals before the Minister relinquishes custody and returns the animals to the owner from whom they were seized.

40. The statutory and situational scheme in *Millett* is significantly different from the within matter. There is no element of haste in the decision of the Director of Consumer Affairs. Rather, the Director provides an opportunity to be heard to an applicant where her Deputy Director of Licensing recommends denying the application for a salesperson licence. Under the *Direct Sellers Act*, the Director is responsible for the regulation of direct sales in New Brunswick, including issuing licences. The Tribunal does not regulate the direct sales industry. Instead, it provides independent oversight of the Director's decisions and orders.

41. We turn to the decisions of *Anna Pyasetsky,* 2013 ONSEC 14, *Hacik Istanbul*, 2008 ONSEC 7, and *Sanjiv Sawh et al.*, 2012 ONSEC 27. These three decisions were reviews of decisions of the Director of Securities by a hearing panel of the Ontario Securities Commission. These reviews were conducted as hybrid appeals. In these three matters, Staff of the Ontario Securities Commission were permitted to present a case and cross-examine witnesses.

42. In our view, these cases are also distinguishable because it was Staff of the Ontario Securities Commission, and not the Director of Securities whose decision was under review, that presented a case and cross-examined the appellant. Thus, issues of impartiality and finality did not arise. This Tribunal has never been asked to determine whether staff of the Financial and Consumer Services Commission, such as the Deputy Director of Licensing in the within matter, should be granted standing in an appeal.

43. We are not aware of any caselaw where a court or appellate administrative tribunal has granted standing to an administrative decision-maker and allowed this decision-maker to testify, call witnesses, provide unfettered arguments, and cross-examine witnesses. This Tribunal has consistently rejected such arguments.

44. *Sellars v. New Brunswick (Superintendent of Insurance),* 2019 NBFCST 2 [*Sellars*] was an appeal of a decision of the Superintendent of Insurance to this Tribunal. The Superintendent of Insurance argued that she should have the same participatory rights as the appellant, including the right to testify, to adduce new evidence, to present witness evidence and to argue the merits of the case. After reviewing the law, including the *Ontario Power Generation* decision*,* the hearing panel concluded that the Superintendent should be granted standing limited to the presentation of the following types of arguments:

- Setting out its established policies and practices;
- Responding to arguments raised by the appellant;
- Providing interpretations of its reasons that are compatible with its original decision or presenting arguments that are implicit in its reasons;
- Assisting the Tribunal by the elucidation of the issues informed by its specialized position; and
- Drawing the Tribunal's attention to aspects of the *Record of the Decision-making Process* for the purpose of creating a complete picture of what it considered in reaching its decision.

45. The hearing panel in *Sellars* commented that it could find no caselaw that discusses the presentation of new evidence by the decision-maker on appeal of its decision; the caselaw dealt solely with submissions or arguments. The hearing panel concluded that, as a general rule, the Superintendent cannot present new evidence on appeal of its decision as this evidence would serve no purpose other than to bootstrap her decision by changing, supplementing or varying her reasons. The hearing panel recognized two exceptions to this general rule: (1) where the appellant or the Tribunal raises a ground of appeal that is not covered by the contents of the *Record of the Decision-making Process*; and (2) where the Tribunal needs additional evidence in order to clarify and properly adjudicate an issue.

46. In *Fredericton Police Association* this Tribunal determined the Superintendent of Pensions' participatory rights on an appeal of her decision under the *Pension Benefits Act*. Subsection 75(1) of the *Pension Benefits Act,* S.N.B. 1987, c P-5.1 grants the Superintendent standing on an appeal of her decision to the Tribunal as follows: "[t]he Superintendent is a party to a matter appealed to the Tribunal and is responsible to present a case in support of a decision or order made by the Superintendent." The Superintendent argued that this subsection granted her full-party rights including the right to present arguments, raise and argue preliminary issues, call witnesses, present new evidence, and cross-examine witnesses.

47. The hearing panel in *Fredericton Police Association* concluded that the common law principles of finality and impartiality as discussed in *Ontario Power Generation Inc*., form an important part of the context in which section 75 must be interpreted. We highlight the following excerpt of the decision:

> 51. In our view, the words "and is responsible to present a case in support of a decision" in section 75, when read harmoniously with the legislative context and the common law principles of impartiality and finality, demonstrate a clear intent by the legislature to set parameters on the Superintendent's participation as a party.
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> […]
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> 58. As such, section 75 places a temporal limit on the evidence that can be presented by the Superintendent in that it limits the evidence to that which the

Superintendent had before she made her decision.

> 59. Our primary difficulty with the Superintendent's contention that section 75 permits her to present new evidence is that it offends the principle of finality. The presentation of new evidence can serve no other purpose than to augment, bolster, or qualify her reasons. As stated in *Ontario (Energy Board),* a tribunal cannot defend its decision on a ground that it did not rely on in its decision. [*Ontario (Energy Board),* para. 64] This clearly constitutes impermissible bootstrapping. […]
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> 60. We conclude that the Superintendent's responsibility under subsection 75(1) is to bring to the Tribunal's attention, in the *Record of the Decision-making Process*, the evidence she considered in making her decision. This interpretation is compatible with the common law principles of impartiality and finality. Subsection 75(1) does not allow the Superintendent to introduce new evidence either by testimony, the bringing of witnesses, the presentation of additional documents, or the cross-examination of witnesses.

48. The hearing panel restricted the Superintendent's arguments to the same topics set out in *Sellars*. The Tribunal was of the view that this would allow it to benefit from the Superintendent's expertise and familiarity with the pensions sector. The Tribunal also confirmed the two exceptions to the presentation of new evidence set out in *Sellars* but found them to be inapplicable. The Court of Appeal recently affirmed the Tribunal's decision in *Fredericton Police Association*: see *The City of Fredericton et al. v. Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America et al*., 2021 NBCA 30.

49. Applying the discretionary and contextual approach set out in *Ontario Power Generation,* this appeal would be unopposed if the Director did not have standing. Furthermore, in determining whether to grant a licence, the Director is exercising a regulatory role rather than an adjudicatory function. The Director is well positioned to explain the regulatory scheme and the factual and legal realities of the specialized field in which the Director works. On the basis of the foregoing, the Director has standing.

