PATENTED MEDICINE PRICES REVIEW BOARD

IN THE MATTER OF the Patent Act, R.S.C. 1985, c. P-4, as amended

AND IN THE MATTER OF Alexion Pharmaceuticals Inc. and the medicine "Soliris"

REASONS FOR DECISION

(*Respondent's Motion Relating to Conflicts of Interest*)

1. On September 16, 2015, the panel of the Board seized with this proceeding (the "**Panel**") heard a motion brought by the Respondent, Alexion Pharmaceuticals Inc. ("**Alexion**" or the "**Respondent**"), regarding allegations of conflict of interest and bias.

2. Through the motion, Alexion seeks the following six Orders:

   (a) Quashing the Notice of Hearing and Statement of Allegations of Board Staff based on an alleged conflict of interest or reasonable apprehension of bias relating to the Board's Chairperson, Mary Catherine Lindberg;

   (b) Disqualifying Isabel Jaen Raasch, the Director, Legal Services and General Counsel for the Board, from participating in the proceeding or in any way assisting or collaborating with Board Staff in the proceeding;

   (c) Directing Board Staff and Ms. Raasch to destroy any work product generated by Ms. Raasch in respect of the proceeding;

   (d) Requiring Ms. Raasch to be subject to an ethical screen preventing her from receiving or sharing any information with Board Staff concerning the proceeding, or having any further involvement with the proceeding;

(e) Disqualifying Parul Shah of the Legal Services Branch of the Board as a lawyer of record for Board Staff in the proceeding; and

(f) Disqualifying David Migicovsky, Christopher Morris and Perley-Robertson, Hill & McDougal LLP as lawyers of record for Board Staff in the proceeding.

3. The motion was heard at a Pre-Hearing Conference held in Ottawa on September 16, 2015.

4. The motion raises serious allegations of conflicts of interest and reasonable apprehensions of bias on the part of a number of the individual counsel involved in this proceeding and the Chairperson of the Board. The Panel has carefully considered the affidavit evidence, written submissions, briefs of authorities and oral submissions made by the Respondent, Board Staff and counsel for Ms. Lindberg. For the reasons outlined in the respective sections of the decision that follow, the Panel dismisses the Respondent's motion.

5. Approximately one week after the conclusion of the hearing of the motion, Alexion requested leave to submit additional written argument regarding certain aspects of the motion relating to the alleged conflict of Ms. Raasch and the procedures followed by Board Staff. For the reasons set out in the final section of this decision, the Panel denies Alexion's request for leave to file additional written argument.

Background

6. Soliris (eculizumab) 10mg/mL ("**Soliris**") is indicated for the treatment of Paroxysmal Nocturnal Hemoglobinuria ("**PNH**"), a rare and life-threatening blood disorder that is characterized by complement-mediated hemolysis (the destruction of red blood cells). Soliris is sold in Canada by the Respondent, Alexion.

7. Board Staff has determined that the Respondent is selling Soliris at a price that is excessive and seeks an Order under section 83 of the *Patent Act*, R.S.C., 1985, c. P-4 (the "***Patent Act***") requiring Alexion to, among other things, stop selling Soliris at a price

that is alleged to be excessive and to offset the allegedly excess revenues that Alexion has generated from prior sales of Soliris.

8. On January 22, 2015, the Board issued a Notice of Hearing to require a public hearing with respect to Board Staff's allegations of excessive pricing of Soliris.

9. The purpose of the hearing is to determine whether, under sections 83 and 85 of the *Patent Act*, the Respondent is selling or has sold Soliris in any market in Canada at a price that, in the Board's opinion, is or was excessive, and if so, what order, if any, should be made.

10. In accordance with subsection 86(2) of the *Patent Act*, the Minister of Health for the province of British Columbia filed a Notice of Appearance on February 6, 2015 in respect of this proceeding. The B.C. Minister of Health, on his own behalf and on behalf of the Ministers of Health for the Provinces of Ontario, Manitoba and Newfoundland and Labrador, intends to make representations supporting the proposed Orders of the Board.

11. In a motion dated May 12, 2015, the Canadian Life and Health Insurance Association Inc. ("**CLHIA**") sought leave to intervene in this proceeding. With the consent of the Respondent, CLHIA was granted a limited right of intervention in this proceeding.

12. In addition to the proceedings outlined above, there are also a number of interlocutory motions relating to the pleadings, disclosure and requests for confidentiality. Other than as described below, these motions are not relevant to the present matter.

Allegations of Bias Relating to the Chairperson

13. Alexion seeks an Order quashing the Notice of Hearing and Statement of Allegations of Board Staff on the basis of an alleged conflict of interest or reasonable apprehension of bias of the Board's Chairperson, Ms. Lindberg.

(i) Relevant Facts

14. Ms. Lindberg was first appointed Member and Vice-Chair of the Board in June 2006. On May 19, 2010, Ms. Lindberg assumed the powers and functions of the Chairperson while the office was vacant. She was officially appointed Chairperson of the Board on March 3, 2011.

15. In investigating and bringing proceedings relating to allegations of excessive pricing, Board Staff operate in accordance with certain administrative guidelines that outline the policies and procedures normally undertaken when a price appears to be excessive. These administrative guidelines are entitled the *Compendium of Policies, Guidelines and Procedures* (the "**Guidelines**").

