Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Andrew Kazina

Heard: October 5, 2021 by electronic hearing in Winnipeg, Manitoba
Decision and Reasons (Motion): February 9, 2022

DECISION AND REASONS
(Motion)

Hearing Panel of the Prairie Regional Council:

Sherri Walsh	Chair

Appearances:

Justin Dunphy	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Audrey Smith	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Jonathan Kroft	)	Counsel for Respondent
Adele Domenco	)	Counsel for Respondent
Andrew Kazina	)	Respondent

I. OVERVIEW

1. On August 9, 2021, the Respondent's counsel sent a letter to both MFDA Staff ("Staff") and the Hearing Panel ("the Panel") advising that they were seeking additional disclosure from Staff with respect to 9 listed items and would be seeking summonses from the Panel for 17 proposed witnesses. They further advised that upon issuance of those summonses they would attempt to speak to the witnesses with a view to narrowing the list of individuals they may actually call to testify at the Hearing on the Merits (the "Hearing").

2. Several months before making this request, on April 19, 2021 the Respondent had sent a letter to Staff, attaching a list of the 17 witnesses he proposed to call to testify at the Hearing, together with Will-Say statements for each of those witnesses.

3. At that time, Staff objected to the Respondent calling some of the witnesses because they were of the view that the majority of the witnesses did not have any relevant information to share in this matter and had no firsthand information of the facts and allegations at issue.

4. Counsel for both parties appeared before the Panel on August 11, 2021 at which time the Panel directed the parties to schedule a hearing in order to make submissions with respect to the matters raised in the Respondent's counsel's letter of August 9, 2021 (the "Interim Hearing").

5. The parties were to appear before the Panel on September 2, 2021 but that appearance was adjourned to September 9, 2021 and was ultimately rescheduled to take place on October 5, 2021.

6. The Hearing which had previously been scheduled to take place from October 12 to October 18, 2021 was adjourned. New dates for the Hearing have not yet been set.

7. In recognition of the fact that proceedings in the context of an administrative tribunal need not be as formal as court proceedings, it was agreed that there was no need for the parties to file formal motions.

8. Prior to the start of the Interim Hearing, both parties filed comprehensive and very helpful Written Submissions and Books of Authorities.

9. The Respondent's counsel attached a 9 page Schedule to their written submission entitled: "Proposed Witness List" which referenced each of the 17 witnesses for whom the Respondent wanted the Panel to issue summonses. These were the same individuals the Respondent had

identified in his letter to the Corporate Secretary of April 19, 2021 and for whom he had provided Will-Say statements.

10. The information in the Proposed Witness List expanded on the information that was contained in the Will-Say statements.

11. For example, for each witness it identified: their position with the Member, their anticipated evidence; and the relevance of their evidence to the allegations set out in the Notice of Hearing.

12. By the time of the Interim Hearing, the Respondent's counsel had narrowed the request for further disclosure, to items 7 and 9 listed in their August 9, 2021 letter.

II. ISSUES

13. The issues which the parties asked the Panel to determine may be characterized as follows:

a) Are 8 of the 17 witnesses the Respondent proposes to call (the "disputed witnesses") able to provide relevant testimony with respect to matters at issue in the proceeding such that the Panel should allow the Respondent to call them to testify at the Hearing on the Merits?

b) What is the test for compelling witness testimony, and applying that test, is the Respondent entitled to compel the witness testimony requested in this case? and

c) Is Staff required to make further disclosure with respect to Items 7 and 9 as set out in the Respondent's counsel's letter of August 9, 2021?

14. With respect to these issues, for the reasons set out below, the Panel finds:

a) The Respondent is entitled to call each of the 17 witnesses he has identified on the Proposed Witness List;

b) The Respondent is entitled to obtain summonses for 16 of those witnesses; and

c) Staff is not required to make further disclosure.

III. THE PARTIES' POSITIONS

Issue #1 - Are 8 of the 17 witnesses the Respondent proposes to call (the "disputed witnesses") able to provide relevant testimony with respect to matters at issue in the proceeding such that the Panel should allow the Respondent to call them to testify at the Hearing on the Merits?

Staff's Position

15. In their written submissions Staff acknowledged that the Respondent is entitled to make full answer and defence to the allegations of misconduct that have been made against him and that the hearing process should uphold a high standard of procedural fairness and natural justice. They submitted however, that the Respondent is only permitted to call witnesses to testify about subject matter that is relevant and material to the issues raised in the Notice of Hearing.

16. In making their submission, Staff acknowledged that the Panel has broad authority under the *Rules of Procedure* to manage the conduct of a hearing on the merits. For example, Rules 1.3(1) and 1.5 state:

> ***1.3 General Principles***
>
> (1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.
>
> ***1.5 General Powers of a Panel***
>
> (1) A Panel may:
>
> (a) exercise any of its powers under these Rules on its own initiative or at the request of a party;
>
> (b) waive or vary any of these Rules at any time, on such terms as it considers appropriate;
>
> (c) issue directions or make interim orders concerning the practice or procedure to be followed during a proceeding, on such terms as it considers appropriate.
>
> Rules 1.3 and 1.5 of the MFDA *Rules of Procedure*

17. Staff further acknowledged that pursuant to Rule 13.1 of the MFDA *Rules of Procedure*, the Respondent has the following rights:

> ***13.1 Rights of a Respondent***
>
> (1) A Respondent is entitled at the hearing of a proceeding on its merits:
>
> (a) to attend and be heard in person;
>
> (b) to be represented by counsel or an agent;
>
> (c) to present documentary evidence;
>
> **(d) to call and examine witnesses;**
>
> (e) to cross-examine opposing witnesses; and
>
> (f) to make submissions. **[emphasis added]**
>
> Rule 13.1 of the MFDA *Rules of Procedure*

18. With respect to the ability to call witnesses, Staff submitted that while the MFDA *Rules of Procedure* permit a Hearing Panel to construe the rules of admissibility in a liberal manner,

evidence that a party wishes to introduce must be "relevant to the matters before it". In support of this they point to Rule 1.6 which states:

> ***1.6 Admissibility of Evidence***
>
> (1) Subject to sub-Rule (3), **a Panel may admit as evidence any testimony**, document or other thing, including hearsay, **which it considers to be relevant to the matters before it** and is not bound by the technical or legal rules of evidence.
>
> (2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.
>
> (3) Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege.
>
> **[Emphasis added]**
>
> Rule 1.6 of the MFDA *Rules of Procedure*

19. Staff acknowledged that relevance will be determined based on the facts and matters at issue having regard to the allegations in the Notice of Hearing and the Respondent's Reply.

20. The Notice of Hearing which was issued in this matter alleges that the Respondent has committed the following violations of the By-laws, Rules or Policies of the MFDA:

> **Allegation #1**: Between February 8, 2002 and October 5, 2017, the Respondent engaged in outside business activities that were not disclosed to and approved by the Member by operating businesses that provided tax and financial planning services to individuals, and marketing, franchising and other consulting services to businesses, contrary to the policies and procedures of the Member and MFDA Rules 1.2.1(d)1 [now 1.3.2], 2.1.1, 2.5.1, 2.10 and 1.1.2.
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> **Allegation #2**: Between January 2012 and October 5, 2017, the Respondent recommended and accepted approximately $257,500 for investment in a business that he operated from at least eight clients and at least two non-clients, thereby engaging in securities related business that was not carried on for the account of the Member or processed through the facilities of the Member, contrary to the policies and procedures of the Member and MFDA Rule**s** 1.1.1, 2.1.1, 2.5.1, 2.10 and 1.1.2.
>
> **Allegation #3**: Between January 2012 and October 5, 2017, the Respondent solicited approximately $232,500 from at least eight clients that he used to finance and operate his business and commingled the money with his personal savings in bank accounts that he held in his own name or jointly with his wife, thereby engaging in personal financial dealings with clients that gave rise to a conflict of interest that he failed to disclose to the Member or address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rule**s** 2.1.4 and 2.1.1.
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> **Allegation #4**: Between no later than 2006 and October 5, 2017, the Respondent provided false or misleading information to the Member in responses to questions on annual compliance questionnaires from the Member, contrary to MFDA Rule 2.1.1.