50. However, the Director's participatory rights are not unconstrained given the application of the principles of impartiality and finality. We see no reason to deviate from *Sellars* and *Fredericton Police Association*. Consequently, the Director has standing to present written and oral arguments as set out in those decisions. The Director does not have standing to testify at the hearing, to bring other witnesses to testify at the hearing, to adduce additional evidence without leave of the Tribunal, or to cross-examine Mr. Wagnies in the within matter.

Conduct of Future Appeals and Reviews

51. Given that this is the third time that a regulator argues that it should be granted full party status in an appeal before the Tribunal, we feel it appropriate to provide further guidance on the conduct of appeals and reviews.

52. All appeals and reviews before the Tribunal are conducted as hearings *de novo*, whereby the Tribunal

conducts a fresh analysis of the whole of the evidence and reaches its own independent conclusion. As determined by the Court of Appeal in *The City of Fredericton et al. v. Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America et al*., 2021 NBCA 30 at para 107, no deference is owed to the regulator's decision. In previous decisions, the Tribunal may have referred to appeals as being hybrid appeals because the regulator provides a record of its proceedings pursuant to the Tribunal's *Rules of Procedure.* The requirement for the regulator to provide a *Record of the Decision-making Process* exists solely to accelerate and facilitate the hearing process before the Tribunal. Thus, it is an evidentiary starting point for the appeal or review.

53. Regulators whose decisions are under appeal or review do not automatically have standing on the appeal or review. Standing can be provided by statute or be granted by the Tribunal following a successful application by a regulator.

54. In all appeals and reviews, the regulator is served with the *Notice of Appeal* to allow the regulator to prepare the *Record of the Decision-making Process*. A regulator who intends to apply for standing should file a *Notice of Application* as soon as possible after being served with the *Notice of Appeal* to not delay the appeal or review.

55. Where a regulator has standing on an appeal or review, this does not automatically confer full participatory rights of a party on the regulator. The extent of the participatory rights of the regulator should be determined on a case-by-case basis based on the legislative scheme, the common law principles of impartiality and finality, and the circumstances of the case: *The City of Fredericton et al. v. Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America et al*., 2021 NBCA 30 at para 112 to 136.

C. Does the Director of Consumer Affairs' *Statement of Position* respect the principle of bootstrapping?

56. In our Order issued July 8, 2021, we concluded that the arguments of poor literacy, lack of diligence and sophistication, and conducting direct sales without a licence raised by the Director in her *Statement of Position* were not raised nor implicit in her January 12, 2021 Decision and as such constitute impermissible bootstrapping. These are our reasons for that Order.

57. Three arguments contained in the Director's *Statement of Position* appeared to be new arguments, which were not in her Decision. On June 25, 2021, we requested that the parties address the following questions at the start of the hearing:

- Where in the Director of Consumer Affairs' Decision does she raise Mr. Wagnies' poor literacy as a reason for denying his application for a licence?

- Where in the Director of Consumer Affairs' Decision does she raise Mr. Wagnies' lack of diligence and sophistication as a reason for denying his application for a licence?

- Where in her Decision does the Director of Consumer Affairs raise, as a reason for denying

the application for licence, the fact that Mr. Wagnies has conducted direct sales without a salesperson licence?

- Whether the Director raising Mr. Wagnies' low literacy, lack of diligence and sophistication, and his past unlicensed status as reasons for denying his application for a licence in the Statement of Position constitutes bootstrapping.

58. The parties were advised to address the Tribunal's previous decisions in *Sellars* and *Fredericton Police Association* and were also invited to present additional caselaw for our consideration.

59. At the start of the July 5, 2021 hearing, we heard arguments on the above questions.

60. The Director of Consumer Affairs contends that the caselaw we asked the parties to consider is only applicable to true appeals and therefore is of no application to *de novo* appeals heard by the Tribunal. The Director relies on the decisions of *Millett v Nova Scotia (Minister of Agriculture),* 2015 NSSC 21 and *Nova Scotia (Minister of Agriculture) v Millett,* 2017 NSCA 2, which she contends stand for the proposition that bootstrapping is not applicable in an appeal that is conducted as a *de novo* hearing. In the alternative, the Director submits that the primary basis upon which she made her decision was Mr. Wagnies' criminal convictions, but that Mr. Wagnies' unlicensed direct selling was another consideration. She further submits that her arguments pertaining to Mr. Wagnies' lack of diligence and sophistication are implicit in her reasons regarding Mr. Wagnies' unlicensed activity. The Director admits that the arguments regarding Mr. Wagnies' low level of literacy are not contained in her Decision.

61. Mr. Wagnies did not provide a position on bootstrapping.

62. After hearing oral arguments, we adjourned the hearing to July 20, 2021 to allow us the time to fully consider the issue of bootstrapping.

Applicability of bootstrapping principles

63. We conclude that the interdiction against bootstrapping applies to the Director's participation in this appeal.

64. *Ontario Power Generation Inc* is the leading decision on bootstrapping. In that matter, Rothstein, J., writing for the majority of the Supreme Court of Canada, explains as follows the interdiction against bootstrapping:

> [64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

> [65] The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

65. Rothstein, J., states that a tribunal should limit the content of its arguments to the following:

> [68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

66. Rothstein, J., goes on to caution tribunal parties to be cognizant of the tone they adopt on appeal of their decisions; they should refrain from the aggressive partisanship of an adversary.

67. In *Bransen Construction Ltd. v C.J.A., Local 1386,* 2002 NBCA 27 at paragraph 33, Justice Robertson was unequivocal in stating that "[n]o tribunal should be permitted to bootstrap its decisions". He added at paragraph 35 that "tribunals accept that the principle of impartiality limits their ability to engage fully in the adversarial process".

68. We cannot accept the Director's argument that bootstrapping does not apply in an appeal *de novo.* This Tribunal dealt with that issue in *Sellars*, where it considered the decision of *Springfield Capital Inc. v Grande Prairie (Subdivision and Development Appeal Board),* 2018 ABCA 203 (CanLII). In the latter matter, the Alberta Court of Appeal found, applying the *Ontario Power Generation* decision, that the principles of bootstrapping apply in a *de novo* appeal before the Subdivision and Development Appeal Board.