16. Section A.3.6 of the Guidelines provides that the Chairperson will issue a Notice of Hearing and will appoint a panel of Board members to preside at such hearing where the Chairperson decides that it is in the public interest that a hearing be held to determine whether a patented medicine is being or has been sold at an excessive price in any market in Canada.

17. The Chairperson reviews the report from Board Staff setting out the allegations of excessive pricing and considers whether the results of the investigation, if proven true, would show a *prima facie* case of excessive pricing such that a hearing of the allegations would be in the public interest. If so, the Chairperson will cause the Board to issue a Notice of Hearing. Section A.3.7 of the Guidelines further states that the Chairperson determines whether a hearing is in the public interest in her "management capacity as the Chief Executive Officer of the PMPRB".

18. In accordance with Section A.3.7 of the Guidelines and in her capacity as the Chief Executive Officer of the Board, Ms. Lindberg reviewed the report submitted by Board Staff and determined that a public hearing with respect to this matter is in the public interest.

19. Accordingly, on January 22, 2015, the Board issued a Notice of Hearing to require a public hearing with respect to the allegations of excessive pricing of Soliris. In addition, Ms. Lindberg assigned the matter to the current Panel members for hearing. It should be noted that the Panel assigned to hear this matter does not include Ms. Lindberg.

20. There is no dispute that, at the time of her appointment and throughout her tenure at the Board, Ms. Lindberg has also been a director of Green Shield Canada ("**Green Shield**"), a Canadian not-for-profit insurance company that supplies health and dental benefit plans. Currently, there are 14 members of the board of directors of Green Shield, including Ms. Lindberg.

21. Along with a number of other Canadian insurance companies, Green Shield is a member of the Intervener, CLHIA. At present, there are more than 70 insurance companies that are members of CLHIA.

22. On August 21, 2015, the Respondent brought a motion seeking an Order to quash the Notice of Hearing and Statement of Allegations of Board Staff based on an alleged conflict of interest of Ms. Lindberg, as described further below.

(ii) Submissions of the Parties

23. The Respondent submits that Ms. Lindberg's duty as a director of Green Shield places her in an irreconcilable conflict of interest as Chairperson of the Board. At paragraph 11 of the Notice of Motion, the Respondent submits that Ms. Lindberg's duties to Green Shield "could reasonably be apprehended to have influenced her decision whether it was in the public interest to issue a Notice of Hearing".

24. The Respondent submits that Green Shield, as a member of CLHIA, has an obvious interest in the outcome of the proceeding, including the potential of seeking compensation for any excessive pricing. For example, in paragraph 10 of the Notice of Motion, the Respondent alleges:

> "As a Director of Green Shield, Ms. Lindberg has fiduciary duties that would include keeping Green Shield's costs under control. This would include costs relating to patented medicines, including Soliris, purchased by, or on behalf of, Green Shield's insured members."

25. In subsequent submissions, the Respondent clarified that it is not alleging that Ms. Lindberg had an actual bias in issuing the Notice of Hearing, but that Ms. Lindberg's position as a director of Green Shield raises a reasonable apprehension of bias on her part.

26. In response, Board Staff does not contest that Ms. Lindberg is a director of Green Shield, but submits that the decision to issue a Notice of Hearing does not "predetermine" any issues or result in any prejudice to Alexion at the hearing as the Panel must still ultimately determine whether the price of Soliris is excessive. Board Staff further submits that Alexion has failed to demonstrate that Ms. Lindberg had a "closed mind" when she determined that it was in the public interest for the Board to hold a public hearing in this matter.

27. On the consent of both parties, the Panel also permitted counsel for Ms. Lindberg to submit written and oral arguments in respect of this aspect of the Respondent's motion. The submissions of counsel for Ms. Lindberg may be summarized as follows:

(a) Depending on the function being performed, the standard to be applied in assessing bias on the part of a decision maker ranges from a determination of whether there is a reasonable apprehension of bias to whether the decision-maker had a closed mind;

(b) When issuing a Notice of Hearing, Ms. Lindberg was functioning as the Chief Executive Officer of the Board;

(c) The decision to issue a Notice of Hearing was administrative in nature and not adjudicative, and is thus subject to the lower standard of the "closed mind" test. Under this test, Alexion would have to establish "pre-judgment

of the matter to such an extent that any representations to the contrary would be futile"; and

(d) There is no evidence of closed mindedness on the part of Ms. Lindberg and the allegations of any conflict of interest or bias are "misplaced speculation, founded on a misconception".

(iii) Analysis

28. The submissions of the Respondent, on the one hand, and Board Staff and Ms. Lindberg, on the other, differ with respect to the appropriate standard to be applied by the Panel in determining whether a reasonable apprehension of bias exists in the present case.

29. The Respondent submits that the appropriate standard to be applied in the present matter is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator. This standard for determining whether a reasonable apprehension of bias exists was expressed as follows by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. Canada (National Energy Board*), [1978] 1 S.C.R. 369 at 394:

> "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'"

30. Ms. Lindberg and Board Staff submit that given the administrative and non-adjudicative nature of the function performed by the Board Chair, the reasonable apprehension of bias test generally applicable to adjudicative functions is not applicable to Ms. Lindberg's decision to refer the matter for hearing. Rather, Board Staff and Ms. Lindberg submit that the conduct of the Chairperson should be evaluated under the less stringent standard of the "closed mind" test. Under this standard, the test is not whether

bias can be reasonably apprehended in the circumstances, but whether the Chairperson had closed her mind on the issue to the point that she was not amenable to persuasion.