21. In his Reply, the Respondent stated, among other things that:

- at all material times he received verbal authorization by the Member's Division Director to operate a secondary business;
- he was advised he could conduct any other business as long as it did not exceed an average of 10 hours per work week;
- the Member's Branch Managers/Directors had knowledge of his outside business activities;
- at no time during his 26 years with the Member did any Director or Head Office Staff question him about his outside business activities or advise him that he could not continue with those activities;
- during his career with the Member, he was never:
    - advised to cease such secondary business activity;
    - advised that he could not engage in or continue with such activity; or
    - questioned by a Branch Manager and/or Division Director about his responses on annual compliance questionnaires; and
- the policy and practice of the Member was to permit outside business activities similar to those activities in which the Respondent engaged.

22. Staff submitted that merely asserting that a witness has relevant or material evidence about which they will testify does not make it so. In support of this position, they cited *R v. Elliot* in which the Ontario Court of Appeal, in addition to discussing the test for calling Crown Counsel witnesses, discussed the following test for calling witnesses in general:

> (ii) The test for calling witnesses in general
>
> 119 […] Ordinarily, a subpoena will go as a matter of course upon the statement by counsel that a witness has material evidence to give. However, where the subpoena or the right to call a witness is challenged, a mere allegation that the proposed witness has material evidence to give is not sufficient. The party must establish that the witness can give material evidence. Defence counsel made no such showing with respect to the Cumberland Crown counsel. [emphasis added]
>
> *R v Elliot*, [2003] OJ No. 4694 (ONCA), at para. 130

23. Staff also relied on the decision in *R v. Hainsworth* where a defendant wanted to call a former Lieutenant Governor of Ontario as a witness to a criminal proceeding. The Court in that case commented as follows:

> 9 … In my view, Mr. Hainsworth's evidence amounts to mere speculation, personal opinion and allegations that are not founded on evidence. The comments of the Ontario Court of Appeal in *R. v. Harris*, *[1994] O.J. No. 1875*, at paragraph 7, are applicable: "The respondent is speculating that Murphy may have material evidence and, in doing so, he falls short of the test of likelihood. He proposes to go on a fishing expedition with the hope of turning up something useful. This is inappropriate and would only have the effect of disrupting the trial process."
>
> 10 In my opinion, Mr. Hainsworth's assertions are entirely speculative and unsupported. Further, his assertions are flatly contradicted by the highly credible evidence of the three Crown witnesses, which I accept.
>
> 11 Mr. Onley [the proposed witness] has no relevant or material evidence to contribute in this proceeding. His only involvement is the fact that his name shows as one of the many "carbon copies" on the letters. According to the evidence on this motion, that is the entire extent of Mr. Onley's involvement in this matter.
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> *R v Hainsworth*, 2016 ONCJ 425 at paras. 9-11

24. With respect to whether the anticipated evidence of the disputed witnesses was relevant, Staff said that evidence as to whether anyone other than the Respondent carried on outside business activities was not relevant to whether the Respondent breached his obligations to disclose and obtain approval of his own outside business activities and that evidence therefore should be ruled inadmissible to the proceedings.

25. On this point, Staff submitted that to the extent that any of the disputed witnesses were being called to testify about the fact that they had carried on outside business activities, such evidence is neither a defence nor a mitigating factor with respect to whether the Respondent contravened his regulatory obligations as alleged in the Notice of Hearing. Staff cited several cases on this point: *Law Society of Ontario v. Spiegel*, 2017 ONLSTH 188 at para 96; and *R. v. Steinhubl*, 2010 ABQB 602, at para 243-244.

26. With respect to one of the disputed witnesses - MB, whom the Respondent identified as being the individual who hired him when he started work at the Member in 1991, Staff said that because that hiring took place more than a decade before the MFDA Rules came into effect and

therefore before the Respondent became subject to the MFDA's jurisdiction, MB's evidence as to what was discussed at the time the Respondent was hired, is not relevant to the matters in issue.

27. Staff also objected to the Respondent's entitlement to call some of the disputed witnesses on the basis that the Respondent says those individuals had supervisory oversight over him at various periods of time. Staff said that calling those witnesses would be unduly repetitious and their evidence should be inadmissible on that basis. In this regard Staff noted that as part of their case, they would be calling one of the Respondent's proposed witnesses to whom they did not object on the basis of relevance – an individual who had supervisory oversight over the Respondent at one time - WC.

28. In summary, Staff's position was that the disputed witnesses do not offer any relevant admissible evidence that can support the Respondent's defence and the Respondent should not, therefore, be permitted to call those individuals to testify at the Hearing.

Respondent's Position

29. The Respondent's position was that each of the disputed witnesses is expected to give evidence that is relevant to the allegations made against him and the issues raised by him in his Reply and the evidence of those witnesses is therefore relevant to the issues the Panel must decide.

30. In their written submission, the Respondent's counsel pointed out that Allegations #1 and #2 in the Notice of Hearing claim that the Respondent breached the Policies and Procedures of the Member and that these allegations put in issue what the Member's Policies and Procedures actually were, in respect of the matters alleged.

31. They noted that the Respondent in his Reply denied that the written Policies and Procedures of the Member were the policies and procedures which it actually implemented and enforced. Therefore, they submitted, evidence from the disputed witnesses as to what actual policies and procedures were employed and enforced by the Member, is relevant to the allegations made against the Respondent.

32. Respondent's counsel submitted that because Allegation #4 in the Notice of Hearing alleges that certain outside business activity conducted by the Respondent was neither disclosed to nor approved by the Member, this allegation puts in issue whether the Member and its directors/managers were aware of the services the Respondent was providing and whether they expressly or implicitly approved such activity. In this regard, Respondent's counsel said that the

evidence of the disputed witnesses relates to the Member's actual or vicarious knowledge of the Respondent's business activity as referenced in the Notice of Hearing and is, therefore, relevant to the matters at issue in these proceedings.

33. Respondent's counsel said that the disputed witnesses are not being called for the purposes of establishing that other Approved Persons may have committed similar breaches to those alleged against the Respondent. Rather, they are being called to establish that the policies and procedures alleged to have been in place were not the actual policies and procedures that existed at the relevant times.

34. With respect to the issue of undue repetition, Respondent's counsel pointed out that the Allegations in the Notice of Hearing date back as far as 2002 and that during the time he was employed by the Member the Respondent worked with and was supervised by a number of people including the disputed witnesses. As such, they say, information and discussions that the Respondent had with all of the disputed witnesses is material and relevant to his ability to respond to the Allegations at issue.

35. In their written submissions, Respondent's counsel submitted that the anticipated evidence from all of the proposed witnesses, including the disputed witnesses, "is not simply speculation, personal opinion or a mere allegation that they possess material evidence as has been suggested." As set out in the Respondent's "Proposed Witness List", they said the disputed witnesses were individuals who were affiliated with the Member at the same time as the Respondent, worked with him, and in some circumstances had discussions with him about issues which he says are relevant to the Allegations made against him.

36. In particular, with respect to Staff's objection to disputed witness MB, Respondent's counsel submitted that although that individual hired the Respondent at a time which predated the existence of the MFDA Rules, the historical framework MB can speak about will provide context for the Respondent's engagement with the Member. They also pointed out that MB continued to work with the Respondent after the MFDA's jurisdiction came into effect.

