

Reasons for Decision (Motion)

File No. 202028



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: November 9, 2020 by electronic hearing in Winnipeg, Manitoba
Reasons for Decision (Motion): January 6, 2021

**REASONS FOR DECISION
(Motion)**

Hearing Panel of the Prairie Regional Council:

Sherri Walsh

Chair

Appearances:

Francis Roy

) Senior Enforcement Counsel for the Mutual
) Fund Dealers Association of Canada
)

Andrew Kazina

) Respondent
)
)

I. INTRODUCTION

1. The Mutual Fund Dealers Association of Canada ("the MFDA") commenced a disciplinary proceeding in respect of Andrew Kazina ("the Respondent") by Notice of Hearing dated June 4, 2020.
2. A first appearance was held on August 11, 2020 as the result of which the Hearing Panel ("the Panel") made an Order which set a date for the hearing of the matter and dates by which each of the parties was to comply with their respective pre-hearing obligations.
3. The first of these obligations required that the Respondent deliver and file a Reply to the Notice of Hearing on or before September 4, 2020. The Respondent complied with this obligation.
4. MFDA Staff ("Staff") was to provide disclosure to the Respondent on or before September 30, 2020; with the Respondent to provide any reciprocal disclosure to Staff on or before October 30, 2020.
5. Staff did not provide its disclosure to the Respondent, however, until October 22, 2020.
6. Not having received disclosure as per the Panel's Order of August 11, 2020, the Respondent filed 2 motions. In the first motion, the Respondent sought an order that the dates set out in the Order of August 11, 2020 be revised, because he was not able to comply with his own obligations arising from that Order, in light of Staff's delay.
7. In his second motion, the Respondent sought an order to strike the MFDA's right to use the documents comprising its disclosure and to dismiss the MFDA's proceedings against him in their entirety.
8. The Respondent requested that the hearing of both motions proceed as a written hearing.
9. However, pursuant to Rule 6.3(4) of the MFDA's *Rules of Procedure*, as Chair of the Panel I required the hearing to proceed by way of an electronic hearing in order to ensure that I fully understood the Respondent's reasons for bringing the motions including hearing his response to Staff's written submissions. I felt that doing this would afford more fairness to the Respondent.

10. For the reasons set out below, I have dismissed the Respondent's second motion to have the proceedings against him struck out or, in the alternative, to prohibit the MFDA from being able to rely on its documentary disclosure. Instead, so as to ensure the Respondent is afforded procedural fairness, I have issued an Order which sets a new date for the hearing along with a revised timetable for the parties by which to complete their respective pre-hearing procedural obligations.

II. FACTS

11. Following the first appearance of this matter on August 11, 2020, I issued an Order that the hearing of the matter on its merits take place on January 13 and 14, 2021 ("the Order").

12. The Order also provided the following timetable for the parties to complete their respective pre-hearing steps:

- the Respondent shall deliver and file a Reply to the Notice of Hearing on or before September 4, 2020;
- Staff shall provide disclosure to the Respondent on or before September 30, 2020;
- the Respondent shall provide any reciprocal disclosure to Staff on or before October 30, 2020;
- Staff shall deliver to the Respondent on or before December 4, 2020:
 - a list of expected witnesses it intends to call during the hearing on the merits in this matter (the "Staff witness list"); and
 - a Statement of Expected Evidence for all witnesses on the Staff witness list; and
- the Respondent shall deliver to Staff on or before December 18, 2020:
 - a list of expected witnesses he intends to call during the hearing on the merits in this matter (the "Respondent witness list"); and
 - a Statement of Expected Evidence for all witnesses on the Respondent witness list.