31. The Panel recognizes that all administrative bodies, irrespective of their functions, owe a duty of fairness to those parties that may be adversely affected by their decisions. However, like other aspects of procedural fairness, the standards for reasonable apprehension of bias vary depending on the context and type of function performed by those making administrative decisions.

32. In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 ("***Newfoundland Telephone***"), the Supreme Court of Canada confirmed the principle that courts must take a flexible approach in evaluating allegations of bias, including consideration of the role and function of the administrative body that is being examined:

> "It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature." [pp. 638-39]

33. When evaluating the Respondent's allegations of bias and conflict of interest, it is necessary for the Panel to consider the role and function exercised by the Chairperson, as Chief Executive Officer of the Board, in issuing a Notice of Hearing.

34. The role and function exercised by the Chairperson when issuing a Notice of Hearing was considered extensively by the Federal Court in *Hoechst Marion Roussel Canada Inc. v. Canada (Attorney General)*, 2005 FC 1552 ("***Hoechst***"). In this case, the Court considered an application for judicial review of two decisions of the Board relating to the pricing of NicoDerm, a smoking cessation aid. One of the issues considered was whether there was a reasonable apprehension of bias on the part of the then Chairperson of the Board. Among other things, the respondent in that case alleged bias on the basis that the Chairperson who issued the Notice of Hearing also ultimately sat on the panel hearing the matter on the merits.

35. The Court in *Hoechst* rejected the allegations of bias and confirmed that the decision of the Chairperson to issue a Notice of Hearing is administrative in nature:

> "In this regard, I refer to the Board's reasons in its decision on jurisdiction, Part I. The Board noted that in deciding whether to issue a notice of hearing, the Chairperson considers whether the results of the investigation, if proven true, would show a prima facie case of excessive pricing.
>
> The issue of actual excessive pricing is a matter to be resolved at the public hearing, when all interested parties are given the opportunity to lead evidence, cross-examine and make submissions. That being so, I agree with the arguments of the respondent Attorney General of Canada and the intervener that the issuance of the notice of hearing does not represent the Board's conclusion on the issue, but rather constitutes an allegation that is sufficiently substantiated to justify a hearing on the merits. I conclude that no objectionable bias has been proven in this regard.
>
> …
>
> … As noted above, the Chairperson, when reviewing the Staff report and VCU, was acting in his administrative capacity as chief executive officer, for the limited purpose of deciding whether or not to issue a notice of hearing. I agree with the submissions of the respondent and the intervener that no independent analysis was conducted by the Chairperson as to whether the results of the investigation are, or may be, established.

> Finally, the Act does not ban the Chairperson from sitting as a member of a Board panel, notwithstanding his role in the issuance of a notice of hearing. Having regard to the fact that the Board is an expert tribunal, that the Chairperson is presumably highly knowledgeable in this field, and that the Chairperson, to date, has had no role in determining the well-foundedness of the allegation contained in the Staff report, I see no basis upon which an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that there is a reasonable apprehension of bias arising from the Chairperson's participation in the panel. This view is reinforced by my opinion as to the degree of flexibility to be afforded to the Board in satisfying the duty of fairness.
>
> For these reasons, the application for judicial review in respect of the Board's decision on jurisdiction, Part I, is dismissed." [paras. 88-89, 92-94]

36. As recognized by the Court in *Hoechst*, when determining whether to issue a Notice of Hearing, the Chairperson is acting in an administrative capacity as the Chief Executive Officer of the Board and for the limited purpose of determining whether a public hearing should be held into the allegations of excessive pricing.

37. No independent analysis of the allegations is conducted by the Chairperson to determine whether the results of the investigation are, or may be, established. The Chairperson considers only whether the results of the investigation, if proven true, would show a *prima facie* case of excessive pricing.

38. The Chairperson's decision to issue a Notice of Hearing does not represent the Board's conclusion on the issue. Rather, as recognized by the Court in *Hoechst*, the issue of actual excessive pricing "is a matter to be resolved at the public hearing, when all interested parties are given the opportunity to lead evidence, cross-examine and make submissions".

39. Board Staff also relies upon the decision of the Federal Court in *Bell Canada v. Communications, Energy & Paperworkers' Union of Canada*, [1997] F.C.J. No. 207 (T.D.) (QL). In that case, the applicant sought judicial review of a decision of the Canadian Human Rights Commission to refer certain complaints for a hearing before

the Canadian Human Rights Tribunal. Among the grounds alleged by the applicant was an allegation of bias on the part of the Commission when making the decision to refer the complaints to a hearing.

40. On a motion for a stay pending the application for judicial review, the Federal Court recognized that the standard applicable to allegations of bias is more lenient when applied to those performing an administrative or investigative function:

> "The applicant has also raised the issue of bias or impartiality. The Supreme Court formulated this test in Newfoundland Telephone Company Ltd. v. The Board of Commissioners of Public Utilities: 'The test is whether a reasonably informed bystander could reasonably perceive a bias on the part of an adjudicator'. The standard of conduct which is applicable to those performing an adjudicative function is different from those performing a purely administrative or investigative function. In the case of an administrative or investigative function, the standard is not whether there is a reasonable apprehension of bias on the part of the investigator, but rather whether the investigator maintained an open mind, that is whether the investigator has not predetermined the issue." [citations omitted] [para. 30]

41. Consistent with the principles outlined above, the Panel finds that given that the issuance of a Notice of Hearing is a preliminary and administrative step that merely initiates a determination on the merits, a less demanding standard of impartiality than that applied to the exercise of adjudicative functions is warranted. In particular, the Panel finds that the appropriate consideration is whether the Chairperson had a "closed mind" when issuing the Notice of Hearing, such that there was a prejudgement of the matter to the extent that the Chairperson would not be amenable to persuasion.

