

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. (“Respondent”)
and the Medicine “Soliris”**

**SUPPLEMENTARY WRITTEN REPRESENTATIONS OF ALEXION:
(Response to Submissions filed by Mr. Stern
on Behalf of Mary Catherine Lindberg on 14 September 2015)**

1. Ms. Lindberg's counsel Mr. Stern has suggested at paragraph 15 of his submissions that Green Shield Canada's (“GSC”) status as a non-profit corporation means that neither GSC nor Ms. Lindberg can act to increase value, maximize shareholder returns or gains, or generate personal gain.

2. Mr. Stern's argument appears to be predicated on the assumption that because GSC is organized as a non-profit corporation, GSC has no interest in maximizing its corporate value or generating financial savings for its members. This contention could not be further from the truth. A review of GSC's website makes clear that both Ms. Lindberg and the corporation have critical financial interests of relevance to the present motion.

3. GSC's Corporate Governance Practices indicate, at page 2, that: “The Board of Directors receive remuneration and it is the responsibility of the Compensation and Human Resources Committee to review Director compensation bi-annually. As part of their remuneration, Directors receive health and dental benefits until retirement from the

Board.” Ms. Lindberg therefore has a financial interest in remaining a member of the Board of Directors of GSC. It is not apparent from the online material how board remuneration is calculated by the Committee.

4. GSC’s website includes a page entitled “Preferred Pharmacy Network.” This page features the sub-heading “High-cost specialty drugs pose a significant financial challenge,” followed by a statement that:

“As an increasing number of biologic and specialty drugs are introduced, many people’s lives are changing for the better. However, these typically high-cost specialty drugs are posing a significant financial challenge for Canadian public and private drug plans and their members.

GSC’s preferred pharmacy network (PPN) for specialty drugs limits the financial impact of these high-cost specialty drugs and ensures those taking these drugs receive the treatment support they need.”

This webpage highlights that GSC has a corporate interest in the cost of specialty drugs, and may be negatively affected by the price of specialty drugs like Soliris. This page also makes clear that GSC has an interest in passing on to plan members costs-savings achieved through the corporation’s “preferred pharmacy network.”

5. The “Group Products” heading on the GSC website leads to a page entitled: “We’ve Always Been Different,” that explains how GSC is uniquely situated to “safeguard plan member health while providing the accuracy and expertise necessary for plan sponsors to realize measurable cost savings and guarantee the long term sustainability of their benefit plan.” [Underlining added.]

6. Under a sub-heading entitled “Innovative claim management strategies... that work,” GSC states:

"we work with our clients to customize both the 'big picture' plan and the day-to-day details – to improve health outcomes while managing costs. Our claim management strategies work because we are our own Pharmacy Benefit Manager (PBM) and we:

...

Control drug pricing with a national drug pricing policy and instant drug price updates". [Underlining added.]

These passages demonstrate that GSC has a critical financial interest in ensuring low drug prices with "a national drug pricing policy."

7. GSC has a clear financial interest having drug prices controlled by the Board. As a director of GSC, Ms. Lindberg is required by statute and under the common law to fulfill a fiduciary duty (or duty of loyalty) and a duty of care towards GSC. Ms. Lindberg's fiduciary duty to GSC is the primary source of her conflict of interest as a director of GSC and CEO of the Board.

8. The statutory fiduciary duty of a director is codified at Subsection 122(1) of the *Canada Business Corporations Act* ("CBCA")¹:

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.²

9. In *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461 (S.C.C.), the Supreme Court of Canada held that:

¹ *Canada Business Corporations Act*, RSC 1985, c C-44, s. 122(1).

² *Canada Business Corporations Act*, RSC 1985, c C-44, s. 122(1).

"[t]he first duty has been referred to in this case as the 'fiduciary duty'. It is better described as the 'duty of loyalty'... This duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the 'duty of care'. Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs."