69. We are also of the view that *Millett v Nova Scotia (Minister of Agriculture),* 2015 NSSC 21 and *Nova*

Scotia (Minister of Agriculture) v Millett, 2017 NSCA 2, relied upon by the Director, do not stand for the proposition that bootstrapping principles are not applicable in an appeal *de novo.* There is no discussion of bootstrapping, or its underlying principles of impartiality and finality in these decisions.

70. We conclude that the interdiction against bootstrapping applies in an appeal *de novo.*

Low Level of Literacy

71. In paragraphs 10, 14 and 24 of her *Statement of Position*, the Director invokes Mr. Wagnies' low level of literacy as a reason why he is unsuitable for a salesperson licence. The Director argues that this low level of literacy is relevant because licensed salespersons must be able to familiarize themselves with their statutory obligations under the *Direct Sellers Act* and because direct sales require a written contract pursuant to sections 12 and 13 of the *Act.* The Director admits that she did not consider Mr. Wagnies' low level of literacy, either explicitly or implicitly in her Decision. We find that the Director's submissions in this appeal regarding Mr. Wagnies' low level of literacy are a clear attempt to add arguments to her reasons and as such constitute impermissible bootstrapping.

Lack of Diligence and Sophistication

72. In her *Statement of Position,* the Director sets out an argument relating to lack of diligence and sophistication. The Director contends that this argument is implicit in her Decision, specifically her reasons relating to Mr. Wagnies' unlicensed direct sales activity. Paragraph 24 of the *Statement of Position* sets out the argument:

> 24. While inadvertent, Mr. Wagnies' unlicensed conduct as a direct sales salesperson suggests that he may lack the diligence and sophistication to ensure compliance with the statutory obligations under the *Direct Sellers Act*. This may be complicated by his poor literacy skills.

73. We reproduce paragraphs 16, 35 and 36 of the Director's decision, which discuss Mr. Wagnies' unlicensed activity:

> [16] The Applicant provided the following information during the opportunity to be heard:
>
> > d. His previous employment had him performing similar duties, which involved direct sales. He worked for this company for 20 years, unaware a licence was required to direct sell until he became employed with the licensed vendor;
> >
> > f. He understands FCNB licenses direct sellers as a matter of public safety;
> >
> > g. The Applicant understands he does not need a licence to direct sell to commercial businesses, but he enjoys the personal element of doing residential work and would like to be licensed;
> >
> > h. The Applicant indicated that he has not been performing direct sales for the

licensed vendor, as he isn't licensed. He has sold to a couple businesses;

[…]

[35] The Applicant displayed a willingness to acknowledge many of his convictions. He relied heavily on his past employment which he indicated was in the same field – however, he did not hold a licence to direct sell for his past employer.

[36] I believe that the Applicant was honest when he indicated that he had conducted direct sales for his former employer and that he was not aware he required a licence. However, even though the Applicant's fifth reference, his former employer, indicated he had no issues with him, he would not confirm that he had regularly conducted direct sales activity. It can be assumed this is because the company does not hold the required vendor licence. However, without this verification, the reference failed to provide any confidence or assurance regarding any past direct sales conduct.

74. We find that the Director's argument pertaining to Mr. Wagnies' lack of diligence and sophistication are not implicit in her reasons pertaining to Mr. Wagnies' unlicensed activity. At most, there is a mention at paragraphs 16 and 36 that Mr. Wagnies did not know he required a salesperson licence to conduct direct sales. There is no consideration or discussion by the Director that Mr. Wagnies' ignorance of the statutory requirements was the result of a lack of diligence or sophistication on his behalf. In our view, the Director's arguments of lack of diligence and sophistication raised in this appeal are an attempt to vary, qualify or supplement her reasons and constitute impermissible bootstrapping.

Unlicensed Activity

75. In paragraph 12 of her *Statement of Position* filed in this appeal, the Director contends that she refused Mr. Wagnies' application for a salesperson licence for two reasons: (1) his many past criminal convictions between 1976 and 1997; and (2) his more recent unlawful conduct in operating as an unlicensed direct salesperson in New Brunswick. Paragraphs 18, 19, 22, 24, 28, 30 and 33 of *Statement of Position* set out the arguments. We highlight the following excerpt of the *Statement of Position*:

> 15. Counsel for the Director of Consumer Affairs has been unable to locate any caselaw that considers the issue of longstanding criminal convictions and recent unlicensed conduct that arise in this case in the context of direct sellers legislation in New Brunswick or the rest of Canada. As such, there does not appear to be any binding precedent in New Brunswick involving licensing under the contemporary statutory scheme.
>
> 16. The Tribunal considered a similar lack of New Brunswick precedent in the case of *Estabrooks v New-Brunswick (Director of Consumer Affairs)*, 2017 NBFCST 2. In *Estabrooks* the Tribunal considered a refusal of a real estate licence using the analytical framework set out in *Henderson v Ontario (Superintendent Financial*

Services), 2008 ONFST 7 and *Alves v Ontario (Superintendent Financial Services)*, 2008 ONFST 10, both of which set out an analytical framework for approaching the issues of past conduct. The *Alves* case provides as follows:

> 39 In *Henderson,* the Tribunal held that a number of circumstances should be taken into account in determining whether the past conduct of an applicant meets the threshold established by section 10, paragraph 1, of the Regulation. A non-exhaustive and non-prioritised list of nine circumstances was identified by the Tribunal:
>
> 1) The time that has elapsed since the conduct occurred;
> 2) The prolonged or repetitive nature of the conduct;
> 3) The advertent or inadvertent nature of the conduct;
> 4) The extent to which the conduct can be taken to call into question the integrity, honesty and law abiding nature of the individual;
> 5) The closeness of the context of the conduct to the context of activities in which the individual would be engaged as a mortgage agent or broker;
> 6) The fairness of the process followed in the disciplinary proceeding;
> 7) The seriousness with which the disciplinary body treated the conduct as reflected in the severity of the sanction it imposed;
> 8) Any unusual and severe pressure the individual was under at the time of the conduct that would explain the conduct but is unlikely to reoccur;
> 9) Any consistent and prolonged pattern or reformed or redeeming behaviour on the part of the individual since the conduct occurred.
>
> […]
>
> 28. The analysis is similar with respect to the unlicensed sales. Mere unlicensed activity has been a common ground for enforcement actions seeking market bans in the context of securities regulation in New Brunswick and elsewhere in Canada.