42. The Respondent appears to concede in paragraph 28 of its Written Representations on this motion that an administrative decision-maker is not held to the same standards as a judge or adjudicator. However, the Respondent submits that in light of her position as a director of Green Shield, Ms. Lindberg is in an "irreconcilable conflict" with her position as the Chairperson of the Board. More specifically, the Respondent submits that as a director, Ms. Lindberg is "duty-bound to maximize Green

Shield's value as a company" and that this includes "minimizing the drug acquisition price of Alexion".

43. In *Newfoundland Telephone*, Cory J. recognized that members of administrative boards may also hold other positions, including as directors in corporations. Although these individuals may provide a corporate perspective when acting as a member of an administrative board, that does not mean that the member will act unfairly:

> "The composition of boards can, and often should, reflect all aspects of society. Members may include the experts who give advice on the technical nature of the operations to be considered by the Board, as well as representatives of government and of the community. There is no reason why advocates for the consumer or ultimate user of the regulated product should not, in appropriate circumstances, be members of boards. No doubt many boards will operate more effectively with representation from all segments of society who are interested in the operations of the Board.
>
> Nor should there be undue concern that a board which draws its membership from a wide spectrum will act unfairly. It might be expected that a board member who holds directorships in leading corporations will espouse their viewpoint. Yet I am certain that although the corporate perspective will be put forward, such a member will strive to act fairly. Similarly, a consumer advocate who has spoken out on numerous occasions about practices which he, or she, considers unfair to the consumer will be expected to put forward the consumer point of view. Yet that same person will also strive for fairness and a just result. Boards need not be limited solely to experts or to bureaucrats." [p. 635]

44. The structure of the Board itself recognizes that members will have differing backgrounds, skills and experience, and also contemplates that members of the Board may be employed in other capacities. Indeed, each of the five members of the Board, including the Chairperson and Vice-Chair, serve only on a part-time basis.

45. Although Alexion alleges that by simultaneously serving as a director of Green Shield and as the Chairperson of the Board, Ms. Lindberg faces an "irreconcilable conflict", Alexion has failed to demonstrate any genuine conflict between these roles. In particular, the Respondent has not shown how Ms. Lindberg’s duty as the Chairperson

of the Board, requiring her to act appropriately in issuing the Notice of Hearing, would necessarily result in a breach of her fiduciary duties to Green Shield. To use the language of Cory J. in *Newfoundland Telephone*, it is presumed that although Ms. Lindberg is one of the directors of Green Shield, she will "also strive for fairness and a just result" when exercising her functions as Chairperson.

46. Further, Alexion has not cited any authority to support the proposition that Ms. Lindberg faces an irreconcilable conflict in circumstances such as the present case. The authorities cited by Alexion as support for the proposition that Ms. Lindberg's fiduciary duties as a director of Green Shield creates an irreconcilable conflict of interest do not address circumstances that are analogous to the present facts.

47. In summary on this issue, the Chairperson's decision to issue a Notice of Hearing does not represent the Board's conclusion on the issue, but is a preliminary and administrative step. The issue of actual excessive pricing is a matter to be resolved at the public hearing, where all interested parties will be given the opportunity to lead evidence, cross-examine and make submissions. The decision of the Chairperson is subject to a less stringent standard of impartiality than that applied to the exercise of adjudicative functions.

48. The Respondent has failed to establish that the requisite standard of impartiality has not been met in the circumstances of this case. In particular, the Respondent has not provided any basis to suggest that the Chairperson in making the decision to refer the matter for hearing was not amenable to persuasion or otherwise had a "closed mind" in issuing the Notice of Hearing.

49. The Panel therefore concludes that the Respondent's motion to quash the Notice of Hearing and Statement of Allegations of Board Staff should be dismissed.

Allegations of Conflict Relating to Isabel Raasch

(i) Relevant Facts

50. The facts relating to the allegations of a conflict involving Ms. Raasch as set out below are not in dispute between the parties.

51. On July 7, 2015, Isabel Raasch was appointed as the Director, Legal Services and General Counsel for the Board. In this capacity, Ms. Raasch is responsible for supervising all of the legal work related to Board Staff, including the supervision of other in-house lawyers, the instruction of outside counsel and the provision of legal advice related to proceedings before the Board.

52. Ms. Raasch joined the Board from the Ottawa office of Gowling Lafleur Henderson LLP ("**Gowlings**"), where she was a partner in the intellectual property litigation group. Her practice was predominantly in the areas of patent litigation, including infringement actions, references for damages and proceedings under the *Patented Medicines (Notice of Compliance) Regulations*. Prior to joining Gowlings, Ms. Raasch was an associate with Ropes & Gray LLP – Fish & Neave IP Group, an intellectual property firm in New York City.

53. Gowlings is the solicitor of record for Alexion in this proceeding. Alexion is primarily represented by Malcom Ruby and Alan West of Gowlings' Toronto office.

54. Board Staff is represented by Parul Shah, an in-house lawyer at the Board, and David Migicovsky and Christopher Morris, two partners at Perley-Robertson, Hill & McDougall LLP, as external counsel.