37. Respondent's counsel submitted that it will be a question for the Panel to decide in the course of its determination on the merits as to the significance, if any, of what the Member's policies were at the time the Respondent was first hired as compared to what they were when the MFDA's jurisdiction came into effect. Further, they submitted, regardless of what the written policies stated, the Panel will still need to look at the issue of what policies were enforced by the

Member and in what way. Accordingly, they submitted that hearing only from witnesses who are at a high supervisory level as per Staff's suggestion, may not provide the Panel with all the relevant evidence it needs to know.

38. With respect to the appropriate standard to be applied in determining the relevance of a potential witness, counsel for the Respondent submitted that at this stage of the proceedings the threshold is not a high one.

39. In support of this they cited a decision of the Ontario Superior Court of Justice: *Bearden v. Lee,* 2005 CanLII 13453 (ONSC).

40. In that case, in response to the defendant's motion to set aside the plaintiff's successful judgment, the plaintiff had summoned a witness pursuant to Rule 39.03 of the Ontario Rules of Civil Procedure. The rule allows that a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of their evidence available for use at the hearing. The witness, who had not taken part in the original trial, brought a motion to set aside the summons. In deciding that the witness was in a position to offer relevant evidence and his examination should be conducted, the Court looked at the majority's comments in the Ontario Court of Appeal decision: *Payne v. Ontario (Human Rights Commission)*, 2000 CanLII 5731 ONCA where the Court stated:

> Nor do I agree with my colleague Abella J.A.'s conclusion that there is a "heavy onus" or that the party seeking an examination must provide "reasonable, reliable, relevant evidence" to meet the "high threshold." In my view, language of this kind is not apt for a variety of reasons. First, it is inconsistent with *Canada Metal, supra*, and a long line of cases that have followed. Second, there is a distinct risk that if the standard is expressed in these terms, resort to Rule 39.03 would become virtually redundant. Simply put, an applicant for judicial review should not have to prove his or her case before securing access to the very process designed by the Rules of Civil Procedure to adduce evidence.
>
> …
>
> In my view, requiring the applicant for judicial review to satisfy a "heavy onus" by providing "reasonable, reliable, relevant evidence" would effectively deny access to rule 39.03 to anyone who was not already in a position to prove his or her own case.
>
> *Bearden v. Lee*, *supra,* at para. 17

41. The Court in *Bearden* went on to say:

> I accept the formulation of the onus as enunciated by Abella J.A. in *Anglers*; I also accept from *Payne* that the threshold, which was not altered in *Anglers*, is not a high one. It must be more than a "fishing expedition" (*Transamerica Life Insurance Company of Canada v. Crown Life Assurance Co.* (1995), 1995 CanLII 7258 (ON SC), 27 O.R. (3d) 291 (Gen. Div.) at 299), but need be no more than to demonstrate that the proposed examination would be conducted on issues relevant to the pending application (in our case, a motion) and that the proposed witness is in a position to offer relevant evidence (See *Anglers,* and *Transamerica*).
>
> *Bearden v. Lee*, *supra* at para. 17

42. Respondent's counsel submitted that while the comments in *Bearden* were made in the context of seeking to quash a summons, they nonetheless apply to the issue of relevance generally.

43. Respondent's counsel also reminded the Panel of its ability to maintain control of its proceedings and submitted that issues of relevance and repetition are something that the Panel can deal with in a more efficient manner as the evidence is adduced at the Hearing itself.

44. In this regard, they submitted, it is premature for the Panel to determine that a witness' testimony will be irrelevant or unduly repetitious and therefore, not admissible.

Issue 2 – What is the test for compelling witness testimony in an MFDA proceeding? And how it should be applied in this case?

45. The Panel has the power to compel the attendance of Members and Approved Persons and to direct the Member to require the attendance of its employees or agents, pursuant to Section 20.6 of MFDA By-law No. 1:

> 20.6.2 *Attendance or Production*
>
> Every Member, Approved Person and other person under the jurisdiction of the Corporation may be required by a Hearing Panel:
>
> (a) to attend before it at any of its proceedings and give information respecting any matter involved in the proceeding; and
>
> (b) to produce for inspection and provide copies of any books, records and accounts of such person, or within such person's possession and control, relevant to the matters being considered.
>
> 20.6.3 *Required Attendance of Employee or Agent of Member*
>
> In the event that a Hearing Panel requires the attendance before it of any employee or agent of a Member who is not under the jurisdiction of the Corporation, the Member shall direct such employee or agent to attend and to give information or make such production as could be required of a person referred to in Section 20.6.2.

Staff's Position

46. Staff points out that because the wording of the By-law uses the word "may", it contemplates that the Panel has discretion in deciding whether or not to issue a summons.

47. By the time of the Interim Hearing, the Respondent's counsel had acknowledged that the Panel does not have jurisdiction to issue a summons with respect to 1 of the proposed 17 witnesses – MG and they confirmed, therefore, that the Respondent will not be seeking a summons for that individual.

48. With respect to the remaining 16 witnesses, Staff's position is that notwithstanding the Panel's jurisdiction to compel those witnesses to testify at the Hearing, before it does so, the Respondent must satisfy the Panel by means of "clear and cogent evidence" in the form of sworn evidence, that those witnesses will provide evidence that is relevant to the matters raised in the Notice of Hearing.

49. Staff submitted that while a simple Will-Say statement which advises that a party has relevant evidence may be sufficient for the purpose of justifying why the Respondent wants to call that person, if there is going to be a summons issued, something more than just an assertion that a witness has relevant evidence must be provided. They said that while a respondent should not have an onerous burden imposed on them, and should not have to prove their case in order to obtain a summons, there should nonetheless be some evidentiary foundation consistent with the test set out in *Nunweiler (Re),* MFDA File No. 201030, Hearing Panel of the Pacific Regional Council, Decision and Reasons (Motion) dated July 4, 2011, in which the party provides clear and cogent evidence about the proposed testimony.

50. The *Nunweiler* case was the only decision which Staff said, to their knowledge, has been issued by an MFDA panel with respect to the test a panel should follow in determining whether to issue a summons.

51. In that case, before the Hearing on the Merits took place, the Respondent brought two motions: one seeking a finding of reasonable apprehension of bias on the part of the Hearing Panel; and the other seeking an order that the Hearing Panel issue summonses pursuant to Sections 20.6.2 and 20.6.3 of MFDA By-law No. 1.

52. For each of the motions, the Hearing Panel ordered that the Respondent file a Notice of Motion, supporting evidence and an outline of submissions and authorities. It directed Staff to file

any responding materials including any evidence, and an outline of submissions and authorities prior to hearing the motions.

53. After hearing the parties' submissions, the Hearing Panel denied both motions. The reason it denied the Respondent's request to issue summonses was because it found that none of the affidavit evidence he tendered in support of his motion established that the witnesses had any relevant evidence about which to testify.

54. Staff referred to the following statement from the Hearing Panel's decision in that case as to the test for issuing summonses:

> 49. In our view the evidence that should be before a Hearing Panel that is requested to make an attendance or production order should be clear, cogent evidence establishing that the person or persons against whom the order is sought have, or appear to have, relevant evidence bearing on the issues raised in the particular case that is before the hearing panel. Prior to the hearing on the merits commencing, the hearing panel will be guided on what is in issue by the allegations in the Notice of Hearing, and the responses thereto by the Respondent in his Reply, including any admissions by the Respondent. Thus, in this case, the issues are significantly narrowed as a result of the admissions and responses put forward by the Respondent in his Reply.
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> *Nunweiler (Re), supra,* at para. 49

55. Staff also referred to a decision of the Ontario Securities Commission ("OSC"): *Khan (Re),* 2013 LNONOSC 847. In that case the Respondent brought a motion asking the Panel to issue summonses to compel approximately 700 witnesses, to testify at the hearing.

