
Citation: *Edward Wagnies v. New Brunswick (Director of Consumer Affairs)*, 2021 NBFCST 4

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

Date: 2021-07-08
Docket: CA-001-2021

BETWEEN

Edward Wagnies,

Appellant,

-and-

Director of Consumer Affairs,

Respondent.

ORDER

WHEREAS:

1. On April 26, 2021, Edward Wagnies filed a *Notice of Appeal* seeking to appeal to our Tribunal a decision of the Director of Consumer Affairs;
2. A *Notice of Hearing* was issued setting July 5, 2021 for the hearing of the appeal;
3. On June 22, 2021, the Director of Consumer Affairs filed a *Statement of Position* in relation to the appeal;

4. After review of the Director of Consumer Affairs' *Statement of Position*, we requested that the parties address the following questions:

- 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. The panel will ask that you address the following decisions on the issue of bootstrapping:
 - *Sellars v. New Brunswick (Superintendent of Insurance)*, 2019 NBFCST 2
 - *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 12

You may also present additional caselaw for the hearing panel's consideration,

5. At the start of the July 5, 2021 hearing, we heard arguments from the parties on these questions. At the hearing, the Director of Consumer Affairs took the position that in a de novo appeal, she should be permitted to cross-examine witnesses, to elicit her own evidence and to make submissions with respect to the evidence and the law;

6. Mr. Wagnies intends to testify at the hearing;

7. At the July 5, 2021 hearing, we asked the Director of Consumer Affairs whether she intended to cross-examine Mr. Wagnies during the hearing, to which the Director responded in the affirmative;

8. We adjourned the hearing to July 20, 2021 to allow us the time to fully consider the issue of bootstrapping; we advised the parties that they could provide additional written arguments on the issue of the Director of Consumer Affairs' ability to cross-examine Mr. Wagnies;

9. The Director of Consumer Affairs filed a *Statement of Position* on the issue of cross-examination;

10. In *Sellars v. New Brunswick (Superintendent of Insurance)*, 2019 NBFCST 2 and *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 12, this Tribunal decided that the interdiction against bootstrapping as set out by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 applies to an appeal of a regulator's decision to our Tribunal;

11. *Sellars* and *Fredericton Police Association* remain good law. *Fredericton Police Association* was

appealed to the Court of Appeal, which dismissed the appeal and maintained this Tribunal's decision: *The City of Fredericton v. Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America et al.*, 2021 NBCA 30. We do note that the Court of Appeal's written reasons have not yet been released.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Consistent with *Sellars* and *Fredericton Police Association*, the Director of Consumer Affairs can do the following at the hearing:

- a. Set out her established policies and practices, even if they are not explicitly set out in her reasons for decision,
- b. Respond to arguments raised by Mr. Wagnies,
- c. Provide interpretations of her reasons that are compatible with or implicit in her original decision,
- d. Assist the appellate body by the elucidation of the issues informed by her specialized position as opposed to aggressive participation typical of an adversary,
- e. Draw the Tribunal's attention to aspects of the record for the purpose of creating a complete picture of what the Director considered in reaching her decision, and
- f. Explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work;

2. The Director of Consumer Affairs cannot:

- a. testify at the hearing or bring other witnesses to testify at the hearing,
- b. adduce additional evidence without leave of the Tribunal,
- c. cross-examine Mr. Wagnies at the hearing,
- d. raise the issue of Mr. Wagnies' low literacy skills as a reason for denying his application for a salesperson licence,
- e. raise the issue of Mr. Wagnies' lack of diligence and sophistication as a reason for denying his application for a salesperson licence,
- f. raise the issue of Mr. Wagnies' conducting direct sales without a licence as a reason for denying his application for a salesperson licence;

3. Our detailed reasons will follow in our decision on the outcome of this appeal.

DATED this 8th day of July, 2021.

Mélanie McGrath

Mélanie McGrath
Chair of the Tribunal

Chantal Thibodeau, Q.C.

Chantal Thibodeau, Q.C.
Member of the Tribunal

Gerry Legere

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