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: Jeffrey Gordon Cox

Heard: November 24, 2015 in Winnipeg, Manitoba
Reasons for Decision (Motion): February 16, 2016

REASONS FOR DECISION
(Motion)

Hearing Panel of the Prairie Regional Council:

Sherri Walsh	Chair

Appearances:

David Babin	)	Counsel for the Mutual Fund Dealers Association of Canada
Jeffrey Cox	)	Not present either in person or through a representative

BACKGROUND

1. This matter involved a motion made by Staff of the Mutual Fund Dealers Association of Canada ("Staff") for an Order declaring that Staff had satisfied its disclosure obligations to the Respondent, or alternatively, an Order stating that it was not required to provide the Respondent with disclosure.

2. Staff also requested that the Panel grant an Order abridging the time for service of the Motion.

3. On November 24, 2015, the matter was heard by me alone, pursuant to Section 19.13(b) of By-law No. 1 of the Mutual Fund Dealers Association of Canada ("MFDA").

4. Prior to the hearing, Staff filed a Motion Record consisting of a Notice of Motion and the Affidavit of Alan Currie, Manager of Investigations for the MFDA Prairie Region. It also filed the Supplementary Affidavit of Anne Dyer, Senior Administrative Assistant for the MFDA Prairie Region, together with written submissions and a Book of Authorities.

5. Staff appeared during the teleconference and made a lengthy oral submission. The Respondent did not attend the Motion, either in person or through a representative.

6. Based upon the submissions made by Staff at the outset of the hearing and for the reasons set out below, I granted Staff's request to abridge the time for service of the Motion. Staff then proceeded with its submissions on the substantive issues.

7. Following completion of those submissions, I made an Order requiring Staff to send the Respondent a letter advising him one more time, that he had a right to receive and or make arrangements to review Staff's disclosure and that if he did not avail himself of that right the Hearing on the Merits would still proceed.

8. Here are my reasons for that Order.

FACTS

Issuance and Service of the Notice of Hearing

9. The Notice of Hearing in this proceeding was issued on June 17, 2015

10. On July 21, 2015, the Notice of Hearing, an accompanying letter from Staff, dated July 21, 2015, a copy of the MFDA's Rules of Procedure ("Rules of Procedure") and the MFDA guide to the Disciplinary Hearing process were personally served on the Respondent.

11. The letter from Staff among other things, advised the Respondent of his right to receive disclosure stating:

> "Prior to the commencement of the hearing, you are entitled to receive from the MFDA copies of the documents and witness statements that the MFDA will be relying on at the Disciplinary Hearing."

12. The letter also invited the Respondent to contact Staff, either by telephone or email to arrange delivery of the disclosure materials.

13. The Respondent replied to Staff that same day, July 25, 2015, by email. He indicated that he had destroyed the documents with which he had been served, would not be showing up for anything and ended by saying: "I DON'T CARE".

14. He also indicated that if another person came to his premises without his knowledge or acceptance beforehand, they would be dealt with as trespassers. He asked that Staff stop sending him material.

First Appearance and Subsequent Orders

15. The first appearance was to be held by teleconference pursuant to Rule 5 of the Rules of Procedure, on August 11, 2015. Staff provided the Respondent with the dial-in details for that appearance on August 7, 2015, by email.

16. I presided over the proceeding on August 11, 2015 sitting as a Panel member alone pursuant to Section 19.13(b) of MFDA By-law No. 1.

17. The Respondent did not appear either in person or through a representative.

18. Although the Notice of Hearing stated that a first appearance in the matter was scheduled to occur on August 11, 2015, the letter from Staff which accompanied the Notice of Hearing indicated that the first appearance was scheduled to occur on August 20, 2015. This was not correct.

19. Not only was there a discrepancy between what was stated in the Notice of Hearing and in Staff's accompanying letter, regarding the date for the first appearance, the Notice was not served within the timeframe required by the Rules of Procedure.