56. The Hearing Panel rejected the Respondent's request and limited him to compelling only a sample of certain groups of witnesses. It described the criteria it relied on for issuing summonses as follows:

> **33** The predominant considerations in determining whether to issue a summons should be procedural fairness, and specifically whether the Applicants are being afforded an opportunity to be heard, the relevance of the evidence to be provided by the witnesses, and whether the evidence provided will be unduly repetitious. (emphasis added)
>
> **34** I agree with Staff's position that the relevance of evidence to the proceeding is framed by the Statement of Allegations. I also accept the test articulated in *R. v. Truscott* that evidence is relevant if it renders the existence or absence of a material fact in issue more or less likely, and irrelevant if it does not make the fact more or less likely or the fact is not material (*R. v. Truscott, supra*).
>
> **35** While this is an administrative proceeding, I also find the court's analysis in *R. v. Fazekas* to be of assistance in these circumstances. In that case, the court found that the

> party seeking to call the witness has the onus of proving that it is probable the witness will give material evidence (*R. v. Fazekas, supra*).
>
> *Khan (Re), supra*, at paras. 33-35, 60-62

57. In light of the OSC's comments about undue repetition, in its Written Submission, Staff again noted that many of the Respondent's proposed witnesses are alleged to have had supervisory oversight over the Respondent over a certain period of time and that because it intends to call the Respondent's former Branch Manager, WC, as well as a witness who is currently employed with the Member, to testify about the Member's relevant Policies and Procedures, the calling of multiple witnesses who had supervisory oversight over the Respondent is unduly repetitious and the Panel should refuse to issue summonses on that basis.

58. Staff acknowledged the general principle from the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 that the Respondent is entitled to a high standard of procedural fairness. They submitted, however, that there is nothing in the *Baker* decision that specifically discusses the requirement to compel witness testimony in the context of procedural fairness or that goes so far as to say that anyone who may be compelled should be compelled.

59. They also cautioned the Panel about trying to move towards a standard that defeats the purpose of an administrative regime which is to provide a setting that is more efficient and cost effective than a court room proceeding while nevertheless ensuring a high standard of procedural fairness for the Respondent.

60. Staff submitted that the purpose of the summons provision set out in the By-law is not to provide a right of discovery as suggested by the Respondent's counsel; rather it is to give a Hearing Panel the ability to compel witnesses to attend and produce documents where they have relevant evidence.

61. Staff submitted there is also a cost efficiency argument that if a party is going to compel witnesses to attend there should be some support that they are actually going to say what the party expects them to say. Otherwise, Staff submitted, it will be a substantial waste of resources and time and effort on everyone's behalf.

62. On questioning from the Panel, Staff acknowledged that one never knows for certain what a witness is going to say, until they actually testify.

63. Finally, Staff submitted that in terms of cost efficiency, although requiring a party to provide evidence and be subjected to cross-examination in order to justify a request for a summons might increase costs at the beginning of the process, it will still be more cost effective than summoning a witness in the hopes that their evidence will be consistent with their Will-Say and then finding out once they come to testify that they do not in fact have evidence which is relevant to the proceedings.

Respondent's Position

64. Respondent's counsel submitted that the concept of procedural fairness and principles relating thereto is fundamental to the issues raised in this Hearing.

65. In support of this they cited the following passage from the Supreme Court of Canada's decision in *Baker:*

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional, and social context of the decision.
>
> *Baker v Canada (Minister of Citizenship and Immigration)*, *supra,* at para. 28
> (Excerpt only)

66. They noted that this principle was previously considered by the Panel in this matter in the context of its decision relating to disclosure where the Panel stated that Respondents to MFDA disciplinary proceedings must be given a full and fair opportunity to participate in and respond to the case Staff brings against them.

> *Andrew Kazina* MFDA File No. 202028 Reasons for Decision (Motion)
> dated January 6, 2021 at para. 58

67. In that decision, the Panel expressed the view that the disciplinary proceedings which are prescribed under and conducted in accordance with the MFDA's By-laws and Rules, including the *Rules of Procedure*, are of a quasi-judicial nature. That, plus the importance of the decisions rendered pursuant to such proceedings to the lives of the Respondents who are affected by them, necessarily requires a high level of procedural fairness, closer to the trial model of proceedings.

68. The Respondent submitted that these considerations are equally applicable to the issues before the Panel in this motion.

69. Respondent's counsel submitted that in determining what is required to achieve procedural fairness on the summons issue, the Panel should take into account the fact that Staff have the power to require Members and Approved Persons, whether current or former, to provide information and/or documentation in the course of Staff's investigation and preparation for a hearing while the Respondent has no such power.

70. The Respondent's counsel highlighted what they described as a "significant imbalance" between the discovery rights available to the MFDA and those available to a respondent. In this regard, they pointed out that while the MFDA has the power to talk to everyone who is an Approved Person or an employee of a Member within the jurisdiction of the MFDA, the Respondent has no such power.

71. With respect to this latter point, Respondent's counsel acknowledged that the purpose of the Panel's authority to issue a summons is to compel relevant evidence and not to promote discovery *per se*. They submitted, however, that because, unlike the MFDA, a respondent has no power to force a witness to speak with them in advance, the issuance of a summons increases the likelihood that a witness who is the subject of the summons will agree to speak with the Respondent before the hearing. In this way, they submitted, not only does the Respondent obtain a level of discovery which puts them on a more level playing field with Staff but the Respondent is also able to determine whether the witness can in fact provide relevant evidence.

72. Respondent's counsel said that the Panel should also consider the fact that the information which the Respondent is seeking by way of disclosure and witness testimony through the issuance of summonses is largely from witnesses who are currently or were formerly affiliated with the Member whom they describe as a "party adverse in interest" to the Respondent, given the nature of the allegations in these proceedings. Respondent's counsel submitted that such witnesses are likely to be "disinclined" to cooperate with the Respondent in providing information that may be adverse to the Member.

73. In response to Staff's position that the Respondent must provide an affidavit attesting to the evidence that the witnesses for whom they are asking the Panel to issue summonses will provide, Respondent's counsel submitted that not only is this not required by the MFDA's *Rules of Procedure,* such a requirement is not consistent with the duty of procedural fairness owed to the Respondent in these proceedings.

74. In their written submission, the Respondent's counsel pointed out that in compliance with Rule 11 of the *Rules of Procedure*, the Respondent, through the Will-Say statements he provided on April 19, 2021 together with the information he set out in the Proposed Witness List, has clearly identified the evidence which he expects to obtain from the proposed witnesses including identifying the issues in the Notice of Hearing to which that anticipated evidence relates.

75. The Respondent's counsel submitted that this is all that the Respondent should be required to show in order to obtain a summons.

76. Consistent with their submissions on relevance with respect to Issue #1, referenced above, the Respondent's counsel submitted that the threshold to be applied in determining the relevance of a potential witness for the purpose of issuing a summons, is not a high one.

77. In their oral submissions, the Respondent's counsel pointed out that the OSC in the *Khan* decision did not require the applicant to provide an affidavit in order to obtain summonses.

78. Their position was that requiring the Respondent to submit an affidavit on which he could be cross-examined would effectively be requiring him to prove elements of his case before he has been able to obtain a summons to speak to witnesses. This, they submitted, would put him in a position where his evidence was being tested in advance of the Hearing and would offend the underlying concept of procedural fairness.

79. With respect to the concern raised by Staff that compelling a number of the proposed witnesses would be unduly repetitious, the Respondent's counsel again said that it is important to consider that these individuals worked with both the Member and the Respondent at different times such that they could confirm what policies and procedures were in place having regard to the various timeframes set out in the Notice of Hearing.

80. They also said that, as they stated in their letter of August 9, 2021, obtaining summonses enhances the Respondent's ability to determine in advance of the Hearing whether he needs to call the witness to testify, in fact.

81. Finally, Respondent's counsel pointed out that by issuing a summons the Panel is not giving up its authority to control the process at the Hearing including making rulings that evidence is inadmissible either because it is not relevant or is unnecessarily repetitious.

Issue #3 – Is Staff required to make further disclosure with respect to Items 7 and 9 as set out in the Respondent's counsel's letter of August 9, 2021?