55. Shortly after her appointment as Director, Legal Services and General Counsel for the Board, Ms. Raasch also became involved to some degree in the present proceeding regarding Soliris.

56. In her capacity as the General Counsel and Director of Legal Services for the Board, Ms. Raasch has held discussions regarding the proceeding with in-house and

external counsel for the Board Staff directly involved in the litigation. In addition, Ms. Raasch made requests for information relating to the proceeding from an individual at Health Canada. Although Ms. Raasch supervises Ms. Shah, she is not directly involved in the litigation of this proceeding as a counsel of record.

57. By letter dated July 17, 2015 to the Chairperson of the Board, counsel for Alexion alleged that the involvement of Ms. Raasch in the proceeding was improper given that she was formerly a partner at Gowlings. The letter states, in pertinent part:

> "It has just come to our attention that a former partner at Gowlings, Ms. Isabel Raasch, has become involved in the prosecution of the case currently before a Panel of the Board against our client, Alexion Pharmaceuticals Inc.
>
> This is entirely improper. Until about one month ago, Ms. Raasch was a Gowlings partner. The knowledge we have of the file is imputed to her. She should have no involvement in the proceeding. Moreover, some kind of ethical screen should be implemented at the Board to ensure she does not interact with Board Staff currently responsible for the case."

58. Similarly, in an Amended Response to the Statement of Allegations of Board Staff dated July 17, 2015, Alexion alleged as follows in paragraph 37(h):

> "Board Staff are so intent on obtaining a confiscatory order against Alexion that they have also violated basic rules of professional ethics. On July 13. 2015. Alexion learned that Isabel Raasch, a former Gowlings partner in Ottawa recently hired as PMPRB General Counsel, had become involved in the prosecution against Alexion. As a former Gowlings' partner, Gowlings' knowledge of Alexion based upon the lawyer client relationship between Gowlings and Alexion is imputed to Ms. Raasch. Alexion was entitled to assume that normal ethical principles would be observed and that an ethical screen would be implemented to ensure Ms. Raasch did not become involved in any proceeding against Alexion. Instead. Board Staff have deliberately violated that principle by permitting her to become involved in the prosecution."

59. In a letter dated July 27, 2015 to counsel for Alexion, counsel for Board Staff responded to Alexion's allegations of conflict of interest on the part of Ms. Raasch.

Among other things, counsel for Board Staff advised that during her time as a partner at Gowlings, Ms. Raasch had never acted as counsel in any matter involving Alexion and had no information regarding Alexion or this proceeding.

60. On July 31, 2015 Board Staff filed written representations stating that the portions of Alexion's Amended Response that include allegations regarding Ms. Raasch should be struck as they are vexatious and irrelevant to the matters at issue.

61. By Order dated August 5, 2015, the Panel determined that the Board Staff's written representations should be treated as a motion to strike the portions of Alexion's Amended Response regarding Ms. Raasch's involvement in these proceedings. The Panel also indicated that if Alexion wished to seek relief relating to Ms. Raasch's involvement in these proceedings, Alexion should bring the appropriate motion.

62. On August 21, 2015, Alexion filed a motion seeking an order that Ms. Raasch be disqualified from participating in the proceeding or in any way assisting or collaborating with Board Staff in the proceeding, and that Ms. Raasch be subject to an ethical screen preventing her from receiving or sharing any information concerning the proceeding with Board Staff.

(ii) Submissions of the Parties

63. Alexion makes two main submissions with respect to the issue of the alleged conflict of Ms. Raasch.

64. First, Alexion submits that the confidential information possessed by Gowlings relating to Alexion was imputed to Ms. Raasch at the time she was a partner of Gowlings. Alexion submits that, given this imputed knowledge of Alexion's confidential information, it is improper for Ms. Raasch to be involved in this proceeding.

65. Second, Alexion submits that, as a former partner of Gowlings, Ms. Raasch continues to owe a duty of loyalty to Alexion. This allegation is described at paragraph 17 of Alexion's Notice of Motion as follows:

> "… Gowlings is currently counsel to Alexion in these proceedings and was acted [sic] on Alexion's behalf in relation to the proceeding while Ms. Raasch was still a Gowlings partner. Ms. Raasch, like any other Gowlings partner, owed a duty of loyalty to Alexion. Alexion had a reasonable basis for believing that a Gowlings lawyer would observe that duty by not, in effect, becoming engaged in the prosecution of a case against Alexion after she left the firm and joined the Board."

66. With respect to the submission that the confidential information relating to Alexion provided to their counsel should be imputed to Ms. Raasch, Board Staff submit that when Ms. Raasch left the Ottawa office of Gowlings she had no knowledge of Alexion, this proceeding or any other aspect of the representation of Alexion by Gowlings' lawyers in another city (Toronto). Board Staff submits that, as a consequence, Ms. Raasch cannot be "tainted" by knowledge that could affect the litigation as she has none, nor could there be a conflict of interest in circumstances where Ms. Raasch was not personally involved in the representation of Alexion.

67. With respect to the submission by Alexion that Ms. Raasch owes a duty of loyalty to Alexion, Board Staff submits that Ms. Raasch does not owe Alexion any such duty because: (i) Alexion is not Ms. Raasch's current client; and (ii) Ms. Raasch never acted as counsel for Alexion during the time that she was a partner at Gowlings. Board Staff submits that creating a duty of loyalty in these circumstances would be "unprecedented".

(iii) Analysis

68. Both parties rely on the decision of the Supreme Court of Canada in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 ("***MacDonald Estate***"), although as support for differing propositions.