76. In paragraphs 18 to 33 of her *Statement of Position,* the Director applies the circumstances set out in *Henderson* to not only Mr. Wagnies' past criminal conduct, but also his history of conducting direct sales without a licence.

77. We find that the Director's Decision centers around whether Mr. Wagnies' criminal record affected his suitability to hold a salesperson licence. This is clearly stated as the issue at paragraph 2 of her Decision. Throughout her reasons, the Director focusses on Mr. Wagnies' criminal record: see paragraphs 2, 4 to 7, 15 to 16, 29 to 30, 32 to 33, 35, and 37 to 38.

78. The Director discusses Mr. Wagnies' unlicensed status, either directly or indirectly at paragraphs 3,

16, 18, 20, 34 and 36 of her Decision. In our view, the Director's reasons pertaining to Mr. Wagnies' unlicensed direct sales activity focus on whether his work in direct sales could provide confidence or assurance regarding his character. For example, at paragraph 18 of her Decision, the Director indicates that two of the references indicated that "they did not have any problems with his work, and they felt he had a good character under a rough exterior". At paragraph 20, the Director relates her conversation with Mr. Wagnies' former employer, for which Mr. Wagnies conducted unlicensed direct sales for 19 years: "He indicated that he had no issues, problems, or complaints with the Applicant". The Director goes on to conclude, at paragraphs 34 and 36:

> [34] Although the Applicant did provide references for his past work, which he states involved direct sales, those references could only attest to his commercial rather than residential (house-to-house) sales activity. One reference did not return the call; two did not feel it was appropriate to provide a reference as they indicated they did not know him well; and the fourth provided a generally positive reference but did so with great hesitation. This did not provide me with confidence or assurance as to his past sales conduct.
>
> […]
>
> [36] I believe that the Applicant was honest when he indicated that he had conducted direct sales for his former employer and that he was not aware he required a licence. However, even though the Applicant's fifth reference, his former employer, indicated he had no issues with him, he would not confirm that he had regularly conducted direct sales activity. It can be assumed that this is because the company does not hold the required vendor licence. However, without this verification, the reference failed to provide any confidence or assurance regarding any past sales conduct.

79. There is no explicit mention of Mr. Wagnies' unlicensed direct sales activity as an issue of past reprehensible conduct in the Director's Decision. There is no mention of the *Alves, Estabrooks or Henderson* decisions in the Decision, nor is there mention of the analytical framework for approaching issues of past conduct. We are also unable to find that this argument is implicit in her reasons. The Director was focused on whether Mr. Wagnies' history of unlicensed direct sales could provide confidence or assurance regarding his suitability. We find that the arguments, in the *Statement of Position,* of past illegal conduct pertaining to Mr. Wagnies' unlicensed direct sales are an attempt to bolster or supplement the Director's reasons and as such are impermissible bootstrapping.

D. Was There a Breach of Procedural Fairness in the Opportunity to be Heard Before the Director?

80. We conclude that the Director breached the duty of procedural fairness by not affording Mr. Wagnies the opportunity to respond to the evidence she obtained from his references after the opportunity to be heard.

81. Before the start of the hearing, we sent correspondence to the parties asking them to address the following at the hearing:

> In paragraph 8 of her Decision, the Director of Consumer Affairs indicates that Mr. Wagnies had a right to disclosure of all information considered by the Deputy Director in determining he was unsuitable for licensure and all information put before the Director of Consumer Affairs for consideration at the opportunity to be heard. In paragraphs 17-20, the Director of Consumer Affairs indicates that subsequent to the opportunity to be heard, Mr. Wagnies called the Director to provide her with the names and telephone numbers of four people as references and of his previous employer. She further summarizes the information obtained from these references and the previous employer. In paragraphs 34 to 37, the Director discusses again the conversations she had with the references and the previous employer. The hearing panel will ask the parties to address the following at the hearing:
>
> a) Was the information obtained by the Director from the references and the previous employer, after the opportunity to be heard meeting of November 5, 2020, communicated in any way to Mr. Wagnies?
>
> b) Were the Director's notes regarding her discussions with the references and the previous employer communicated in any way to Mr. Wagnies?
>
> c) Was Mr. Wagnies given an opportunity to be heard with respect to the additional information obtained by the Director from the references and the previous employer, and considered by her in her Decision?
>
> d) Was there a breach of procedural fairness in this case?

82. We raised this issue because we were of the view that to fail to do so would risk an injustice. We were also of the view that there was a sufficient record on which to raise the issue and that raising it would not result in procedural prejudice to any party: *Investment Industry Regulatory Organization of Canada v. Crandall,* 2020 NBCA 76, Par. 42-44.

83. The Director submits that she treated the references much like one would do during a job application. She contends that she was not obligated to contact these references as the opportunity to be heard was over and that she did this as a courtesy to Mr. Wagnies. She did not communicate the information she obtained from the references nor her notes of her discussions with the references to Mr. Wagnies. She did not provide Mr. Wagnies with an opportunity to be heard with respect to the additional evidence she obtained from the references. The Director submits that extending a courtesy to an applicant to consider additional evidence after the close of the opportunity to be heard should not be considered a breach of procedural fairness.

84. Mr. Wagnies does not take a position with respect to the fairness of the Director's proceedings.

85. The duty of procedural fairness exists whenever a decision is administrative and affects the rights, privileges or interests of an individual: *Cardinal v Director of Kent Institution*, [1985] 2 S.C.R. 643 at p. 653; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at par. 20 [*Baker*] At paragraph 28 of *Baker*, L'Heureux-Dubé, J., comments on the values underlying the duty of procedural fairness:

> 28. […] The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

86. Procedural fairness contains several elements, including the right to know the case and to reply. In *Supermarchés Jean Labrecque Inc. v Flamand*, [1987] 2 S.C.R. 219 at para. 48-50, L'Heureux-Dubé, J., recognizes that the right to know the case and reply "is so very fundamental in our law" and "goes back to the origins of our democratic institutions and is part of our most cherished legal heritage".