10. In *Rakowski v Malagerio*, [2007] OJ No 369, 84 OR (3d) 696 (Ont Sup Ct) at paras 51-52, Justice Perell reviewed the common law standards for non-profit corporation directors' duties:

[51] In *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461 (S.C.C.) at para. 35, Major and Deschamps, JJ. discussed the duty of directors of corporations and stated:

The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that has been imposed on them to manage the assets of the corporation in pursuit of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly, and loyally; see K. McGuiness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.

[52] Major and Deschamps, JJ. were speaking about directors of business corporations, but their words were apt for directors for not-for-profit corporations, who also have fiduciary obligations to the corporation of which they are directors. In *Directors Duties in Canada* (3rd ed) (Toronto: CCH Canadian Ltd, 2006), Barrie Reiter discusses conflicts of interest with respect to non-profit corporations and states:

A conflict of interest occurs where a personal interest is sufficiently connected with public or professional duties that it results in a reasonable apprehension that the personal interest may influence the exercise of professional or public responsibilities. Conflicts of interest can arise for directors when they or their friends or family stand to benefit financially from the actions of the board of directors, or when a director serves two or more organizations that may have adverse interests. As conflicts of interest can be both direct and indirect, directors must be vigilant in thinking about and identifying possible personal conflicts of interest.

11. There are many motivating factors that can lead to a conflict of interest. In *Schlenker v Torgrimson*, 2013 BCCA 9, the court assessed whether two elected officials were in a conflict when they voted to award two service contracts to not-for-profit corporations of which they were directors. In overturning the decision of the lower court, Justice Donald held:

[32] As mentioned, my principal difference of opinion with the judge is in what I consider to be his too narrow construction of the phrase "a direct or indirect pecuniary interest".

[33] By limiting the interest to personal financial gain, the chambers judge's interpretation missed an indirect interest, pecuniary in nature, in the fulfillment of the respondents' fiduciary duty as directors. The result of applying that narrow interpretation to the facts was to defeat the purpose and object of the conflict of interest legislation.

[34] The object of the legislation is to prevent elected officials from having divided loyalties in deciding how to spend the public's money. One's own financial advantage can be a powerful motive for putting the public interest second but the same could also be said for the advancement of the cause of the non-profit entity, especially by committed believers in the cause, like the respondents, who as directors were under a legal obligation to put the entity first.

[50] As directors of the Societies, the respondents were under a fiduciary duty to put the Society's interests first. Directors of societies, by virtue of their position, have an indirect interest in any contract a society is awarded. When the respondents moved and voted in favour of resolutions that benefitted their Societies through the granting of contracts, arguably contracts the Societies might not have been awarded had the councillors not also been directors, their duties as directors to put the Society's interests first were in direct conflict with their duties as councillors to put the public's interests first. These circumstances encompass the mischief the legislation was aimed at, namely, a conflict of interest in deciding money resolutions. The public is disadvantaged by the conflict, whether the respondents derived any personal gain or not, because the public did not have the undivided loyalty of their elected officials.³ [Underlining added.]

12. The holding in *Schlenker v Torgrimson* demonstrates that a director's desire to advance the financial interests of a non-profit corporation, leading that individual to compromise their loyalty to the public, is a sufficient motive to find a conflict to exist. The

³ *Schlenker v Torgrimson*, 2013 BCCA 9 at paras 32 – 34, 50.

facts of *Schlenker v Torgrimson* are of assistance in this case. The public and regulated industry has a right to expect the undivided loyalty of the Chair, who oversees “an independent, quasi-judicial body created by Parliament...to balance consumer protection and affordable health care with the trade and industrial development objectives (research and development, investment) of pharmaceutical patent legislation.”⁴ [Underlining added.]