82. In their letter of August 9, 2021, the Respondent's counsel asked Staff for the following further disclosure:

a) Item 7: a full accounting of all funds withheld from the Respondent by the Member or deducted from funds that would have been payable to the Respondent but for the matters referred to in the Notice of Hearing;

b) Item 9: Disclosure of whether Staff conducted an investigation of the Member in respect of any of the matters raised in the Notice of Hearing and the results of that investigation.

Respondent's Position – Item 7

83. With respect to Item 7, Respondent's counsel submitted that funds that have been withheld by the Member from the Respondent are relevant to the penalty aspect of the Hearing and therefore information about those monies should be disclosed to the Respondent.

Staff's Position

84. Staff pointed out that it generally adheres to the disclosure standard that crown prosecutors are expected to uphold in accordance with the Supreme Court of Canada's decision in *R. v. Stinchcombe*. In that case the Court stated that crown prosecutors prosecuting an indictable offence are expected to disclose all information in the crown's possession or control, whether inculpatory or exculpatory, that is not clearly irrelevant or privileged.

R. v. Stinchcombe [1991] 3 SCR 326 (SCC) at paras. 19-23

85. With respect to Item 7, Staff acknowledged that certain funds withheld or deducted from the Respondent by the Member may be relevant to the penalty portion of the disciplinary proceedings should the Panel ultimately make a finding of misconduct.

86. For example, they said it would be relevant to know whether: the Respondent has paid financial penalties to the Member; compensated individuals who were harmed; had financial amounts owed by the Member to him clawed back to cover compensation the Member paid to affected individuals; or whether the Respondent paid fees to cover heightened supervision imposed as a consequence of any alleged misconduct.

87. Accordingly, Staff advised, it had made a request of the Member to disclose the details of any such amounts to the MFDA and the Member confirmed that there are no amounts withheld or deducted related to the matters raised in the Notice of Hearing, that have not already been disclosed to the Respondent.

88. With respect to the Respondent's reference to Assured Value Program ("AVP") payments that he says the Member has withheld from him, Staff submitted that those payments, like any general compensation from the Member to the Respondent, are a matter of contractual issues between the Respondent and the Member and are not relevant to the matters raised in the Notice of Hearing. Staff submitted that these are not in the same category, for example, as amounts deducted as a result of a financial penalty imposed by the Member or amounts paid towards supervision or compensation to affected clients which occurred as the result of the alleged misconduct.

Respondent's Position – Item 9

89. With respect to Item 9, the Respondent's counsel submitted that this disclosure is particularly relevant to the Respondent's ability to maintain his response to the Allegations. For example, as part of his defence, the Respondent intends to advance evidence relating to the Member's actual and enforced protocols and procedures and to the Member's and/or its directors/managers' knowledge of the Respondent's secondary business activity which was explicitly or implicitly approved. The Respondent's counsel submitted that Staff would have obtained this information as part of its investigation into the Member's supervision of its consultants.

90. Respondent's counsel pointed out that the MFDA has not denied the relevance of any information it obtained during its investigation of the Member but rather has taken the position that in order to protect the integrity of its investigation it has no obligation to disclose that information.

91. They submitted that the disclosure of such information does not jeopardize the integrity of the investigation and any concerns about damaging the reputation of a party who provides information should not override the rights of the Respondent in this case to make a full defence.

Staff's Position

92. Staff acknowledged that it is their practice when they investigate alleged misconduct of an Approved Person to also investigate whether the Member's supervision was satisfactory and, if applicable, whether the Member's complaint handling process was prompt and reasonable.

93. In their written submission, Staff said that in order to protect the integrity of MFDA regulatory investigations and to avoid inappropriately damaging the reputation of any subject of such an investigation, Staff is careful to maintain the confidentiality of its investigations except to the extent that it is necessary to disclose information for the purposes of: advancing an investigation; proceeding with a hearing; or sharing information with law enforcement or regulatory partners, as permitted by MFDA By-Law No. 1.

94. Notwithstanding this confidentiality requirement, Staff advised that if, during an investigation into the conduct of one registrant, Staff acquires documents, information or other evidence relevant to misconduct alleged against a different respondent, they will ordinarily disclose such information to that respondent.

95. In their oral submissions, Staff confirmed this means that they provide "the fruits" of an investigation in the form of documents or other information that is relevant to a respondent in a separate matter, but not the conclusions of that investigation such as, for example, whether Staff intends to bring a proceeding. In Staff's view those conclusions are privileged and would not be relevant to the proceeding against the other respondent.

96. Staff submitted that they have fulfilled their disclosure obligation in this regard and have provided what was available and relevant with respect to the "fruits" of any investigation conducted of the Member's supervision, to the Respondent in these proceedings.

97. During the course of the Interim Hearing counsel for the Respondent confirmed that while they were not seeking disclosure of Staff's internal conclusions, if as the result of Staff's investigation, Staff sent a warning letter to the Member, for example, they believed that would be relevant and should be disclosed.

98. Staff confirmed on the record that anything relevant to the supervision of the Respondent would have been disclosed including any cautionary warning connected to that supervision, if one existed. Staff has nonetheless undertaken to do another review to make sure that it has provided all the relevant disclosure in this regard.

IV. ANALYSIS

99. The *Rules of Procedure* which govern the conduct of MFDA disciplinary hearings held pursuant to Sections 20 and 24 of MFDA By-law No. 1 are aimed at ensuring that such hearings are run in an efficient, cost effective and fair manner.

100. This is reflected in Rule 1.3 of the *Rules of Procedure* which states:

> ***1.3 General Principles***
>
> (1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.

The Panel has taken this Rule as the framework for making its decision with respect to all 3 matters at issue.

Issue #1 - Are 8 of the 17 witnesses the Respondent proposes to call (the "disputed witnesses") able to provide relevant testimony with respect to matters at issue in the proceeding such that the Panel should allow the Respondent to call them to testify at the Hearing?

The Test for Issuing a Summons

101. As part of its submissions made at the Interim Hearing, Staff relied on the Ontario Court of Appeal's decision in *R v Elliot*, *supra,* where, in addition to discussing the test for calling Crown counsel as a witness the court discussed the test for calling witnesses in general:

> (ii) The test for calling witnesses in general
>
> 119 […] Ordinarily, a subpoena will go as a matter of course upon the statement by counsel that a witness has material evidence to give. However, where the subpoena or the right to call a witness is challenged, a mere allegation that the proposed witness has material evidence to give is not sufficient. The party must establish that the witness can give material evidence. Defence counsel made no such showing with respect to the Cumberland Crown counsel. [emphasis added]
>
> *R v Elliot*, *supra*, at para. 119

102. That case dealt with a trial involving charges of second degree murder where the trial judge concluded that the misconduct of the Crown and the police delayed the defendant's trial and therefore violated her *Charter* right to a trial within a reasonable time.

103. After reviewing the trial record the Ontario Court of Appeal held that the trial judge's findings of multiple *Charter* breaches could not be sustained, noting that several of the procedural

and other errors committed by the trial judge revolved around his allowing the defence to call Crown counsel as witnesses. The court held that it is only in exceptional circumstances that Crown or defence counsel will be permitted to call opposing counsel as witnesses saying that it is not sufficient that the counsel may have material evidence to give. The party seeking to call opposing counsel must lay an evidentiary foundation showing that the counsel's evidence is likely to be relevant and necessary.

R v Elliot, *supra*, at para. 114

104. Defence counsel also called Crown Counsel from a separate but related case with respect to the test for calling witnesses in general. The court went on to say that strictly speaking the necessity test did not apply to calling the Crown counsel from a related case, but it was incumbent on defence counsel to show that those counsel had material evidence to give. It was in that context that the court held:

> 119 […] Ordinarily, a subpoena will go as a matter of course upon the statement by counsel that a witness has material evidence to give. However, where the subpoena or the right to call a witness is challenged, a mere allegation that the proposed witness has material evidence to give is not sufficient. The party must establish that the witness can give material evidence. Defence counsel made no such showing with respect to the Cumberland Crown counsel.