69. In *MacDonald Estate*, a majority of the Supreme Court of Canada held that, when determining cases in which a disqualifying conflict of interest is alleged against a lawyer, the court must balance three competing values: (i) the concern to maintain the high standards of the legal profession and the integrity of the justice system; (ii) the countervailing value that a litigant should not be deprived of his or her choice of counsel

without good cause; and (iii) the desirability of permitting reasonable mobility in the legal profession.

70. In balancing these values, the central issue considered by Sopinka J., writing for the majority in *MacDonald Estate*, was whether "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" [p. 1260]. To address this issue, Sopinka J. identified the following two considerations:

(a) Did the transferring lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand; and, if so,

(b) Is there a risk the confidential information will be used to the prejudice of the client?

As discussed further below, the Panel finds that both of these questions should be answered in the negative.

71. With respect to the first question, the present case is distinguishable from the circumstances in *MacDonald Estate*, as there is no allegation that Ms. Raasch received any actual confidential information relating to Alexion during her time as a partner at Gowlings. Unlike the circumstances in *MacDonald Estate* and the other cases cited by the Respondent, it is clear that Ms. Raasch was never personally involved in the representation of Alexion.

72. Ms. Raasch filed an Affidavit that was not subject to cross-examination or contradicted by any of the evidence submitted by the Respondent. At paragraph 5 of her Affidavit, Ms. Raasch states as follows regarding her lack of involvement in the representation of Alexion:

> "While employed as a lawyer at Gowlings in Ottawa I had no knowledge of any of the matters related to this litigation or to the representation of Alexion by Gowlings in Toronto. While employed as a lawyer at Gowlings in Ottawa I have never acted for Alexion

> in any matter. While employed as a lawyer at Gowlings in Ottawa I had no information (confidential or otherwise) regarding Alexion."

73. The Panel is cognizant of the reluctance of Canadian courts to rely on affidavit evidence of a transferring lawyer to the effect that they do not presently recall any confidential information that was previously disclosed by a former client or that they will not disclose any confidential information relating to the former client at their new firm (see, for example, *MacDonald Estate* at p. 1263 and *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2010 ONCA 788 ("***Consulate Ventures***") at para. 18). However, the present matter is different because in addition to the uncontroverted affidavit evidence of Ms. Raasch, the Respondent concedes that Ms. Raasch did not receive any confidential information relating to Alexion and that Ms. Raasch was not involved in the representation of Alexion.

74. Rather, the Respondent submits that knowledge of the Alexion matter was imputed to Ms. Raasch at the time she was a partner at Gowlings. The concept of imputed knowledge and its appropriateness in the context of a large national law firm, such as Gowlings, was also addressed by the majority of the Court in *MacDonald Estate*:

> "The answer is less clear with respect to the partners or associates in the firm. Some courts have applied the concept of imputed knowledge. This assumes that the knowledge of one member of the firm is the knowledge of all. If one lawyer cannot act, no member of the firm can act. This is a rule that has been applied by some law firms as their particular brand of ethics. While this is commendable and is to be encouraged, it is, in my opinion, an assumption which is unrealistic in the era of the mega-firm. Furthermore, if the presumption that the knowledge of one is the knowledge of all is to be applied, it must be applied with respect to both the former firm and the firm which the moving lawyer joins. Thus there is a conflict with respect to every matter handled by the old firm that has a substantial relationship with any matter handled by the new firm irrespective of whether the moving lawyer had any involvement with it. This is the 'overkill' which has drawn so much criticism in the United States to which I have referred above." [emphasis added] [p. 1261]

75. Consistent with the principles outlined in *MacDonald Estate*, the appropriate inquiry in the present circumstances is to consider whether the transferring lawyer had actual (as opposed to imputed) knowledge of the former client's confidential information. The focus on whether the transferring lawyer has actual knowledge is also evident in the *Rules of Professional Conduct of the Law Society of Upper Canada*. Rule 3.4-18 states as follows:

> "Rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and
>
> (a) the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers it is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm's matter for its client; or
>
> (b) the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that
>
> (i) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents or represented its client ("former client");
>
> (ii) the interests of those clients in that matter conflict; and
>
> (iii) the transferring lawyer actually possesses relevant information respecting that matter." [emphasis added]

76. The first paragraph of the commentary to the above Rule makes it clear that imputed knowledge is not sufficient to give rise to a disqualification of the transferring lawyer:

> [1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Macdonald Estate v. Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the area of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable

> measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client. [emphasis added]

77. The Panel is of course not bound by the principles set out in codes of professional conduct. However, in the Panel's view, they should be given considerable weight as important statements of public policy that are consistent with the views of the profession regarding appropriate standards. [On this point, see: *MacDonald Estate*, at pp. 1245-46].

78. During the course of the hearing, there was much debate on the issue of when Ms. Raasch became aware that Gowlings is acting as counsel for Alexion. Given that the uncontroverted evidence demonstrates that Ms. Raasch had no confidential information and no involvement in the representation of Alexion, the actual date on which she became aware that her former partners at Gowlings represented Alexion is not relevant to the outcome of this motion.