13. The Respondent filed his Reply to the Notice of Hearing, in compliance with the time lines set out above.

14. Staff did not, however, provide the Respondent with its disclosure on or before September 30, 2020, in accordance with the terms of the Order.
15. At the hearing, Staff advised that the reasons for this delay were two-fold, relating to:
- a) personal and family health matters; and
 - b) work complications arising from changes related to the COVID-19 pandemic.
16. Staff acknowledged that they did not advise the Respondent of the anticipated delay until after the deadline for providing its disclosure had passed.
17. On October 13, 2020, the Respondent advised the MFDA Corporate Secretary that he wished to file a motion.
18. On October 16, 2020, Staff wrote to the Respondent advising that although they had had issues getting the disclosure out, they anticipated being in a position to send it to him by the end of the following week. They apologized for the inconvenience and advised that they would be happy to discuss any accommodation the Respondent required.
19. On October 22, 2020, Staff provided the Respondent with disclosure, in electronic form.
20. On October 29, 2020, Staff wrote to the Respondent again indicating that after reviewing the Respondent's first Notice of Motion which sought an amendment to the dates set out in the Order, they consented to the Respondent providing his disclosure at a later date and suggested a deadline of November 30, 2020.
21. Staff also indicated they were prepared to discuss further options if the Respondent so wished and were amenable to having his motion proceed on consent.
22. They further advised that they would be able to deliver their witness list and Statement of Expected Evidence to the Respondent in the next couple of weeks, in advance of the December 4, 2020 deadline set out in the Order.

23. On October 30, 2020, the Respondent proceeded to file the material for his second motion with the Corporate Secretary and told Staff that he preferred to deal with the issue after the Panel had heard his motion.

III. RESPONDENT'S POSITION

24. Although the Respondent had filed 2 motions, he made it clear that he wanted the Panel to focus its attention on the remedy he sought in the second motion, namely that the Panel dismiss the proceedings against him entirely or in the alternative prohibit the MFDA from relying on its disclosure.

25. In support of his request, the Respondent pointed out that Staff had not given any reason for its delay in providing him with its disclosure and that its failure to comply with the terms of the Order violated his procedural rights.

26. When asked at the hearing whether he had suffered any prejudice or disadvantage as a result of Staff's delay, the Respondent told the Panel that he operates a business and that he had set aside the first week of October and taken time away from his business to be able to review Staff's disclosure during that time. The delay, he said, caused him to unnecessarily take time away from work which he can ill afford to do financially and this caused him stress. He also stated that he is partially disabled which affects his ability to represent himself in these proceedings in any event.

27. He confirmed having received the material electronically, on October 22, 2020, and said that although he had expected to receive the material in hard copy he had no difficulty accessing the material in electronic form.

28. He advised, however, that he had not looked at the contents of the disclosure not only because of the time required to review them but also because the material indicated that it was subject to an implied undertaking not to be used in any other proceedings. Not being a lawyer, he said he was not certain of the significance of that warning, given that he might be contemplating becoming involved in other litigation.

29. He said that he was waiting to hear the Panel's decision before making inquiries as to the significance of the implied undertaking.

30. The Respondent's primary submission to the Panel was that his procedural rights had been violated because of Staff's failure to comply with the August 11, 2020 Order which, if not enforced, he submitted, would be meaningless. In response to a question from the Panel, he also said that he doubted that he could be ready for the scheduled hearing dates of January 13 & 14, 2021.

IV. STAFF'S POSITION

31. Staff acknowledged that it was late in providing disclosure and that that delay may have had an impact on the Respondent.

32. It submitted, however, that the effect of the delay could be remedied by allowing an extension of time for the Respondent to comply with his own procedural obligations.

33. Staff submitted that not only had the Respondent not brought forward evidence of actual prejudice but he had also not cited any precedent in support of his assertion that the proceedings against him should be dismissed.

34. Staff further submitted that the amount of time remaining before the commencement of the hearing on the merits on January 13, 2021 allowed for sufficient time to uphold the Respondent's right to natural justice and procedural fairness.

35. It submitted that although it had not provided disclosure to the Respondent by September 30, 2020, the dismissal of these proceedings is unwarranted for the following reasons:

- a) The Respondent had not alleged, claimed, explained or otherwise demonstrated prejudice caused to him by Staff's late delivery of pre-hearing disclosure;
- b) The right of the Respondent to procedural fairness in this case had not been denied or unreasonably constrained; and
- c) The primary goal of securities regulation is the protection of the investing public. In furtherance of that goal, the Hearing Panel has a broad discretion to make determinations in the public interest. There is a heightened obligation on the

Hearing Panel to ensure that contested disciplinary proceedings are determined in an open and transparent manner and a proceeding should not be dismissed or stayed pre-maturely, especially where a respondent, as in this case, cannot demonstrate prejudice or a denial of procedural fairness.