20. Rule 7.1(2) requires that a Notice of Hearing be served at least 30 days prior to the commencement of the hearing or the date of the first appearance, unless the Hearing Panel orders otherwise. In this case, because of the discrepancy in information in the material that was served on the Respondent and the fact that the Respondent was self-represented, I was not prepared to abridge the time for service of the Notice of Hearing.

21. Accordingly, on August 11, 2015 I ordered that the first appearance be adjourned to September 1, 2015 and that the Respondent be served with notice of the new date.

22. Before such service took place, on August 14, 2015, the Respondent sent an email to the MFDA's Hearings Manager indicating that he had not received the email of August 7, 2015 which contained the dial-in details for the first appearance, until August 14, 2015. The Respondent also advised that he believed the first appearance was to be held on August 20, 2015 and that he would be unable to attend that appearance because he planned on turning himself in to the Winnipeg Police Service on that date.

23. On August 21, 2015, a copy of the Order I made on August 11, 2015 was sent to the Respondent along with a news release issued by the MFDA which advised of the adjournment of the first appearance to September 1, 2015.

24. On August 24, 2015, Staff contacted the Winnipeg Police Service and was advised that although the Respondent had turned himself in to the Police, he was not remanded into custody.

25. On September 1, 2015, the first appearance was held by teleconference. The Respondent, although duly served with notice, did not appear either in person or through an agent or counsel.

26. At the first appearance, I ordered that the hearing on the merits be scheduled to take place on December 3, 2015. I also ordered that Staff provide the Respondent with pre-hearing disclosure, including copies of all documents and a list of all items, other than documents upon which Staff intends to rely at the hearing, by no later than November 5, 2015.

27. On September 10, 2015, Staff sent the Respondent a copy of the Order I issued on September 1, 2015 together with a news release issued by the MFDA, which confirmed that the hearing on the merits would take place on December 3, 2015.

28. On October 1, 2015, Staff sent the Respondent a copy of a news release which indicated that the location for the hearing on the merits would be the offices of the Manitoba Securities Commission, in Winnipeg.

29. The Respondent replied to Staff that same day by an email in which he stated that he did not care if he ever got his license back. He again asked Staff to stop sending him material.

30. The Respondent did not file a Reply to the Notice of Hearing.

Arrangements for Disclosure

31. On October 29, 2015, Enforcement Counsel sent the Respondent a letter asking the Respondent to contact him by November 4, 2015 to advise if the Respondent wished to review any documents that Staff intended to rely upon at the hearing on the merits. Staff's letter referred to this Panel's Order of September 1, 2015, which, among other things, required Staff to provide pre-hearing disclosure to the Respondent, by no later than November 5, 2015.

32. The letter from Staff went on to say:

> "To date, you have not filed a Reply, and your written correspondence with Staff has indicated that you do not wish to participate in the Disciplinary Proceeding. As a result, and pursuant to MFDA Rule of Procedure 10.1(2), Staff will be making its disclosure available to you for inspection upon request.
> Should you wish to review any documents that Staff intends to rely upon at the hearing on the merits, scheduled for December 3, 2015, please respond in writing by no later than November 4, 2015 at the offices of the MFDA."

33. Staff's letter of October 29, 2015 was delivered to the Respondent both by email and in person.

34. The Respondent replied to Staff's letter the next day by an email dated October 30, 2015. In that email, the Respondent did not ask to receive or make arrangements to review Staff's disclosure but simply demanded to know why the MFDA was continuing to send him correspondence.

35. Following receipt of that response, Staff decided to bring this Motion to clarify its disclosure obligations. Staff served the Respondent with a copy of its Motion Record on November 13, 2015 by email. In the covering email which attached a PDF copy of Staff's Motion Record, Staff indicated that it was requesting an Order relieving Staff of its obligation to provide the Respondent with copies of any documents it intended to rely on at the hearing on the merits. Staff also indicated that the Motion would take place on November 19, 2015 at 11:00 a.m. and asked the Respondent to advise whether he intended to contest or consent to the Motion.