87. The duty of fairness is flexible and variable; its content is to be determined in the specific context of each case: *Baker,* para.22. Determining the content of the duty of procedural fairness requires applying the non-exhaustive list of factors set out in paragraphs 23 to 28 of *Baker*:

a) The nature of the decision and the decision-making process employed;
b) The nature of the statutory scheme and statutory provisions pursuant to which the decision-maker operates;
c) The importance of the decision to the individual affected;
d) The legitimate expectations of the party challenging the decision; and
e) The choice of procedure made by the decision-maker.

88. In *Estabrooks*, this Tribunal concluded that a mid-point duty of procedural fairness applies to a proceeding involving the denial of an application for a real estate agent's licence by the Director. The Tribunal found that this mid-point duty of procedural fairness included the right to know the case and to reply before an unbiased decision-maker. We highlight the following excerpt of the decision:

> [74] As to level of disclosure and sharing of documents required for a mid-point duty of procedural fairness, we could find no caselaw directly on point.
>
> [75] In *Young v. Central Health*, 2016 NLTD(G) 145, a mid-point level of procedural fairness was found to apply to a non-disciplinary matter dealing with the denial of medical privileges to a doctor. At paragraph 48, Justice Goodridge states that this level of procedural fairness includes an obligation on the decision-maker to share all relevant information with the affected person and to afford that person a reasonable opportunity to respond before a decision is made. Justice Goodridge went on to cite the following excerpt from *Cameron v. East Prince Health Authority* (1999), 176 Nfld. & P.E.I.R. 296, 88 A.C.W.S. (3d) 937 (P.E.I. T.D.) at par. 125: "As a

> general proposition, fairness requires that there should be full disclosure by a tribunal to a party affected by a decision so that there will be a meaningful opportunity to correct or contradict prejudicial information. There may be no such opportunity unless the information is disclosed. Knowledge of the case to be met is necessary to exercise one's right to be heard. See Blake, *Administrative Law in Canada* (2nd ed.), pp. 29-30."
>
> [76] We conclude that the Director must make full disclosure and share all relevant documents with an applicant sufficiently in advance of the opportunity to be heard meeting to allow the applicant to prepare a reply. This would, at a minimum, include all documents placed before the Director in making her decision. [*1185740 Ontario Ltd. v. Minister of National Revenue* (1999), 247 N.R. 287 (Fed. C.A.); *Canada (Human Rights Commission) v. Pathak*, [1995] 2 FCR 455*; Calgary (City) v. Nortel Networks Corp*., 2008 ABCA 370]

89. In our view, the requirement to make full disclosure and share all relevant documents with an applicant before a hearing or opportunity to be heard to allow the applicant to prepare a reply applies equally to evidence obtained after the hearing or the opportunity to be heard.

90. Given the similarities between the licensing schemes in the *Real Estate Agents Act* and the *Direct Sellers Act,* we find the same duty of procedural fairness is required in the denial of a salesperson's licence under the *Direct Sellers Act*.

91. We agree that the Director was not obligated to contact the references provided by Mr. Wagnies and that she could have informed him that the opportunity to be heard was over. However, the Director did contact these references and obtained evidence from them regarding Mr. Wagnies' character, his employment with Atlantic Sealers, and whether he had been the subject of complaints. The Director used the evidence obtained from the references at paragraphs 17 to 20, 34 and 36 of her Decision. We cannot accept the Director's argument that she treated these references like an employer during the hiring process of a new employee as this argument completely disregards the fact that she was an administrative decision-maker – not an employer.

92. Applying the principles of procedural fairness set out above, we find that the Director should have afforded Mr. Wagnies the opportunity to respond to the evidence obtained from his references, particularly given the Director's finding at paragraph 36 of her Decision that the references "failed to provide any confidence or assurance regarding any past direct sales conduct". In failing to do so, the Director breached the duty of procedural fairness.

93. Pursuant to *Cardinal v Director of Kent Institution*, [1985] 2 S.C.R. 643 at para 23, this breach of procedural fairness invalidates the Director's decision and the typical outcome would be to remit the matter back to the Director. However, in *Estabrooks,* the Tribunal concluded that it retains the jurisdiction to hear an appeal of the Director's decision under the *Real Estate Agents Act* because it has the ability to cure breaches of procedural fairness given that appeals are conducted on a *de novo* basis. The same is true of an appeal of the Director's decision under the *Direct Sellers Act.* An appeal

of the Director's decision is heard as an appeal *de novo*, in which this Tribunal conducts a fresh analysis of the whole of the evidence in order to determine whether Mr. Wagnies should be granted a salesperson licence under the *Direct Sellers Act.* In such an appeal, the appellant can testify, bring witnesses to testify, adduce additional evidence and present oral and written arguments. As such, the Tribunal exercises original jurisdiction. We conclude that these appeal proceedings provide a full and fair rehearing which will cure any defect in the Director's proceedings such that we have the authority to hear Mr. Wagnies' appeal.

E. Should Edward Wagnies be granted a salesperson licence?

94. For the reasons set out below, we conclude that Mr. Wagnies should be granted a salesperson licence.

95. Mr. Wagnies submits that he should be granted a salesperson licence because he has turned his life around and has not been in trouble since getting out of prison 22 years ago. He further submits that he has conducted direct sales, albeit without a licence, for the past 20 years without any complaints.

96. The Director submits that Mr. Wagnies is not suitable for a salesperson licence due to his extensive criminal record. According to the Director, a licence approved by the Financial and Consumer Services Commission provides reassurance to consumers that the licensee is reputable and may be trusted in their given profession. The Director is of the view that a direct sellers' licence issued to an individual with an extensive criminal history and without other evidence to lend to creditability/trustworthiness may reduce the public's confidence in the issuance of such licences.

97. We reproduce the sections of the *Direct Sellers Act* setting out the licensing scheme*:*

> **Vendor's and salesperson's licence**
>
> 4(1) A person shall not direct sell goods or services in the Province unless the person has obtained a licence in accordance with this section.
>
> 4(2) The Director may issue a licence to a person authorizing the person to act as a salesperson or vendor on that person making application for the licence in accordance with section 7.
>
> 4(3) An application for a licence as a salesperson under subsection (2) shall be accompanied by a notice given by a licensed vendor stating that the applicant, if granted a salesperson's licence, is authorized to act as a salesperson representing that vendor.
>
> […]
>
> 4(8) The Director may restrict a licence issued under subsection (2) to the sale of goods and services specified in the licence, and the person receiving that licence shall sell only those goods and services so specified.

