



THE MANITOBA  
SECURITIES  
COMMISSION

**27 September 2019**

**IN THE MATTER OF:                    THE REAL ESTATE BROKERS ACT**

- and -

**IN THE MATTER OF:                    SARAH PAO**

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**REASONS FOR DECISION  
OF  
THE MANITOBA SECURITIES COMMISSION**

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Panel:

Panel Chair:	Mr. D.M.R. Cheop, Q.C.
Member:	Mr. J.T. McJannet, Q.C.
Member:	Mr. C.D. Burns

Appearances:

Ms. K.G.R. Laycock	)	Counsel for Commission Staff
Mr. S. Vincent	)	On behalf of the Respondent

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A DIVISION OF THE MANITOBA FINANCIAL SERVICES AGENCY

## **Introduction**

Sarah Pao ("Pao") was registered as a real estate salesperson under *The Real Estate Brokers Act* (the Act) from May 11, 2010 to May 10, 2017 (her registration having been suspended since June 30, 2016 when her broker, Coldwell Banker Preferred Real Estate, terminated her engagement). On March 18, 2019 the Manitoba Securities Commission ("Commission") issued a Notice of Hearing (the "Notice") and Statement of Allegations regarding Pao alleging, among other things, that:

- in 2013 and 2014, Pao acted as salesperson on the sale of 42 properties by three Manitoba First Nations to corporations owned by members of Pao's family, where she was a guarantor on mortgages that financed the transactions
- the selling price in each of the sales were made at substantially less than their appraised and assessed values
- she did not disclose her involvement in the transactions to her clients, the sellers of the properties
- in a number of cases the properties were resold by the corporations owned by Pao's family who purchased the properties at a higher price than the price paid in the original purchase

The Notice asked the Commission to consider:

- “1. whether or not it is in the public interest to order, pursuant to section 11(1) of *The Real Estate Brokers Act* ("Act"), that registration under the Act of SARAH PAO ("SARAH PAO") be suspended or cancelled;
2. whether or not to find SARAH PAO did not adequately discharge her responsibilities to the Commission, her customers or the public;
3. whether or not pursuant to section 34 of the Act to order that SARAH PAO pay the costs of the investigation and hearing;
4. such further and other matters and the making of such further and other orders as the Commission may deem appropriate.”

At the outset of the hearing Pao brought a preliminary motion seeking:

- a declaration that the Commission lacks disciplinary jurisdiction over Pao because she no longer holds a registration under the Act
- a declaration that, for the same reason, the Commission lacks jurisdiction to make findings of professional misconduct or impose penalties, assess costs or bar her from future registration under the Act based on that alleged misconduct
- an order staying the proceeding or, alternatively, enjoining Staff or the Commission from proceeding further with it

In our view, the Commission has jurisdiction to proceed with the hearing. The following is how we reached that conclusion.

## Arguments

Pao's counsel's argument can be briefly summarized as follows: subsection 11(1) of the Act gives the Commission the power to cancel or suspend a registration under the Act and in this case there is no longer any registration to cancel or suspend because Pao has been terminated. Her counsel notes that the Act, unlike certain other legislation, does not expressly state that the Commission can take action against former registrants. Pao's counsel references the decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd., Re.*<sup>1</sup> where the court quoted with approval the following comments from Driedger's Construction of Statutes on the question of statutory interpretation:

“...the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” (at para. 21)

Pao's counsel submits that had the Legislature intended that the Commission have jurisdiction over former registrants, it would have said so in the Act.

Staff of the Commission disagree. Also referencing *Rizzo*, Staff's counsel focused on the latter part of this quotation, arguing that a broad and purposive approach to the interpretation of the Act should be applied, taking into account the role of the Commission and the purpose of the Act and the regulatory framework it establishes. Staff noted that in *Rizzo* the Supreme Court of Canada held that the lower court had been too restrictive in interpreting the *Employment Standards Act*, resulting in an approach that was inconsistent with the overall scheme created by the legislation. Counsel for Pao is correct in saying that it would have been clearer that the Legislature had intended to give the Commission jurisdiction over former registrants if it had used language to this effect in the Act, as several modern professional regulation statutes referenced by him have done. However, in our view the fact that the Legislature did not expressly reference former registrants is not necessarily determinative of this issue and a broader review is required.

## Analysis

The Commission is a creation of *The Securities Act* and, as such, only has the powers and jurisdiction granted to it in that legislation. But the courts have provided important context to the Commission's role, as counsel for Staff highlighted, noting the comments of the British Columbia Court of Appeal in *Re Capital Reserve Inc. et al.; Rak et al. v. Superintendent of Brokers*:

“It is important to keep in mind the special regulatory character of securities commissions and their paramount obligations to protect the public interest”<sup>2</sup>

This does not, of course, mean that the Commission can assume jurisdiction where it has none but it does emphasize the importance of the Commission being driven by what it perceives to be in the public interest in exercising its powers. As an example, in *Rak* the Court referenced the Ontario Court of Appeal decision in *Re Securities*

<sup>1</sup> [1998] 1 S.C.R. 27, quoting Driedger's Construction of Statutes (2nd edition, 1983).