36. The Respondent did not reply to Staff's email of November 13, 2015.

37. On November 16, 2015, Staff sent an email to a process server asking it to serve the Respondent personally with the Motion Record at his last known address.

38. On November 18, 2015, when Staff followed up on this request, it was informed that the process server had not seen the email of November 16, 2015 until November 18, 2015.

39. On November 18, 2015, the process server attempted to serve the Respondent in person at his parents' home, which was the Respondent's last known address. The Respondent's mother answered the door and refused to accept service of the Motion Record or to permit that service be effected on the Respondent.

40. On November 18, 2015, Staff served the Respondent with its written Submissions and Book of Authorities, by email.

41. On November 19, 2015, the Hearing of Staff's motion proceeded before me by teleconference. The Respondent did not make an appearance either in person or through an agent or counsel.

42. At the outset of the Hearing, Staff could not locate or provide me with the email it believed had been sent to the Respondent which would have outlined the call-in details for participating in the Hearing. Accordingly, Staff requested an adjournment of the Hearing to November 24, 2015, indicating that the Motion material would be personally served on the Respondent before that date. I granted that adjournment.

43. Following the teleconference on November 19, 2015, the MFDA Hearings Manager sent the Respondent an email which advised that the Motion would be heard on November 24, 2015. The email provided the Respondent with the date and time of the Motion and the dial-in details for participating in the Hearing.

44. The Respondent replied to the Hearings Manager that same day, November 19, 2015, by an email in which he simply stated "NO".

45. The Respondent also sent an email to Enforcement Counsel that day asking why Enforcement Counsel was still sending him material. In his email, the Respondent asked to be left alone.

46. The Respondent was personally served with a copy of Staff's Motion Record and accompanying letter in the evening of November 19, 2015.

47. The Hearing of this motion proceeded by teleconference on November 24, 2015. The Respondent did not attend the Hearing either in person or through a representative.

Preliminary Issue – Abridging the Time for Service

48. At the outset of the Hearing on November 24, 2015, Staff asked that the Panel grant an Order abridging the service period for Staff's Motion. It stated that although the Respondent was served with the Motion Record by email on November 13, 2015, the Respondent did not respond to Staff until November 19, 2015.

49. The Respondent was served personally with the Motion Record including the Notice of Motion, in the evening of November 19, 2015.

50. Staff submitted, therefore, that out of an abundance of caution, November 19, 2015 should be considered the date on which service was effected on the Respondent. It asked that the time period for service be abridged from the 10 days required under the Rules of Procedure, to 3 business days - commencing November 19, 2015 and running to the date of the Hearing - November 24, 2015.

51. I granted this request. I did so because the Respondent was originally served with the Notice of Motion by email as permitted by the Rules of Procedure, on November 13, 2015. Measured against the ultimate date of the Hearing of the Motion – November 24, 2015, this service was in compliance with the notice period required under the Rules of Procedure. Further, although the Respondent did not reply to Staff until November 19, 2015, his email responses sent that day clearly indicated he had received notice of the Motion prior to being personally served with the motion materials.

52. Given the various successful efforts by Staff to serve the Respondent with notice of this Motion both by email and in person, and in light of the Respondent's responses to Staff on November 19, 2015, outlined above, I found that the Respondent had received sufficient notice of the opportunity to participate in the hearing of this Motion.

53. I therefore allowed Enforcement Counsel to proceed with his submissions on the substantive aspects of the Motion.

Issues

54. The issues in this Motion are as follows:

a. Does Staff have an absolute or automatic obligation to provide pre-hearing disclosure to a Respondent;

b. If the answer to the first question is no, under what circumstances is Staff not obliged to make such disclosure; and
c. If Staff is not required to provide a Respondent with such disclosure in every case, do the circumstances of this case require that Staff provide the Respondent with pre-hearing disclosure?

Staff's Position

55. Staff submitted that the Respondent in this case has made it clear that he does not want to receive disclosure. Staff further stated that it is not uncommon for a self-represented Respondent to fail to engage in the discipline process, leaving Staff wondering what its disclosure obligations are, in such circumstances.