> 4(9) The Director may at any time restrict a licence by imposing any terms and conditions that he or she considers appropriate on the licence.
>
> […]
>
> 4(11) The Director shall not refuse to issue a licence or impose terms and conditions on the licence under subsection (9) without giving the person applying for the licence or the holder of the licence an opportunity to be heard.

98. The *Direct Sellers Act* does not set out criteria to be considered in determining whether to grant a salesperson licence. In our view, subsection 17(1) of the *Direct Sellers Act*, which sets out the circumstances justifying the cancellation or suspension of a licence by the Director, provides guidance on denying an application for a licence:

> **Suspension or cancellation of licence**
>
> 17(1) The Director may suspend or cancel a licence held under this Act if the person who holds the licence
>
> (a) violates a provision of this Act or fails to comply with a term, condition or restriction to which the licence of that person is subject,
>
> (b) makes a statement in any information or material submitted, provided, produced, delivered or given to or filed with the Commission, the Director, a compliance officer or any person acting under the authority of the Commission or the Director that is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
>
> (c) is guilty of misrepresentation or fraud in the business in respect of which the licence of that person was issued, or
>
> (d) in the opinion of the Director, has demonstrated the person's incompetency or untrustworthiness to carry on the business in respect of which the licence of that person was granted.

99. Paragraphs 17(1)(a), (b) and (c) of the *Direct Sellers Act* are not applicable to the facts of the within matter. Pursuant to paragraph 17(1)(d), the Director may suspend or cancel a licence where she finds the licensee has demonstrated incompetency or untrustworthiness to carry on the business for which the licence of that person was granted.

100. As previously discussed, the *Direct Sellers Act* aims to protect the public from unscrupulous or dishonest persons who intend to go from house to house selling or soliciting orders for the future delivery of goods. The requirement to obtain a licence to conduct door-to-door sales aims to ensure only persons who are competent, trustworthy, and honest are licensed; it is a governmental endorsement with respect to the licensee's good character and competence. Therefore, in assessing

Mr. Wagnies' suitability for a salesperson's licence, we should determine whether he is competent, trustworthy and honest or whether he falls within the category of people from whom it is necessary to protect the public.

101. In our view, Mr. Wagnies' competence is not an issue. He has been conducting direct sales for approximately 20 years, with no known complaints. According to Mr. Wagnies, approximately 95% of his residential customers are repeat customers. Mr. Wagnies' employer for 19 years, Atlantic Sealers, confirms that Mr. Wagnies had steady customers and that they were not aware of any issues, problems or complaints with Mr. Wagnies' work.

102. The sole issue is whether Mr. Wagnies' criminal convictions render him unsuitable for a salesperson licence.

103. We are not aware of any New Brunswick caselaw directly on point. In *Estabrooks*, the Tribunal had to determine whether outstanding judgments rendered Mr. Estabrooks unsuitable for a real estate agent's licence. The Tribunal commented as follows regarding the impact of the outstanding judgments on Mr. Estabrooks' suitability:

> [158] The simple fact that Mr. Estabrooks has judgments against him does not automatically render him unsuitable to be licensed. In our view, it is necessary to look at the number of judgments and the nature of the judgments in order to assess suitability or to determine whether it would be objectionable to issue a licence to Mr. Estabrooks. We are bolstered in this position by the Financial Services Tribunal's decision in *Henderson v. Ontario (Superintendent Financial Services)*, 2008 ONFST 7, where it stated that "the fact that a serious disciplinary sanction had previously been imposed on an individual…does not mean, automatically, that there are reasonable grounds for believing that the individual, if licensed, under the *Act*, could not be expected to deal or trade in mortgages in accordance with the law and with integrity and honesty."
>
> [159] The Judgments obtained against Mr. Estabrooks do not relate to reprehensible conduct such as theft, fraud, misrepresentation or negligence. Judgments relating to such conduct have been found to bring into question an applicant's suitability: *Alves v. Ontario (Superintendent Financial Services),* 2008 ONFST 10; *Todorovic v. Ontario (Superintendent Financial Services),* 2009 ONFST 3; and *Joshi v. Ontario (Superintendent Financial Services),* 2016 ONSC 4477.

104. In *Henderson v Ontario (Superintendent Financial Services),* 2008 ONFST 7, the Ontario Financial Services Tribunal recognized that assessing suitability of an applicant for a mortgage brokers licence involves the balancing of two competing interests: the public interest purpose of the *Act* and the recognition that the denial, revocation or suspension of a licence can have severe consequences for an applicant or licensee:

> In applying the licensing provisions of the *Act*, as supplemented by the *Regulation*, we must be mindful of the fact that the Act is designed to protect the public

> interest. This public interest purpose is implicit in the terms of the *Act*, including the fact that a public official, the Superintendent, is given responsibility for supervising the mortgage brokering industry. […]
>
> At the same time, we must keep in mind that the denial of a licence or the revocation or suspension of a licence under the Act can have severe consequences for the applicant or licensee as it will preclude or limit an individual's ability to earn, or to continue to earn, a living in his or her chosen line of work. Given those serious consequences, the quality of evidence required to support disciplinary action against a licensee is enhanced; the evidence should be "clear, convincing and cogent" (see *Law Society of Upper Canada v. Neinstein,* 2007 CanLII 8001 (ON SCDC), [2007] O.J. No. 958, at pp. 9-10 (Ont. Div. Ct.)). The serious consequences of the denial of a licence to carry on the business of a mortgage agent would seem to suggest that the same quality of evidence should be required in the context of a licence denial as in the context of a licence suspension or revocation.

105. The Financial Services Tribunal went on to set out an analytical framework for approaching issues of past conduct. This framework is comprised of a non-exhaustive list of circumstances that should be taken into account in determining whether the past conduct of an applicant affords reasonable grounds for belief that he or she will not deal or trade in mortgages in accordance with the law and with integrity and honesty. These circumstances are the following:

> 1) the time that has elapsed since the conduct occurred;
> 2) the prolonged or repetitive nature of the conduct;
> 3) the advertent or inadvertent nature of the conduct;
> 4) the extent to which the conduct can be taken to call into question the integrity, honesty and law abiding nature of the individual;
> 5) the closeness of the context of the conduct to the context of activities in which the individual would be engaged as a mortgage agent or broker;
> 6) the fairness of the process followed in the disciplinary proceeding;
> 7) the seriousness with which the disciplinary body treated the conduct as reflected in the severity of the sanction it imposed;
> 8) any unusual and severe pressure the individual was under at the time of the conduct that would explain the conduct but is unlikely to reoccur;
> 9) any consistent and prolonged pattern or reformed or redeeming behaviour on the part of the individual since the conduct occurred.