V. RULES OF PROCEDURE

36. In support of its submission, Staff started by referring to Rule 1.3 of the MFDA *Rules of Procedure* which states:

1.3 - General Principles

- 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.
- Where matters are not provided for in these Rules, the practice may be determined by analogy to them.

(Emphasis Added by Staff)

37. Staff also pointed to Rule 1.7(1) of the *Rules of Procedure* which says that “No proceeding or document, hearing, decision or step in a proceeding is invalid only by reason of a defect or irregularity in its form”.

38. Rule 2.2 provides that the Panel at any time on such terms as it considers appropriate, may extend or abridge the time for the performance of any obligation under the *Rules of Procedure*. Accordingly, Staff submitted, the Panel has the ability to extend the time for providing documentary disclosure.

39. In making its submission, Staff also pointed to Rule 10.1 of the MFDA’s *Rules of Procedure* which only requires that the MFDA make disclosure by no later than 14 days before the hearing:

10.1 Obligation to Disclose Documents and Items – Corporation

(1) The Corporation shall, as soon as reasonably practicable after service of the Notice of Hearing, and in any case at least 14 days prior to the commencement of the hearing of the

proceeding on its merits, provide the Respondent with copies of all documents, and a list of items other than documents, that the Corporation intends to rely on at the hearing.

VI. LAW ON PROCEDURAL FAIRNESS

40. Staff acknowledged the law is clear that the Respondent is entitled to procedural fairness.

41. Citing the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)* [1999 2 SCR 817 paras.21-23] Staff submitted that the content of the duty or corresponding right to procedural fairness in the administrative law context will vary depending upon the circumstances, the nature of the decision being made, and the process followed in making it.

42. As the Supreme Court of Canada stated in that case:

“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, supra, at para. 28

43. Staff acknowledged that the requirement for mutual pre-hearing disclosure serves a number of purposes, all of which are consistent with the goals of procedural fairness as reflected in the *Rules of Procedure*, stating that mutual pre-hearing disclosure, among other things:

- a) allows the parties to prepare the full and fair presentation of their respective cases at a hearing on the merits;
- b) allows the parties to better understand the issues in the proceeding;
- c) facilitates the narrowing of issues;
- d) allows the parties to identify and resolve evidentiary issues that may arise at the hearing;
- e) facilitates settlement;
- f) permits more reliable estimates of the time required to conduct the hearing; and
- g) as a result of all of the above, minimizes the time required, resources required, and cost of the hearing, to the benefit of the MFDA, its membership and of the parties.

44. Staff also referred the Panel to a recent decision of the Alberta Court of Appeal: *R v Robinson*, 2020 ABCA 361 in which a criminal defendant sought a reversal of his conviction at trial on the basis that, among other things, the Crown had provided incomplete or late pre-hearing disclosure. In denying the defendant's appeal and upholding his conviction, the Court stated:

[39] While the case law on the topic is not extensive, the obligation should be on the prosecuting Crown to make disclosure "within a reasonable time": *R. v Girimonte* (1997), 1997 CanLII 1866 (ON C.A.) 37 OR (3d) 617 at p. 625, 121 CCC (3d) 33 (CA). What is reasonable will depend on the nature of the information, and the point in time in the legal proceedings when the information came into the possession or control of the prosecuting Crown. For example, information that is relevant to a potential guilty plea by the accused should be disclosed prior to that plea being taken: *R. v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326 at pp. 342-43. Information potentially relevant to the credibility of a witness (such as a prior statement by that witness) should be disclosed within a reasonable time after receipt, and in any event prior to the testimony of that witness.

[40] The law does not require instantaneous disclosure, although the prosecuting Crown should obviously be sensitive to the progress of the prosecution...

R. v. Robinson, 2020 ABCA 361 at paras. 39-40

45. Staff submitted that although it did not provide disclosure by September 30, 2020 as ordered by the Panel, it did provide extensive documentary disclosure to the Respondent on October 22, 2020, thereby fulfilling its continuing disclosure obligations well in advance of the hearing on the merits. Accordingly, Staff submitted that the Respondent has been given more than ample and reasonable time to review Staff's disclosure and prepare his own case in response.

46. Staff further submitted that notwithstanding the fact that the disclosure is substantial, only a fraction of the documents are in fact relevant to its case and that that would be made clear once it provided its witness statements to the Respondent.