56. Staff advised that this is the first time an MFDA Hearing Panel has been asked to address the issues raised in this motion regarding the nature of Staff's disclosure obligations to a self-represented Respondent.

57. I appreciated, therefore, the thorough and comprehensive submissions that Staff made in addressing the issues before me.

58. Staff's position was that the right to receive disclosure is a contingent right which is dependent on some positive action from the Respondent, even where the Respondent is self-represented.

59. It focused its submissions under three main areas: 1) the common law; 2) the Rules of Procedure; and 3) the discretion that can be exercised by a Hearing Panel pursuant to the Rules of Procedure.

60. First, under the common law, Staff submitted that if a self-represented Respondent has been advised of his right to disclosure, he can waive that right either expressly or through his conduct.

61. In this case, Staff submitted that the Respondent, through his conduct, had indicated that he was waiving his right to disclosure and as a result Staff did not need to provide the Respondent with copies of the documents upon which it intended to rely at the hearing.

62. Next, Staff submitted that based on a reading of the Rules of Procedure, where a Respondent has failed to appear at a first appearance and failed to file a Reply, the Respondent should be precluded from receiving pre-hearing disclosure.

63. In interpreting the Rules of Procedure, Staff identified that the starting point for this Motion is Rule 10.1 which provides:

> "The Corporation will, 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."

64. Staff submitted that although read in isolation this Rule may appear to create an absolute right to disclosure, to read it in isolation would be to ignore the implications of other Rules that interact with Rule 10.1.

65. In particular, Staff submitted that Rules 7.3 and 8.4 act as conditions precedent to the disclosure requirements set out in 10.1.

66. Rule 7.3 provides:

> "Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:
>
> a) proceed with the hearing without further notice to and in the absence of the Respondent."

67. Rule 8.4 provides:

> "Where a Respondent fails to serve and file a Reply in accordance with the requirements of Rules 8.1 and 8.2, the Hearing Panel may do any one or more of the following:
>
> a) proceed with the hearing without further notice to and in the absence of the Respondent."

68. Staff submitted that Rules 7.3 and 8.4 prescribe conditions that must be met before disclosure needs to be provided.

69. Staff submitted that the timing of delivery of disclosure in relation to the service and filing of a Reply and the first appearance is such that disclosure is envisioned to take place last among those three events. Accordingly, Staff argued, if there was an intention on the part of the MFDA to require that disclosure be provided prior to a Reply being filed or to the Respondent attending on a first appearance, Rule 10.1 would have said so.

70. Staff submitted that since the Respondent in this case did not attend the first appearance and did not file a Reply, there was no obligation on Staff's part to provide the Respondent with disclosure.

71. In urging this interpretation of the Rules, Staff highlighted Rule 1.3 which provides:

> "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."

72. In Staff's submission, interpreting the operation of Rules 7.3 and 8.4 to act as conditions precedent to entitlement to disclosure, construes the Rules to secure the most expeditious and cost-effective determination in the circumstances.

73. In support of this position, Staff urged the Panel to consider the use of Staff resources to prepare disclosure which preparation, although not in the instant case, it argued, can be time intensive and expensive. Staff argued that where a Respondent has not asked for disclosure and is clearly not engaging in the disciplinary process, the resources required to produce disclosure are not used in a cost-effective or expeditious way.

74. Staff submitted that the need to make disclosure to a Respondent must be weighed against the judicious use of regulatory resources.

75. In support of this position, Staff cited the decision of the Alberta Securities Commission in *Arbour Energy* where the Panel, in addressing the duty of disclosure stated:

> "However, a Respondent's right to disclosure and a fair hearing must be balanced against other systemic demands, practicalities and the interests of others involved in the securities regulatory proceeding … Administrative tribunals such as the Commission must be increasingly judicious in their use of formal court-like processes in enforcement proceedings to ensure not only that Respondents are accorded natural justice and procedural fairness but also that allegations of contravention of regulatory requirements are handled with due efficiency and effectiveness."
>
> *Arbour Energy (Re),* 2012 ABASC 131 at paras.82 & 83

76. Staff submitted that where a Respondent has engaged in the disciplinary process, balancing the efficient use of Staff resources against a Respondent's right to procedural fairness will militate in favour of providing full disclosure. However, where a Respondent fails to engage in the disciplinary process, this balancing will militate in favour of a Hearing Panel exercising its discretion to waive Staff's disclosure obligations.