R v Elliot, *supra*, at para. 119

105. The court noted that Crown counsel had offered to prepare an agreed statement of facts for to the proposed testimony of the two Crown Counsel from the related case to avoid their having to testify and that that offer should have been pursued.

106. Finally, the court found that when the Crown Counsel from the related case did testify, it became clear that they had no material evidence to give because they were not involved in the defendant's trial and there was no reasonable basis for thinking that their conduct would have led to a breach of the defendant's rights.

R v Elliot, *supra*, at para. 121

107. Looking at the context of that decision as a whole, the Panel finds that it is of limited value to the matters at issue in this proceeding.

108. At the pre-hearing stage, whether a party is seeking to a call a witness to testify or requesting that the Hearing Panel issue a summons compelling a witness to attend the hearing and provide evidence, the test the party must satisfy is the same: they must show that the proposed

witness is in a position to offer evidence that is relevant and material to the matters at issue as framed by the Notice of Hearing and the Respondent's Reply.

109. Typically, the information a party provides when they comply with the requirements of Rule 11 of the MFDA *Rules of Procedure*, will satisfy this test.

110. That Rule states:

> **RULE 11: WITNESS LISTS AND STATEMENTS**
>
> ***11.1 Provision of Witness Lists and Statements***
>
> (1) Subject to Rule 12, a party to a proceeding shall provide every other party with:
>
> (a) a list of the witnesses the party intends to call at the hearing of the proceeding on its merits; and
>
> (b) in respect of each witness named on the list, other than a Respondent who has already provided a statement recorded by the Corporation, either:
>
> (i) a witness statement signed by the witness; or
>
> (ii) a transcript of a recorded statement made by the witness; or
>
> (iii) if no signed witness statement or transcript referred to in sub-Rules (i) and (ii) is available, a summary of the evidence that the witness is expected to give at the hearing.
>
> (2) Where a Respondent intends to testify to matters which were not disclosed by the Respondent in any prior recorded statements provided to the Corporation, the Respondent shall provide every other party with a signed witness statement in respect of the additional matters.
>
> (3) The parties shall comply with the requirements of sub-Rules (1) and (2) at least 14 days prior to the commencement of the hearing.

111. Rule 11 goes on to specify what the content of witness statements should be and what happens if a party fails to comply with the Rule:

> ***11.2 Contents of Witness Statements***
>
> (1) A witness statement, transcript of a recorded statement or summary of the expected evidence of a witness required by Rule 11.1 shall contain:
>
> (a) the substance of the evidence the witness is expected to give at the hearing; and
>
> (b) the name and address of the witness or, in the alternative, the name and address of a person through whom the witness can be contacted. (emphasis added)
>
> ***11.3 Failure to Provide Witness List or Statement***
>
> (1) If a party fails to comply with Rule 11.1, the party may not call the witness at the hearing without permission of the Hearing Panel and on such terms as the Hearing Panel considers appropriate.
>
> ***11.4 Incomplete Witness Statement***
>
> (1) A party may not call a witness to testify to matters not disclosed pursuant to Rule 11.2 without leave of the Hearing Panel and on such terms as the Hearing Panel considers appropriate.

112. In making this ruling, the Panel is guided by the decisions in *Khan (Re), supra* and *Bearden v. Lee, supra* which, although not exactly on point, provide helpful statements about the underlying

principles for admitting and compelling testimony – those principles being ones which require considerations regarding procedural fairness and relevance.

113. The Panel finds that relevance at this stage of the process is determined on a low threshold.

114. While "relevance" is primarily determined by the issues as framed in the Notice of Hearing and Reply, "materiality" relates to whether the proposed information can help, directly or indirectly, to prove a fact in issue.

115. In this regard, the Panel has been guided by statements from the Alberta Court of Appeal in *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2014 ABCA 244.

116. In light of the fact that the *Dow Chemical* case was not referenced by either party in their submissions before the Panel at the Interim Hearing, the Panel provided the case to the parties and gave them an opportunity to provide brief submissions if they wished. The Panel has considered both parties' submissions in reaching its decision.

117. The issue on appeal in *Dow Chemical* was whether certain questions posed by the defendant were relevant and material such that the plaintiff's representatives were required to answer them during the pre-trial discovery process.

118. The Alberta court rules required that parties produce documents and answer questions if the evidence was relevant and material to the matters at issue in the litigation:

> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

The court stated:

> As the wording of the rule implies, relevance is primarily determined by the pleadings, whereas materiality relates to whether the information can help, directly or indirectly, to prove a fact in issue: *Briggs Bros. Student Transportation Ltd. v Collacutt*, 2009 ABCA 17 at para. 10, 100 Alta LR (4th) 17, 446 AR 191; *Weatherill (Estate) v Weatherill*, 2003 ABQB 69 at paras. 16-7, 11 Alta LR (4th) 183, 337 AR 180; *Canadian Natural Resources Limited v ShawCor Ltd.*, 2013 ABQB 230 at para. 18, 90 Alta LR (5th) 169, 559 AR 66. (emphasis added)

Dow Chemical, *supra*, para. 17

119. With respect to the test of materiality, the court went on to state that there is no fixed standard of what is "material"; an element of judgment is required.

Dow Chemical, *supra*, para. 19

120. The court also stated that:

> It is not sufficient for a litigant to show some theoretical line of argument in order to establish "materiality". The case management judge is fully entitled to reject lines of pretrial discovery that are unrealistic, speculative, or without any air of reality.

Dow Chemical, *supra*, para. 21

121. Applying these considerations to the issue of whether the Panel ought to allow the Respondent to call the disputed witnesses to testify, the Panel finds that to satisfy the test for materiality, a party must provide information about the nature of the proposed evidence to show that it can help, directly or indirectly, to prove a fact in issue. The information must show that the materiality of the proposed evidence is more than purely speculative.

122. The Panel finds that at the pre-hearing stage, like the test for relevance, the test for materiality is satisfied on a low threshold.

123. In summary, at the pre-hearing stage, the information that a party needs to provide to satisfy the test of relevance and materiality in order to be entitled to call a witness to testify will typically be consistent with the information they provide to comply with their obligations under Rule 11 of the *Rules of Procedure* although there may be circumstances where other information is required.

124. In summary, to obtain a summons a party must provide information that shows the proposed evidence is relevant and material because it relates to a matter at issue in the proceedings, can help to prove a fact and is not being called on the basis of pure speculation or as part of a mere fishing expedition.

125. To require a party to establish anything more is neither required by the *Rules of Procedure* nor consistent with the requirements of procedural fairness.

Application of the test to the Disputed Witnesses

126. The allegations in the Notice of Hearing span a period of 15 years – from 2002 when the Member joined the MFDA, to 2017.

127. Based on the particulars contained in the Notice of Hearing the factual matters underlying Staff's allegations, as addressed by the Respondent's Reply thereto, cover an even longer period, dating back to October 22, 1991.

128. Having regard to the Notice of Hearing and the Reply, the issues the Panel must determine:

- What policies and procedures the Member had in place; and
- What the Member knew about the Respondent's conduct and activities.

129. The disputed witnesses are all individuals who worked under the Member either as consultants or division directors.

130. Respondent's counsel submitted that the Respondent's purpose in calling all of the witnesses he has identified is based on more than mere speculation as to whether they have material evidence and that Staff's suggestion that the Respondent is calling these witnesses to establish that there were other parties who were also engaging in outside business activities, is not correct.

131. In accordance with the requirement of Rule 11 cited above, the Respondent has provided Staff with a list of witnesses he intends to call and the substance of the evidence each witness is expected to give at the Hearing. He has done this through the provision of Will-Say statements which he provided to Staff on April 19, 2021 and the Proposed Witness List which was attached to his counsel's brief filed in this Interim Hearing. That list contains a chart that identifies for each proposed witness: their position with the Member; their anticipated evidence; and the relevance of that evidence to the allegations in the Notice of Hearing.