106. In *Alves v Ontario (Superintendent Financial Services),* 2008 ONFST 10, the Financial Services Tribunal confirmed the use of this analytical framework for considering issues of past conduct. Mr. Alves was charged with assault causing bodily harm, assault, forcible confinement, theft under $5,000, two counts of mischief in relation to property under $5,000, and criminal harassment, all charges stemming from events that occurred in 2007. In 2008, Mr. Alves applied for a mortgage broker's licence. Shortly after submitting his application, Mr. Alves pled guilty and was convicted of assault, criminal harassment, and mischief. He was sentenced to house arrest for a couple of months and a probationary period expiring in 2010. Mr. Alves also made false statements on his application, by stating that he was not the subject of any criminal charges.

107. The Financial Services Tribunal found that the combination of the criminal convictions and the false statements rendered Mr. Alves unsuitable for a mortgage broker's licence. It found that the circumstance that weighed most unfavourably against him was time. It concluded that "in light of the very close proximity in time between the past conduct and the licence application, and the contemporaneous nature of the criminal sentence imposed on the Applicant, the reasonableness of relying on his past conduct as a ground for denying his application is considerably enhanced."

108. While the statutory scheme in the *Henderson* and *Alves* matters was different than in the within matter, the Ontario *Mortgage Brokerages, Lenders and Administrators Act, 2006* and the New Brunswick *Direct Sellers Act* have similar purposes to protect the public interest. This Tribunal previously found in *Estabrooks* that the balancing of interests discussed in *Henderson* should be applied to the assessment of an applicant's suitability under the *Real Estate Agents Act*. It also adopted the evidentiary burden set out in *Henderson.* We highlight the following excerpt of the *Estabrooks* decision:

> [152] We are of the view that the balancing act discussed in *Henderson* is equally applicable to the assessment of an applicant's suitability under the New Brunswick *Real Estate Agents Act* as the Director also has the mandate to protect the public interest.
>
> [153] We also agree that clear, convincing and cogent evidence is required to support a denial of a licence on a renewal application as the denial has the effect of precluding or limiting the applicant or licensee's ability to earn or continue to earn a living.

109. In our view, the analytical framework and evidentiary burden set out in *Henderson* should be applied to past conduct issues in licensing matters across financial and consumer services legislation, including the *Direct Sellers Act.*

110. In *Preston*, the Saskatchewan Court of Queen's Bench confirmed a decision of the deputy registrar denying Mr. Preston a direct seller's licence because of his past conduct. Mr. Preston applied for a direct seller's licence. Six months before submitting his application, he was convicted of 9 offences under the *Criminal Code*, including fraud and fraudulent use of credit card data. Mr. Preston had not completed serving his conditional sentences when he applied for a direct seller's licence. The deputy registrar concluded that given Mr. Preston's recent and serious convictions, it was not in the public interest to grant him a license which would permit him to enter a consumer's home or solicit orders over the telephone and have direct access to a consumer's financial information and credit card data. On appeal, the Saskatchewan Court of Queen's Bench agreed.

111. We turn to the facts of the within matter.

112. In his application for a salesperson licence, Mr. Wagnies responded "yes" to the question "Have you

ever been convicted of a criminal offence for which you have not received a pardon or record suspension?". He attached a Criminal Record Check to his application detailing convictions for 17 charges between 1976 and 1997 as follows:

Date	Offence	Disposition
October 25, 1976	(1) Robbery Sec 303 CC (2) Dangerous driving Sec 233(4) CC	(1) 7 months jail, probation for 2 years (2) 30 Days Concurrent
April 27, 1983	Possession of a narcotic Sec 3(1) NC ACT	$150 I-D 30 days
October 24, 1983	Failure to appear sec 133(5) CC	$100 I-D 7 days
July 19, 1984	Theft under $200 Sec 294(B) CC	$25 I-D 2 days
September 17, 1986	Possession of a stolen credit card Sec 301.1(1)(C) CC	30 days jail
May 3, 1989	Theft under $1,000 Sec 334(b)(ii) CC	$50 or 5 days
February 12, 1990	Break Enter & Commit Sec 348(1)(B) CC	30 days & surcharge $35 I-D 3 days & probation 1 year
January 22, 1993	Theft under $1,000 Sec 334(B) CC	$250 I-D 60 days Jail
April 29, 1997	(1) Arson Causing Damage to Property Sec 434 CC (2) B&E& Theft Sec 348(1)(B) CC	(1) 2 Yrs & 6 mos (2) 18 Mos
May 5, 1997	(1) Poss Property Obtained by Crime over $5,000 Sec 355(A) CC (2) Poss of Property Obtained by Crime Over $5,000 Sec 355(B) CC (3) Fail to Appear Sec 145(4) CC	(1-2) 6 mos each Chg Consec & Consec to Sentence Serving (3) 30 Days
May 21, 1997	Theft Under $5,000 Sec 334(b) CC	60 Days
June 20, 1997	Assault Sec 266 CC	30 Days Consec to Sentence Serving
June 25, 1997	Fail to Appear Sec 145(5) CC	1 Day

113. Mr. Wagnies was honest in his disclosure of his convictions on his application for a licence. In the proceedings before the Tribunal, he made no attempt to hide his past, nor downplay the seriousness of the criminal convictions.

The Time that has Elapsed Since the Conduct Occurred

114. Mr. Wagnies' last conviction was on June 25, 1997, more than 24 years ago. There is no evidence of any further criminal activity after 1997. This is an important distinction with the *Alves* and *Preston* decisions, where the criminal activity was contemporaneous to the application for a licence.

The Prolonged or Repetitive Nature of the Conduct

115. Mr. Wagnies' criminal activity extended over a prolonged period of 21 years. During that time, he had 17 convictions.