77. Finally, Staff directed the Panel to the provisions of Rule 1.5 which provide that a Panel may waive or vary any of the Rules of Procedure at any time, on such terms as it considers appropriate.

78. Staff submitted that the confidential nature of the client documents contained in Staff's pre-hearing disclosure militated against providing them to the Respondent who, it argued, had demonstrated that he would not exercise careful control over any documents provided to him. It referred, for example, to the Respondent's email of July 25, 2015, where he said that he had destroyed the documents that had been served upon him.

79. Staff submitted, therefore, that the circumstances of this case militated in favour of the Hearing Panel exercising its discretion under Rule 1.5 to waive the requirement to provide pre-hearing disclosure to the Respondent.

ANALYSIS

Staff's Obligation to Make Disclosure, Generally

MFDA Rules of Procedure

80. As Staff identified, the starting point for this motion is Rule 10.1. The Rule describes Staff's obligation to disclose documents, as a mandatory obligation:

> ***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.
>
> (2) The Corporation **shall** make available for inspection by the Respondent any item referred to in sub-Rule (1).
>
> [emphasis added]

81. Pursuant to Rule 10.2 a Respondent has a corresponding mandatory obligation to provide the Corporation and any other Respondent with disclosure:

> ***10.2 Obligation to Disclose Additional Documents and Items – Respondent***

(1) A Respondent 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 Corporation and any other Respondent with copies of all documents and a list of all items, other than those already provided by the Corporation, that the Respondent intends to rely on at the hearing.

(2) A Respondent shall make available for inspection by the Corporation or any other Respondent any item referred to in sub-Rule (1).

82. Rule 10.3 sets out the consequences if a party, whether the Corporation or the Respondent, fails to provide disclosure in accordance with Rules 10.1 and 10.2, namely that the party may not rely on the document or item at the hearing without permission of the Hearing Panel:

10.3 Failure to Disclose Documents or Items

(1) If a party fails to provide a document, or make an item available for inspection, in accordance with Rules 10.1 and 10.2, then the party may not rely on the document or item at the hearing without permission of the Hearing Panel and on such terms as the Hearing Panel considers appropriate.

83. Notably, Rule 10.4 provides that nothing in Rule 10 derogates from the Corporation's obligation to make disclosure as required by common law:

10.4 Corporation's Duty to Disclose

(1) Nothing in this Rule 10 derogates from the Corporation's obligation to make disclosure as required by common law, as soon as reasonably practicable after service of the Notice of Hearing.

84. Finally, Rule 10.5 gives a Hearing Panel discretion to make orders and issue directions with respect to the timing and manner of disclosure on such terms as it considers appropriate:

10.5 Order and Directions Concerning Disclosure and Inspections

(1) The Hearing Panel may at any stage of the proceeding make orders and issue directions with respect to the timing and manner of the disclosure of documents and the inspection of items, on such terms as it considers appropriate.

85. Rule 10 makes it clear, therefore, that the Corporation and Staff acting on behalf of the MFDA must comply with the disclosure obligations which are prescribed by the common law.

The Common Law Duty of Fairness

86. Under the common law, the fact that a decision is administrative and affects "the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness …". *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 SCC (para.20)

87. The determination of whether a Respondent has violated the By-laws, Rules or Policies of the MFDA in accordance with the allegations set out in a Notice of Hearing is clearly a decision which affects the "rights, privileges or interests" of a Respondent.

88. There is no question that a discipline hearing conducted pursuant to s.20 and s.24 of MFDA By-law No. 1 is an administrative proceeding to which a duty of procedural fairness applies.