132. Having reviewed this information, the Panel is of the view that the Respondent has not only complied with what is required by Rule 11, he has met the threshold for establishing that the disputed witnesses are in a position to provide evidence that is relevant and material to the matters at issue in this proceeding.

133. In the Panel's view, there is nothing more that the Respondent is required to do at this stage of the proceedings to be entitled to call a witness as part of his case.

134. The Panel finds that Staff's request that the Panel limit the Respondent's ability to call the evidence of the disputed witnesses on the ground that their anticipated evidence will not be relevant, is premature. It also asks the Panel to limit the Respondent's ability to defend himself in a manner that is not consistent with affording him procedural fairness.

135. What is clear from the parties' submissions, both written and oral, is that they disagree as to what they expect the witnesses to say; and whether the Panel will decide that certain testimony is relevant or unnecessarily duplicative or even persuasive.

136. In the Panel's view, these are all issues for the Panel to determine as the Hearing on the Merits progresses at which time both the parties and the Panel will be in a better position to make and consider arguments about the admissibility of a witness' evidence, in the context of the Hearing itself.

137. At the Hearing, the Panel has broad authority to control its own process in furtherance of ensuring that the Hearing is run in an efficient, cost effective and fair manner. This includes its ability to limit the evidence which it admits on the basis of relevance. See, for example, the following Rules:

> ***1.6 Admissibility of Evidence***
>
> (1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.
>
> (2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.
>
> (3) Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege.
>
> ***13.3 Evidence by Witnesses***
>
> (1) Subject to Rule 13.4, a witness at a hearing shall provide oral testimony under oath or affirmation.
>
> (2) The Hearing Panel shall exercise reasonable control over the scope and manner of questioning of a witness so as to protect the witness from undue harassment or embarrassment and may disallow a question put to a witness that is vexatious or irrelevant to any matter at issue in the hearing. (emphasis added)

Rule 1.6 and Rule 13.3 of the MFDA *Rules of Procedure*

138. For all of the above reasons, the Panel is not prepared to make any further rulings at this stage of the proceedings with respect to the relevance or admissibility of the anticipated testimony of any of the Respondent's proposed witnesses.

Issue #2 – What is the test for compelling witness testimony and applying that test, is the Respondent entitled to compel the witness testimony requested in this case?

139. Staff has submitted that even if the Panel is prepared at this stage of the proceeding to allow the Respondent to call the 17 witnesses he has identified, the Respondent should be put to an

additional burden before the Panel issues summonses to compel those witnesses to attend the hearing.

140. In particular, Staff submits that a Hearing Panel should only exercise its discretion to issue a summons once it has been provided with evidence from the party seeking the summons, which evidence may be subjected to cross-examination.

141. The Panel disagrees with this submission.

142. As stated above, at the pre-hearing stage, whether a party is seeking to call a witness to testify or requesting that the Hearing Panel issue a summons compelling a witness to attend the hearing and provide evidence, the test the party must satisfy is the same: the party must show that the proposed witness is in a position to offer evidence that is relevant and material to the matters at issue.

143. The Hearing Panel has the power to compel the attendance of Members and Approved Persons and to direct the Member to require the attendance of its employees or agents, pursuant to Section 20.6 of MFDA By-law No. 1.

144. The only criteria that Section 20.6.2 identifies to guide a Hearing Panel in exercising its discretion to issue a summons is that the person will attend and "… give information respecting any matter involved in the proceeding". With respect to producing and providing copies of documents, – those documents must be "relevant to the matters being considered." (Emphasis added)

145. The Panel interprets this to mean that it can issue a summons to anyone who falls within the MFDA's jurisdiction to testify if the Panel is of the view that they have information which is relevant to a matter in the proceedings.

146. The Panel agrees with Respondent's counsel's submission that a determination of what is relevant for the purpose of issuing a summons is based on a low threshold.

147. Requiring a party to satisfy a heavy onus to provide "clear, cogent evidence" in support of a request to secure the attendance of a witness at a hearing would effectively deny the party access to having their matter adjudicated on the basis of putting all relevant evidence before the Panel.

148. The Panel finds that such an onus is neither contemplated by any of the MFDA's By-laws, Rules or Policies nor consistent with the requirements of procedural fairness.

149. Once it has determined it has jurisdiction to issue a summons, the predominant consideration for a Hearing Panel in determining whether to do so, will be relevance.

150. An applicant seeking a summons will need to tell the Hearing Panel the basis for calling the witness including identifying the name of the witness, their location, contact information, a summary of their anticipated evidence and how that evidence is relevant and material having regard to the allegations in the Notice of Hearing and any Reply.

151. This information will typically align with and be contained in the information that a party must provide in order to comply with the requirements of Rule 11.1 of the *Rules of Procedure* referenced above.

152. A Hearing Panel may refuse to issue a summons in circumstances where this information is not provided and/or where it is clear from the information that is provided that the relevance of the proposed witness' evidence to a matter in the proceeding is purely speculative, or that the request for the summons amounts to a pure fishing expedition.

153. The Panel finds that a party is not required to adduce evidence in order for a Hearing Panel to decide whether to exercise its discretion to issue a summons pursuant to Sections 20.6.2 and 20.6.3 of MFDA By-law No. 1.

154. The Panel finds that if a party were subjected to the burden to adduce evidence which could be subjected to cross-examination at the pre-hearing stage of proceedings. there is a distinct risk that a party would essentially be required to prove the elements of their case before the Hearing on the Merits has begun.

155. Staff was only able to point to one decision from an MFDA Hearing Panel on this subject: *Nunweiler*, *supra,* which was a 2011 decision of the Hearing Panel of the Pacific Regional Council.

156. It appears that the Respondent in that case did not object to the Hearing Panel's requirement that he file evidence in support of his request for summonses and, therefore, the issue as to whether such evidence is even required, was not considered by the Hearing Panel.

157. Of further note is the fact that most of the Hearing Panel's reasons in that decision focused on Staff's objections to the affidavit the Respondent filed in support of his request for a summons. Those objections included arguments that the affidavit itself was improper - that significant portions of it were inadmissible and clearly not within the personal knowledge of the affiant.

158. For these reasons, the Panel finds the decision in *Nunweiler* to be of limited assistance to the issues in this matter.

159. A more helpful authority is the decision of the Ontario Securities Commission ("OSC"): *Khan (Re)* referenced above.

160. In that case, the OSC confirmed that pursuant to its Rules of Procedure, its decision to issue a summons was a discretionary one and was conditional upon the relevance of the proposed evidence. It also stated that it could exclude relevant evidence if it determined the evidence would be unduly repetitious.

161. The applicant in that case brought a motion to support a request that approximately 700 witnesses be summonsed to testify at a merits hearing. It argued that it had a legal right to bring before the OSC and examine the following categories of witnesses: i) 679 account holders referenced in the Statement of Allegations; ii) 5 Staff members; iii) several chief executive officers and staff at brokerage houses; iv) Staff witnesses; and v) an individual account holder and 12 of the individual family members.

162. In support of his application, the applicant simply filed a brief one page document by email which contained general submissions in relation to the five categories of individuals that he argued would be required to appear for the merits hearing. The OSC noted that in this material the applicant did not even identify the names and addresses of all of the proposed witnesses; nor provide detailed submissions on the relevance of the witness categories.

163. The OSC found, therefore, that the applicant's submissions did not provide a sufficient basis for it to determine that the evidence sought to be tendered from all 679 account holders, for example, would be relevant to the allegations or that the evidence that those account holders might give would be directed at rebutting the allegations of staff. It further found that it was not persuaded that the evidence would not be unduly repetitious.