47. In summary, Staff submitted that the Respondent had not demonstrated any prejudice which could not be cured by allowing him an extension of time to provide any reciprocal disclosure; nor had he established that his right to procedural fairness had been violated.

48. Staff confirmed that it was willing to consent to any reasonable request to allow the Respondent an extension of time in which to make his own disclosure.

49. It submitted that it would be inconsistent with the public interest to dismiss or prematurely stay this disciplinary proceeding which has been commenced by Staff in furtherance of the MFDA's mandate to protect investors especially in light of the fact that the Respondent cannot demonstrate or establish that he has suffered prejudice or harm as the result of Staff's actions.

VII. ANALYSIS

50. The main issue for the Panel to determine in these two motions is whether Staff's failure to provide documentary disclosure to the Respondent in accordance with the deadline set out in the Panel's Order of August 11, 2020, has compromised his right to participate in these proceedings such that it should grant his request to have the proceedings against him be dismissed entirely or, in the alternative, to preclude Staff from relying on its documentary disclosure.

51. The law is clear that the duty to afford procedural fairness to participants in administrative law proceedings such as the hearing in this matter, is of fundamental importance.

52. As the Supreme Court of Canada stated in *Baker, supra*, however, the existence of a duty of fairness does not determine what requirements will be applicable in a given set of circumstances.

53. The duty of fairness is flexible and variable and depends on an appreciation of the context of the particular statutory or regulatory scheme and the rights affected.

Baker, supra, at paras.21&22

54. In saying this, the Court emphasized that:

“... the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.”

55. The Court recognized that several factors have been identified as being relevant to determining what is required by the duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. The Court stated:

“The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.”

Baker, supra, at para.23

56. Another factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.

Baker, supra, at para.25

57. The list of factors to be considered in determining what constitutes compliance with the duty of fairness, is not exhaustive.

58. As the Supreme Court stated:

“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, supra, at para.28

59. In the Panel’s view, 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.

60. That fact, 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.

61. Consistent with this requirement, 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. This can only be achieved if they are given the benefit of full and timely disclosure of the case they have to meet.

62. The MFDA's *Rules of Procedure* set out a number of pre-hearing requirements including, for example, Staff's obligation to disclose documents and provide witness lists and statements, on certain time lines. These *Rules* are designed to reflect the common law duty of procedural fairness which is owed to a respondent, as prescribed by the Supreme Court of Canada in the *Baker* decision, *supra*.

63. The purpose of the deadlines prescribed by the Panel's Order of August 11, 2020, was to ensure that the parties and, in particular, the Respondent were afforded the right to procedural fairness as required by the common law and the MFDA's *Rules of Procedure*.

64. The Panel accepts the Respondent's submissions that Staff's delay in providing disclosure caused him inconvenience and concern and impeded his ability to comply with his own deadline for providing reciprocal disclosure.

65. Ultimately, however, the Panel finds that there is no evidence that Staff's delay in providing disclosure has caused the Respondent to suffer such prejudice that fairness requires that the proceedings against him be struck out or that the MFDA not be allowed to rely on its disclosure at the hearing on the merits.

66. Fairness does require, however, that the Respondent be given an extension of time in which to provide any reciprocal disclosure. Further, to ensure that the Respondent has sufficient time to prepare his response to the MFDA's case against him, and be able to participate fully in the proceedings, the Panel finds that fairness requires that the proceedings be re-scheduled to a later date.

67. It should be noted that at the end of the motions hearing, the Panel told the Respondent that he should address the concerns he raised about the significance of the implied undertaking upon which Staff made its disclosure, as soon as possible so that that would not impede his ability to participate in these proceedings.

68. For all of the above reasons, the Panel made the following Order at the conclusion of the hearing:

- the hearing of this matter is re-scheduled to be heard on February 24 & 25, 2021 by way of video conference;
- the Respondent must provide any documentary disclosure to Staff by December 21, 2020;
- Staff would still provide its list of witnesses and witness statements to the Respondent by December 4, 2020; and
- the Respondent will provide his witness list and expected evidence to Staff by January 29, 2021.

DATED this 6th day of January, 2021.

“Sherri Walsh”

Sherri Walsh
Chair

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