89. As the Supreme Court in *Baker* further articulated, however, the existence of a duty of fairness does not determine what requirements will be applicable in a given set of circumstances. The duty is flexible and variable and depends on the context of the set of circumstances. *Baker supra*, at paras. 21 and 22.

90. Several factors have been recognized in the case law as relevant to determining the nature and extent of the duty of procedural fairness. One important consideration is the nature of the decision being made and the process to be followed in making it:

> "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

91. Another factor to consider is the importance of the decision to the individual. The more important the decision is to the lives of those affected and the greater its impact on that person, the more stringent the procedural protections that will be mandated. *Baker, supra,* at para.25.

92. Another factor is the nature of the statutory scheme and the terms pursuant to which the decision making body operates. Greater procedural protections will be required where there is no appeal procedure provided or where the decision is determinative of the issue and further requests cannot be submitted. *Baker, supra*, at para.24.

93. The legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. If the claimant has a legitimate expectation that a certain procedure will be followed, that is the procedure that the duty of fairness will require. *Baker, supra,* at para.26.

94. An analysis of what the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the decision maker has the ability to choose its own procedure or when the agency has an expertise in determining what procedures are appropriate in the circumstances. *Baker, supra,* at para.27.

95. This list of factors is not exhaustive. As the Supreme Court stated, what is important is to remember that:

> "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 having the 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.

96. Applying the factors listed in *Baker, supra*, to a discipline hearing under s.20 and s.24 of MFDA By-law No. 1:

- the process provided for in the By-law including the nature of the Hearing Panel which makes the determination, involves decision making which resembles judicial decision making;
- the decision reached by a Hearing Panel will have a significant impact on the Respondent whose very livelihood and reputation may be at stake;
- the appeal or review process contemplated under By-law No. 1 is extremely limited; and
- the Rules both stipulate and raise an expectation on the part of the Respondent that he is entitled to receive copies of all documents on which Staff intends to rely in proving its allegations at a hearing on the merits.

97. Based on this analysis, it is clear that the duty of procedural fairness owed by Staff to a Respondent in a discipline hearing under MFDA By-law No. 1 is a significant one.

98. As referenced above, Staff's obligation to provide disclosure in a regulatory proceeding was addressed in the context of a hearing before the Alberta Securities Commission in *Arbour Energy, supra.*

99. In that case where Staff alleged that the Respondents had engaged in conduct contrary to the public interest under the provisions of *The Securities Act* of Alberta, the Respondents expressed concerns regarding the fairness of the proceedings. One of their concerns related to the extent of Staff's disclosure of documents.

100. The Panel in *Arbour* identified that the extent of Staff's obligation to provide disclosure in a securities regulatory proceeding has been evolving since the issuance of the Supreme Court of Canada's seminal decision in *R.* v *Stinchcombe* [1991] 3 SCR 326. That case confirmed that in the context of criminal proceedings Crown counsel has a duty to disclose all relevant information in its possession relating to the investigation of an accused.

101. The Panel in *Arbour* stated:

> "The fundamental principle of fairness that an affected party has the right to know the case it has to meet has been long established in administrative proceedings, but the *Stinchcombe* disclosure duty has met with varying applications in administrative proceedings." *Arbour, supra,* at para.79

102. The Panel then went on to confirm that because securities regulatory proceedings also involve serious allegations and potentially grave consequences, securities regulatory authorities have accepted that the *Stinchcombe* rules of full pre-trial disclosure apply in enforcement proceedings, obliging Staff to disclose to a respondent all:

> "relevant fruits of their investigation of a respondent's alleged misconduct that are in their possession or control. The objective of such full disclosure as is the case in criminal proceedings, is to enable a person alleged to have contravened Alberta securities laws to make full answer and defence to the allegations faced, and to provide for a fair hearing." *Arbour, supra*, at para.81