164. As discussed earlier in these Reasons, the OSC did allow the applicant to call a representative sample of each group of account holders that might provide relevant evidence

including a maximum of 18 account holders. Ultimately, however, the tribunal determined that there was insufficient information upon which to actually issue any summonses because, as noted above the applicant had only identified a limited few by name.

165. The Panel notes that in dealing with the criteria for issuing summonses generally, the OSC did not require that the applicant provide it with evidence such as an affidavit which could be the subject of cross-examination, in order to decide whether to exercise its jurisdiction to issue a summons.

166. Instead, the OSC simply said that the party seeking a summons must "articulate the basis" for calling the witness, citing with approval the decision in *Axcess Automation* which required the applicants to provide details with respect to witnesses they sought to be summonsed, including a list of proposed witnesses, their locations, witness summaries and submissions regarding the relevance of the proposed witnesses, stating:

> While the threshold for issuing a summons is generally considered to be low, the Commission may request that the party seeking a summons articulate the basis for calling the witness. In *Axcess Automation*, the Commission required the Applicants to provide details with respect to certain witnesses sought to be summonsed after the hearing had commenced. It requested:
>
> > a list of their proposed witnesses, their locations, witness summaries and submissions regarding relevance of the proposed witnesses to assist us [the panel] in determining whether to grant leave to permit certain witnesses to testify pursuant to subrule 4.5(4) of the [*Rules of Procedure*]
> >
> > (*Re Axcess Automation LLC, supra* at para. 53)
> >
> > *Khan (Re), supra* at para 32

167. The OSC went on to say:

> **33** The predominant considerations in determining whether to issue a summons should be procedural fairness, and specifically whether the Applicants are being afforded an opportunity to be heard, the relevance of the evidence to be provided by the witnesses, and whether the evidence provided will be unduly repetitious.
>
> **34** I agree with Staff's position that the relevance of evidence to the proceeding is framed by the Statement of Allegations. I also accept the test articulated in *R. v. Truscott* that evidence is relevant if it renders the existence or absence of a material fact in issue more or less likely, and irrelevant if it does not make the fact more or less likely or the fact is not material (*R. v. Truscott, supra*).

> **35** While this is an administrative proceeding, I also find the court's analysis in *R. v. Fazekas* to be of assistance in these circumstances. In that case, the court found that the party seeking to call the witness has the onus of proving that it is probable the witness will give material evidence (*R. v. Fazekas, supra*).
>
> *Khan (Re), supra,* at para. 27

168. During the Interim Hearing, the Panel asked Staff what more they would expect an affidavit to say with respect to the testimony of the proposed other witnesses than what had already been set out in the "Will-Say" statements provided. Their answer was that the Respondent should set out evidence which identifies the source of his information, how he knows about conversations that occurred between individuals or about certain meetings that were conducted, and whether his evidence was based on first-hand information or evidence he heard from other people.

169. The Panel disagrees.

170. Requiring a Respondent to adduce such evidence in support of a request to secure the attendance of a witness, in advance of a hearing, would effectively deny the Respondent access to having his matter adjudicated on the basis of putting all relevant evidence before a Hearing Panel.

171. Similar to the Panel's findings with respect to Issue #1, the Panel finds that if a party were subjected to the additional burden to adduce evidence which could be subjected to cross-examination at the pre-hearing stage, there is a distinct risk that a party would essentially be required to prove the elements of their case before, the Hearing on the Merits has begun.

172. This is neither contemplated by any of the MFDA's By-laws, Rules or Policies nor consistent with the requirements of procedural fairness.

173. Further, it creates a layer of pre-hearing process which does not ensure the most efficient, cost-effective process consistent with procedural fairness.

174. In saying this, as the Panel noted above the majority of the Hearing Panel's Reasons for Decision in *Nunweiler* focused on Staff's objections to the contents of the affidavit which the applicant filed in support of his request for a summons.

175. In the Panel's view, the *Nunweiler* decision is, therefore, a good example of how requiring a party to provide evidence in order to obtain a summons does not secure the most expeditious and cost-effective process – even aside from any considerations of fairness.

176. With respect to the submissions Respondent's counsel made about pre-hearing discovery, the Panel confirms that the purpose of Sections 20.6.2 and 20.6.3 of By-law No. 1 is to facilitate the production of relevant evidence at a hearing - not to offset Staff's power to conduct examinations and investigations; nor to enable any kind of pre-hearing discovery.

177. However, the Panel acknowledges counsel for the Respondent's submissions that a summons can have a certain practical effect on the efficiency of the Hearing and agrees that it may make it more likely that a witness will speak with the Respondent in advance of the Hearing which, in turn, would give the Respondent the ability to consider whether the witness' evidence will be both useful to their defence and not be unduly repetitious.

178. The Panel encourages the Respondent to make that consideration in advance of the Hearing in this matter.

179. At the Interim Hearing, Staff also submitted that in deciding whether to use its power to compel a witness to testify the Panel should consider the witness' convenience.

180. In this regard, the Panel finds that any potential inconvenience to a witness having to testify, when balanced with the ability of a party to make full answer and defence will not be the basis for a Panel's refusal to issue a summons.

181. Further, the MFDA's *Rules of Procedure* have always allowed for a witness to participate by electronic means and in this COVID era, conducting hearings where some or all of the witnesses participate remotely from the convenience of their own office or home has become routine. Any witness can request the ability to testify in this manner.

Application of the test to the request for summonses for the Proposed Witnesses

182. Applying the test referenced above, the Panel finds that the Respondent is entitled to seek summonses for the 16 proposed witnesses which fall within its jurisdiction to compel.

183. Having regard to Staff's supplementary submissions regarding the application of the decision of the Alberta Court of Appeal in *Dow Chemical, supra*, the Panel finds that the proposed witnesses are in a position to provide relevant evidence which can help, directly or indirectly, to prove a fact in issue in these proceedings.

184. In making this determination, the Panel emphasizes that issuing a summons does not mean it no longer retains the authority to make determinations at the Hearing about the admissibly of evidence.

185. A Panel always retains the authority to control its proceedings. At the Hearing, counsel can still make any objections they wish regarding the admissibility of a witness' evidence and the Panel can make rulings to limit or exclude evidence on grounds which include that the evidence is not relevant or is unduly repetitious.

186. Finally, the Panel reminds the parties that to the extent the Panel finds that any party has unduly prolonged the Hearing by calling witnesses whose evidence is either not relevant or is unduly repetitious, the Panel's determination may be reflected in an order for costs.

Issue #3 – Is Staff required to make further disclosure with respect to Items 7 and 9 as set out in the Respondent's counsel's letter of August 9, 2021?

Item 7

187. Staff acknowledged that if findings of misconduct are made in this case, it may be relevant to the penalty portion of the disciplinary proceeding to know about such matters as whether the Respondent: has paid financial penalties to the Member; or compensated individuals who were harmed; or had financial amounts the Member owes to him clawed back to cover any compensation it paid to affected individuals.

188. Staff advised that it has asked the Member to disclose the details of any such amounts and that the Member has confirmed that there are no such amounts withheld or deducted relating to the matters raised in the Notice of Hearing that have not already been disclosed to the Respondent.

189. Staff's position is that any other financial dealings between the Member and the Respondent are a matter of contract between those parties and are not relevant to these proceedings.

190. The Panel agrees. With respect to Item 7, the Panel is satisfied that Staff has provided the relevant disclosure and no further disclosure will be ordered in this regard.

Item 9

191. With respect to Item 9, based on the discussions between counsel which occurred on the record at the Interim Hearing, counsel for the Respondent said he was satisfied that Staff has complied with this request.

192. In light of this exchange the Panel does not need to make any further order.

193. The Panel looks forward to meeting with the parties to schedule dates for the Hearing on the Merits.

DATED this 9th day of February, 2022.

"Sherri Walsh"
Sherri Walsh
Chair

DM 870082