<sup>2</sup> 1990 CarswellBC 246 at p.8

*Comm. and Mitchell*<sup>3</sup>, where the cancellation of an advisor's registration based on the Ontario Securities Commission's view that doing so was in the public interest was upheld despite the fact that there was no breach of any provision of the *Securities Act* or the supporting regulation by the advisor. Although this case deals with real estate and not securities, this Commission has determined that the same considerations apply, and that in both cases

"...[t]he first concern...is the broader interest of public protection."<sup>4</sup>

The Act gives the Commission broad authority to oversee the real estate industry in Manitoba, including, among other things, the power (i) to register and discipline brokers and salesmen, (ii) to regulate the way in which they conduct their business (including the forms of offers to purchase that must be used), (iii) to investigate matters relating to the Act (including potential fraudulent acts) and (iv) to prosecute violations of the Act. Looking at the Act as a whole, there are instances where it refers to persons in a context where the clear implication is that the intention is not to limit the scope to current registrants. For example, the Act allows the Manitoba Real Estate Association, which includes most brokers in the province as members, to establish a reimbursement fund to compensate persons who have suffered a loss in certain circumstances. Under section 39.1(2), the Commission can order payments from the fund where

"a broker registered on the basis of membership in the association, or an authorized official, employee or salesperson of such a broker..."

has committed a fraudulent act, been subject to a final judgment based on a finding of fraud in civil proceedings or has been convicted under an offence under the Act or the *Criminal Code*. Section 39.1(3) of the Act contains a similar provision allowing compensation orders where a "broker registered on the basis of membership in the association..." becomes a bankrupt (or makes a proposal) or, if a corporation, has a winding up order issued against it.

Section 39.1 was enacted as an alternative to the bonding provisions that would otherwise apply that provide protection to the public from financial loss where a broker or salesperson commits fraud or goes bankrupt. When this occurs, in many cases the broker or salesperson is no longer registered under the Act, particularly if fraud is involved. If one accepts the argument of Pao's counsel, because the Act refers only to "a broker registered" and not "a broker registered or formerly registered" the Commission would have no jurisdiction to make an order compensating clients for their losses arising from the misconduct if the person has left the industry. Given the intention of the provision – the compensation of the public in the event of fraud by or the bankruptcy of a registrant – this interpretation makes no sense.

In our view, the same analysis applies to section 11: The Commission does not lose jurisdiction over a broker or salesperson simply because their registration is terminated. The position taken by Pao's counsel is that, relying on the language of this section, the Commission could launch a proceeding under the Act and as long as the salesperson gave up his or her registration prior to the conclusion of the hearing,

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<sup>3</sup> [1957] O.W.N. 595

<sup>4</sup> *MSC v. Pereira* (2001) p.6

the Commission would cease to have jurisdiction because there is no longer anything to cancel or suspend. Given the purpose of the Act and the powers given to the Commission, this conclusion is untenable.

It is a different question as to what the Commission can order at such a hearing, given that the subject of it no longer holds a registration.

Staff have put forward three substantive actions in the Notice that it wants the Commission to consider. Dealing with each in turn:

- *Should Pao's registration be canceled or suspended?*- although Pao is no longer a registrant under the Act, the Commission nonetheless would have a basis to cancel or suspend her registration should doing so be justified by the evidence adduced at the hearing. This is supported by the decision of the Ontario Divisional Court in *College of Nurses v. Dumchin*,<sup>5</sup> which held that a disciplinary panel had erred in deciding it had no jurisdiction to revoke a nurse's certificate of registration because he had already given it up, commenting that the panel was incorrect in reasoning:

“...that once a member resigns his certificate becomes “non-existent” and that by using the words “certificate of registration” the legislature had intended to prohibit a panel from ordering a suspension or revocation of a “non-existent certificate...” (para. 37)

In that case, the Court determined that the panel could order the prospective operation of the revocation order that would apply should the nurse ever seek reinstatement of his certificate<sup>6</sup>. This case was followed by a disciplinary panel of the Ontario College of Physicians and Surgeons in *Ontario (Ontario College of Physicians and Surgeons) v. Einstoss*<sup>7</sup>, which commented that concluding that a “non-existent” certificate could not be revoked would

“...lead to physicians accused or suspected of misconduct surrendering their certificate of registration as a simple solution to avoiding disciplinary action.” (para 124)

- *Did Pao adequately discharge her responsibilities to the Commission, her customers and the public?*- the Commission clearly has power to inquire into the conduct of a registrant under section 11 or, more generally, under the general investigative powers granted to it in section 33 of the Act. The options, and the effectiveness of those options, to sanction any conduct if a person has given up their registration is a separate question.

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<sup>5</sup> 2016 CarswellOnt 4984

<sup>6</sup> The fact that in the *Dumchin* case the panel clearly had authority over former members does not distinguish it from the situation here given our conclusion that section 11 of the Act applies to persons who formerly held a registration.

<sup>7</sup> 2016 CarswellOnt 17541

- *Should costs be assessed against Pao?*- section 34 of the Act provides that where the conduct of a registrant has been the subject of an investigation and, as a result of that investigation,

“...(b) the registrant's registration is suspended or cancelled or the name of the authorized official has been deleted from the register; or

(c) the commission is satisfied that the registrant or authorized official has not adequately discharged his responsibilities to the commission, his customers or the public;...”

the Commission may assess all or part of the costs of the investigation and any hearing that results from it against the registrant. Our comments above on whether the use of “registrant” in this situation by implication includes a “former registrant” are equally applicable here, and our conclusion is again that it does. We note that in this case Staff’s investigation of Pao started some time before her registration was terminated (the evidence submitted on this motion indicates she was in fact interviewed by staff twice by that point). The panel in *Eintoss* commented that it would be “absurd” if a physician could frustrate the actions of a disciplinary body by simply giving up his or her licence. This analysis is equally applicable here and in our view the Commission could assess costs against Pao if it were to conclude that the evidence adduced at the hearing supported such an order.

### **Conclusion**

For the reasons set out above, we conclude we have jurisdiction to proceed with the hearing and Pao’s motion is dismissed.

“D.M.R. Cheop, Q.C.”

D.M.R. Cheop, Q.C.

Chair

“J.T. McJannet, Q.C.”

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Member

“C.D. Burns”

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Member