The Advertent or Inadvertent Nature of the Conduct

116. The criminal convictions all involve advertent conduct.

The Extent to Which the Conduct can be Taken to Call into Question the Integrity, Honesty and Law-abiding Nature of the Individual

117. Mr. Wagnies' past criminal history involves multiple instances of serious criminal conduct that would give a reasonable consumer grounds to question Mr. Wagnies' honesty, integrity, and law-abiding nature.

The Closeness of the Context of the Conduct to the Context of Activities in Which the Individual Would be Engaged as a Salesperson

118. The convictions for robbery, theft, break and enter, arson and assault are issues that a consumer might be legitimately concerned about when interacting with a door-to-door salesperson. These concerns are attenuated in the within matter because of the nature of the product Mr. Wagnies wants to sell – driveway sealer – which is an outdoor product. This is significantly different from a door-to-door salesperson selling vacuum cleaners or makeup, which would likely require entering the home. We accept Mr. Wagnies' testimony that in the 19 years he worked for Atlantic Sealers selling driveway sealing, his usual practice was to not enter his potential customers' homes. He would knock on the door and step off the stoop. He would then explain what he was selling. Mr. Wagnies recalled one occasion when he entered a house because an elderly client wanted to put a magnet on Mr. Wagnies' business card to put it on his fridge because he kept losing the card.

The Fairness of the Process Followed in the Disciplinary Proceeding

119. Mr. Wagnies' past criminal convictions were dealt with in Canadian courts. These criminal proceedings provide very high standards of fairness to accused persons, including the protections of the *Canadian Charter of Rights and Freedoms.*

The Seriousness with Which the Disciplinary Body Treated the Conduct as Reflected in the Severity of the Sanction it Imposed

120. The criminal justice system deemed Mr. Wagnies' behaviour serious enough to impose jail time on 9 occasions. These jail terms ranged from a minimum of one day to a maximum of two and a half years.

Any Unusual and Severe Pressure the Individual was Under at the Time of the Conduct that Would Explain the Conduct but is Unlikely to Reoccur

121. Mr. Wagnies had a very difficult childhood. He was taught how to steal and survive at a very young age by this mother. At five years old, he entered the foster home system and bounced from foster home to foster home until he was 16 years old. He recalls living in every province in Canada, aside

from Newfoundland, before the age of 11. He testified that by the time he was 10 or 11 years old, he was out of control. Mr. Wagnies' mother died when he was 11 and then his father died in 1976.

Any Consistent and Prolonged Pattern of Reformed or Redeeming Behaviour on the Part of the Individual Since the Conduct Occurred

122. It has been 24 years since Mr. Wagnies was convicted of a crime. He testified at the hearing that when he got out of prison for the last time in 1999, he had lost everything, including his girlfriend and two children and he swore that "the cops will never knock on my door again." We accept Mr. Wagnies' testimony that he has not been in trouble with the law since that time.

123. Mr. Wagnies has been gainfully employed conducting direct sales for over 20 years.

Balancing the Protection of the Public Interest and the Right to Earn a Livelihood

124. On the one hand, Mr. Wagnies has an extensive criminal record and his convictions for robbery, theft, break and enter, arson and assault are issues that a consumer might be legitimately concerned about when interacting with a door-to-door salesperson.

125. However, the simple fact that Mr. Wagnies has a criminal record does not automatically render him unsuitable to be licensed: *Estabrooks; Henderson*. More is needed to deny Mr. Wagnies' application; there must be clear, convincing and cogent evidence creating a reasonable apprehension that Mr. Wagnies will not respect his obligations under the *Direct Sellers Act* or will act in an unscrupulous or dishonest manner in conducting direct sales.

126. We find Mr. Wagnies to be very forthcoming and credible. We accept the whole of his testimony.

127. The evidence overwhelmingly establishes that since leaving prison in 1999, Mr. Wagnies has turned his life around. He was employed with Atlantic Sealers for 19 years selling driveway sealing door-to-door, albeit without a licence. Mr. Wagnies testified that he was not aware of any complaints by customers against him during this period. This is corroborated by Atlantic Sealers – Mr. Wagnies' former employer. Mr. Wagnies took pride in informing us that a happy customer is a repeat customer and that he does not accept payment for a job until the customer is satisfied. He estimated that 75 to 85% of his customers were residential customers and that of these, approximately 95% were repeat customers.

128. Mr. Wagnies testified that during his employment with Atlantic Sealers, he collected money from his clients. He remitted this money to his employer, who then provided him with his pay. Again, there is no evidence suggesting that Mr. Wagnies did not remit the appropriate amounts to his employer or attempted to steal money. When contacted as a reference, the owner of Radical Edge indicated that he had no problems with Mr. Wagnies. He indicated that Mr. Wagnies was trusting as could be, honest as the day is long, and that he would not steal.

129. In 2020, Mr. Wagnies obtained employment with Advanced Asphalt, who required that he be

licensed to conduct door-to-door sales on its behalf. We accept Mr. Wagnies' testimony that he was not aware before this date that his direct selling required a license. We further find that upon learning of the requirement to be licensed, Mr. Wagnies immediately applied for a licence because he wanted to do things legally. We accept that Mr. Wagnies ceased conducting direct sales to residential customers upon learning of the requirement for a salesperson licence. He did continue to conduct sales to commercial customers, as this type of activity does not require a licence. In our view, these are further examples of Mr. Wagnies' continued desire to be a law-abiding citizen.

130. We conclude that Mr. Wagnies has demonstrated the competence, trustworthiness, honesty and integrity required to obtain a salesperson licence. Mr. Wagnies poses no danger to New Brunswick residents and as such terms and conditions are not required.

V. CONCLUSION AND ORDER

131. We conclude the Director's decision was not correct. We allow Edward Wagnies' appeal and vacate the Director of Consumer Affairs' Decision of January 12, 2021. Mr. Wagnies shall be granted a salesperson licence provided the conditions of subsection 4(3) of the *Direct Sellers Act* are met.

DATED this 25th day of November, 2021.

Mélanie McGrath
Mélanie McGrath, Tribunal Chair

Chantal Thibodeau, Q.C.
Chantal Thibodeau, Q.C., Tribunal Member

Gerry Legere
Gerry Legere, Tribunal Member

*On January 18, 2022, a revised Decision was issued. The revisions are the citations in paragraphs 31, 32, 37, 38, 45, 86, 97 and 127.