13. In a recent application for directions by the London Humane Society, Granger J. stated that “[d]irectors of not-for-profit and charitable organizations are subject to fiduciary duties at common law... While most litigation in this area focuses on for-profit corporations, various academic texts apply the same concept to the directors of not-for-profit corporations.”⁵

14. Both Justice Perell, in *Rakowski v Malagerio*, and Mr. Stern, in the present case, referred to Barry Reiter’s *Directors Duties in Canada* as an instructive text. At paragraph 15 of his written submissions, Mr. Stern quotes Reiter to suggest that Ms. Lindberg is not biased because GSC is a not-for-profit corporation, and “cannot operate with the aim to increase value, maximize shareholder returns or generate personal gain.”⁶ The most recent edition contains the following language:

“The duties of directors are found both in common law and in legislation. In general, the common law duties that are applicable to directors and officers of for-profit corporations are applicable to those of not-for-profit corporations as well.”⁷

⁴ PMPRB Website, *Roles and Responsibilities of Board Members*, included at Exhibit “E” of the Affidavit of Anna Di Domenico, sworn 15 Sept. 2015.

⁵ *London Humane Society, Re*, 2010 ONSC 5775 at para 19.

⁶ *Written Submissions*, para 15.

⁷ *Directors Duties in Canada* (4th ed.) (Toronto: CCH Canadian Ltd, 2009) at 590.

15. The general common law duties of directors that Reiter cites as applying equally to not-for-profit and for-profit corporation directors include both the fiduciary duty and the duty of care. Reiter states that the fiduciary duty, also known as the duty of loyalty, “requires directors to give the corporation’s best interests unqualified priority over their personal interests or other competing claims... In general terms, this means that actual or apparent conflicts of interest or self-dealings must be avoided and that confidentiality must be maintained.”⁸ [Underlining added.]

16. As with for-profit corporations, directors of not-for-profit corporations and charities are in a fiduciary relationship to the corporation. “A fiduciary relationship is characterized by the duties of loyalty, utmost good faith, and the avoidance of conflicts of interest.”⁹ As evidence of the seriousness of the responsibility embodied in a fiduciary relationship, Reiter cites *Austin v Habitat Development Ltd*, (1992), 114 NSR (2d) 379 (NS CA). In that case, Justice Freeman quoted with approval *Fiduciary Duties In Canada* by Mark Vincent Ellis:

“The law requires the fiduciary to act in a manner consistent with the best interests of the beneficiary in all matters related to the undertaking of trust and confidence. As a corollary to the heightened degree of loyalty required, the actions of the fiduciary will be viewed with a strictness unknown to most other areas of law. It is the fact of a departure from adherence to the beneficiary's best interests, rather than an evaluation of the fiduciary's motive in the departure, that constitutes a breach of fiduciary duty. It is in this sense that the absence of malice will not validate a repugnant act.”¹⁰

17. In defining conflicts of interest for a director of a not-for-profit corporation, Reiter writes, “[a] conflict of interest occurs where a personal interest is sufficiently connected

⁸ *Directors Duties in Canada* (4th ed.) (Toronto: CCH Canadian Ltd, 2009) at 43.

⁹ *Directors Duties in Canada* (4th ed.) (Toronto: CCH Canadian Ltd, 2009) at 595.

¹⁰ *Austin v Habitat Development Ltd*, (1992), 114 NSR (2d) 379 (NS CA) at para 13.

with public or professional duties that it results in a reasonable apprehension that the personal interest may influence the exercise of professional or public responsibilities.”¹¹

18. Alexion submits the conflicts in this case are clear and obvious. Ms. Lindberg's duty to GSC compels her to prioritize low drug prices because she has to “put that entity first”. Her statutory mandate as Chair of the Board, however, requires her to “balance consumer protection and affordable healthcare with...trade and industrial development objectives” of the *Patent Act*. Her fiduciary duty to GSC is incompatible with her duty to be objective and balanced in exercising her duties under the *Patent Act* in relation to members of the regulated industry.

Dated: 15 September 2015

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¹¹ *Directors Duties in Canada* (4th ed.) (Toronto: CCH Canadian Ltd, 2009) at 596.

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