79. In summary, on the two questions identified by Sopinka J. in *MacDonald Estate*, the Panel concludes as follows:

(a) The uncontroverted evidence demonstrates that Ms. Raasch did not receive confidential information attributable to a solicitor and client relationship through her position as a partner at Gowlings. The evidence demonstrates that Ms. Raasch was not aware of the Alexion matter and had no knowledge of this matter during her time as a partner at Gowlings. To the extent that there is any presumption that the knowledge of her former partners should be imputed to Ms. Raasch, the Panel finds clear and convincing evidence that such a presumption would be rebutted in the circumstances; and

(b) As Ms. Raasch does not have any confidential information, there is no risk that any confidential information will be used to the prejudice of the client.

80. Given the evidence before the Panel and in particular, the admission of the Respondent that Ms. Raasch did not have any confidential information relating to Alexion, the Panel is of the view that a reasonably informed person would be satisfied that no use of confidential information would occur from Ms. Raasch's continued involvement in this matter.

81. Alexion further alleges that as a former partner of Gowlings, Ms. Raasch continues to owe a duty of loyalty to Alexion on the basis that Alexion was a client of Gowlings at the time that Ms. Raasch was a partner. Alexion claims that Ms. Raasch's involvement in this proceeding breaches a duty of loyalty allegedly owed to Alexion.

82. It is well-established that lawyers owe a fiduciary duty to their clients which includes a duty of loyalty. One aspect of this duty of loyalty is the avoidance of conflicts of interest.

83. The Panel agrees with the submissions of the Respondent that a duty of loyalty is not limited to current clients and may also exist with respect to former clients. For example, in *Consulate Ventures*, the Ontario Court of Appeal described the rationale underlying the duty to former clients as follows:

> "Counsel submits that lawyers owe a duty of loyalty to their former clients. That duty is not premised on or confined to confidentiality obligations, but flows from a broader concept of fidelity that is essential to the proper functioning of the client/solicitor relationship. Clients must be able to speak frankly and without fear of exposure to their lawyers about their legal problems. To do so, clients must be confident that their lawyers will not become their adversaries' lawyers at some subsequent point in the course of the same dispute. The prospect of one's lawyer switching sides must undermine the confidence essential to the operation of the client/solicitor relationship. There is also concern that if lawyers act against former clients in the same manner, the public confidence in the integrity of the legal profession will suffer. That confidence is crucial to the effective and just administration of justice." [para. 22]

84. The Panel further agrees with the Respondent that such a duty may arise even in circumstances where (as in the present case) the lawyer has not received any

confidential information relating to the former client. For example, in *R. v. Neil*, [2002] 3 S.C.R. 631 ("***Neil***"), the Supreme Court of Canada recognized that a duty of loyalty may exist even where there is no risk that the former client's confidential information will be revealed. Binnie J. writing for the Court in *Neil* stated as follows:

> "While the Court is most often preoccupied with uses and abuses of confidential information in cases where it sought to disqualify a lawyer from further acting in a matter, as in *MacDonald Estate*, *supra*, the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role." [para. 17]

85. However, Binnie J. also recognized the potential that "exaggerated and unnecessary" duties of loyalty could be extended to lawyers in other offices of a national firm in circumstances where those lawyers have no knowledge of the client. Ultimately, Binnie J. favoured the application of rules that are "sensible and necessary" to protect the client in a manner that links the duty of loyalty to the policies that it is intended to further:

> "… In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. Lawyers are the servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around. Yet it is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests." [para. 15]

86. The Respondent cites a number of cases that recognize a duty of loyalty to former clients. However, none of these authorities extends a duty of loyalty to clients of the lawyer's former firm in circumstances where the transferring lawyer was not

personally involved in the representation of the client and had not received any confidential information relating to the client.

87. Board Staff relies upon a 2010 decision of the Ontario Superior Court in *Basque v. Stranges*, 2010 ONSC 5605 ("***Basque***"), that is more directly applicable to the facts of the present matter. The Court in *Basque* considered a motion to disqualify a transferring lawyer in circumstances where the lawyer was not personally involved in the representation of the client at his former firm. The client in that case retained Mr. Budgell, a partner at the St. Catharines firm of Chown Cairns. Another lawyer, Mr. Graham, was also a partner at Chown Cairns but did not have any personal involvement in the representation of the client nor did he have any conversations with Mr. Budgell about the matter. After leaving Chown Cairns, Mr. Graham was retained to represent an adverse party in the same matter.

88. The Court found that, in all of the circumstances, no reasonably informed member of the public could sensibly conclude that the transferring lawyer is tainted with a disqualifying conflict of interest. In reaching this conclusion, the Court recognized that the transferring lawyer was not personally involved in the prior representation of the client:

> "In my opinion, Graham's relationship with Chown Cairns during the period from April 27, 2007 (when the plaintiff first consulted Budgell) to May 31, 2007 (when Graham left Chown Cairns), which I will call the 'overlap period', was not sufficiently connected to his retainer by The Dominion of Canada General Insurance Company one year later so as to raise the inference that confidential information was imparted. During the overlap period, there would have been no reason for confidential information regarding the plaintiff's case to have been divulged to, or obtained by, Graham. Graham had no involvement in the plaintiff's case (or knowledge of its existence) during the overlap period and this is wholly consistent with his role at Chown Cairns during that time. And, furthermore, there is no evidence of confidential information having been imparted to Graham during the overlap period." [para. 46]

89. Indeed, the rationale underlying the duty of loyalty to former clients would not support extending this duty to circumstances where the former lawyer had no personal involvement in the representation of the client. For example, the ability of a client to speak frankly and without fear of exposure to their lawyers about their legal problems is not diminished where a former partner of their lawyer who was located in a different office, with no involvement in the matter and no confidential information departs the firm and represents an adverse party.

90. When asked during the hearing to identify the prejudice to Alexion arising from the continued involvement by Ms. Raasch in this proceeding, counsel for Alexion largely focused on the alleged expectations of Alexion, including the expectation that having paid Gowlings, Alexion was entitled to a continuing duty of loyalty from all of the individuals that were partners of the firm at the time of that payment:

> MEMBER KOBERNICK: So we are dealing with a similar situation here by an individual who was an employee of a national law firm. I want to understand how your client has been prejudiced.
>
> MR. RUBY: They are prejudiced because, as I said earlier, they pay for Gowlings. Gowlings is a firm. It is a national firm and when a lawyer leaves and we are all -- we all have a duty of loyalty to this client, all of us, Ms Raasch included, and I say she still does.
>
> When a lawyer leaves it's an affront to the duty of loyalty for that lawyer to act against the client who previously paid the firm where she was a partner where she acted. The prejudice is that there is a rule that says you can't do it. There is case law that says it is a violation of a fiduciary duty or a duty of loyalty. That's the prejudice.
>
> The prejudice is that we should have been consulted about it and we weren't. The prejudice is that when we find out about it and we ask for it not to happen that we are told "no" that she would act. That's the prejudice. …[p. 364]

91. Although senior representatives of Alexion attended the hearing, no individual from Alexion submitted evidence of any prejudice, or for that matter, any other evidence on this motion. Rather, Alexion relied on evidence found in an affidavit of a law clerk working with counsel for Alexion.

92. In light of the uncontroverted evidence that Ms. Raasch was not involved in the representation of Alexion and had no confidential information relating to Alexion, together with the absence of any authority or sensible rationale for extending a duty of loyalty to Ms. Raasch in the present circumstances, the Panel finds that no reasonably informed person could reasonably conclude that Ms. Raasch is subject to a disqualifying conflict of interest based on the facts of the present matter.

93. The Panel therefore denies the request from Alexion for an order to disqualify Ms. Raasch on the basis of a conflict of interest.

Disqualification of Remaining Counsel for Board Staff

94. Alexion also seeks an order to disqualify the remaining internal and external counsel for the Board Staff involved in this proceeding as a result of their collaboration with Ms. Raasch during the course of this proceeding.

95. Given the Panel's conclusion that Ms. Raasch is not subject to a disqualifying conflict of interest, there are no grounds for an order to disqualify the remaining counsel for the Board Staff. Specifically, given the uncontroverted evidence that Ms. Raash has not received any confidential information relating to Alexion, there is no basis for the Panel to conclude that the remaining counsel are somehow “tainted” through any collaboration with Ms. Raasch.

96. The request from Alexion for an Order disqualifying the remaining internal and external counsel for the Board Staff is denied.

Motion for Leave to Submit Additional Written Argument

97. On September 23, 2015, one week after the conclusion of the hearing of the motion, Alexion’s counsel submitted additional written argument to the Panel by way of a letter to the Registrar. Board Staff objected to the filing of the additional written argument on the basis that the supplementary written argument was improper and should be disregarded. In addition, counsel for the Board Staff noted in a letter of the same date that “Alexion did not consult Board Staff in advance of its attempt to

unilaterally file the Supplementary Submissions". Alexion subsequently brought a motion seeking leave from the Panel to file additional written argument.

98. The additional written argument relates to the issues of when Ms. Raasch first became aware that Alexion was represented by Gowlings and the procedure followed by the Board Staff in screening for potential conflicts at the time Ms. Raasch was hired as the Director, Legal Services and General Counsel for the Board.

99. The Panel denies Alexion's motion for leave to submit additional written argument.

100. Alexion seeks to introduce further written argument following the conclusion of the hearing on issues that were or could have been addressed during the hearing of the motion. In addition, given the Panel's conclusion that Ms. Raasch is not subject to a disqualifying conflict of interest, further argument on the issue of when Ms. Raasch became aware of the Gowlings retainer or the procedures followed by the Board Staff in initially screening for conflicts is not relevant to the matters at issue in this motion.

101. As stated above, given that the uncontroverted evidence demonstrates that Ms. Raasch had no confidential information and no involvement in the representation of Alexion, the actual date on which she became aware that her former partners at Gowlings represent Alexion is not relevant to the outcome of this motion.

102. Although the Panel always strives to conduct hearings in a manner that is as informal and expeditious as the circumstances and considerations of fairness permit, the evidentiary record, submissions and written argument before the Panel on a motion must at some point be considered complete.

103. Further, even if the additional written submissions were relevant to the matters at issue, the Panel would continue to have concerns with granting leave in the circumstances given the procedure followed by Alexion and potential prejudice to the Board Staff. The Panel notes that Alexion did not attempt to secure the consent of Board Staff for the filing of additional written argument. Rather, Alexion attempted to

introduce additional written argument by submitting materials to the Panel without any notice or initial consultation with opposing counsel. Providing proper notice and consulting with opposing counsel is important in all cases, but particularly where the additional written argument contains very serious allegations against Board Staff, including allegations that they wilfully neglected their ethical obligations.

Conclusion

104. The Panel therefore orders that Alexion's motions be dismissed.

DATED at Ottawa, this 5th day of October 2015.

Signed on behalf of the Panel by Dr. Mitchell Levine

Panel Members:
Dr. Mitchell Levine
Carolyn Kobernick
Normand Tremblay