103. The essential principles of disclosure set out by Justice Sopinka in *Stinchcombe* included the following:

- a Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not; *Stinchcombe, supra,* at para.19
- the obligation to disclose, however, is not absolute. It is subject to the discretion of counsel for the Crown both with respect to the withholding of information and the timing of disclosure; *Stinchcombe, supra,* at para.20
- the obligation to disclose will be triggered by a request by or on behalf of the accused; *Stinchcombe, supra,* at para.28
- provided the request for disclosure has been timely it should be complied with so as to enable the accused sufficient time before election or plea to consider the information; *Stinchcombe, supra,* at para.28
- in the rare cases in which the accused is unrepresented, Crown Counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done; *Stinchcombe, supra,* at para.28

104. I find that the principles relating to disclosure set out in *Stinchcombe* and referenced with approval by the Panel in *Arbour* are equally applicable to a discipline hearing under s.20 and s.24 of MFDA By-law No. 1.

105. They are, therefore, applicable to the issues raised in this matter.

106. In its submissions in this Motion, Staff agreed with the basic principles regarding disclosure as set out in *Arbour* and *Stinchcombe*. Citing the statement in *Stinchcombe* that disclosure must be triggered by a request, however, Staff characterized a Respondent's right to disclosure as being a "contingent" right.

107. It argued that on the facts of this case, where the Respondent has not filed a Reply and has not responded to Staff's offers either to provide disclosure or to make disclosure available for the Respondent to review, the Respondent has failed to trigger his right to disclosure and Staff, therefore, has no obligation to make such disclosure.

108. Staff further submitted that the Respondent in this case has waived his right to disclosure.

109. In addressing its arguments relating to waiver, Staff relied on the decision of the Alberta Provincial Court in *R.* v *Payton*, [2003] A.J. No.1425. In that case the accused argued that because he was self-represented, the Crown owed him a greater disclosure obligation and should have voluntarily made disclosure to him even though he had not requested it.

110. The Crown in that case did not deny the accused's right to disclosure or the Crown's obligation to advise an accused person of such right. It argued, however, that the written notices on the two court forms which had been sent to the accused advising him of his right to disclosure, discharged the Crown's obligation in that regard. The Crown further argued that by ignoring those notices the accused either recklessly or carelessly waived or forfeited his right to disclosure.

111. The Court in *Payton* held that the Crown did not have an automatic duty to provide disclosure. It confirmed that the duty of the Crown is to advise an accused of his right to disclosure. The duty of the trial judge is to determine whether such advice has been given. Depending on the answers to that inquiry, the judge will then want to determine whether the accused has either waived the right to disclosure or received the disclosure he has requested.

112. The Court explained that the automatic tendering of disclosure in a criminal context could prejudice the liberty of an accused who wishes to plead guilty and resolve matters. This is the reason why the obligation to make disclosure must be in response to a request for same and it implies that an accused retains the right to waive disclosure.

113. I find that while Staff in an MFDA discipline proceeding cannot rely on the same rationale for waiting to provide disclosure until a Respondent asks for it, there remain good reasons for not requiring Staff to automatically provide disclosure to a Respondent. The most significant of these is where the Respondent has clearly waived his right to disclosure either expressly or through conduct.

114. I find that it would serve no useful purpose to require Staff to prepare and provide disclosure to a Respondent who has clearly indicated he does not want to receive it.

115. As the Panel in *Arbour, supra*, stated, a Respondent's right to disclosure and a fair hearing must be balanced against other systemic demands and practicalities and the interests of others involved in a securities regulatory proceeding. Administrative tribunals must be increasingly judicious in their use of formal court-like processes in enforcement proceedings to ensure "… not only that respondents are accorded natural justice and procedural fairness but also that allegations of contraventions of regulatory requirements are handled with due efficiency and effectiveness." *Arbour, supra,* at para.83

116. It was Staff's submission that in this case the effective use of Staff resources militated against the provision of documents because the Respondent had made clear that he did not wish to receive them.

117. Further, Staff submitted, the Panel should consider the sensitive nature of the information contained in the disclosure which included information about clients which was of a confidential nature.

118. Staff argued that because the Respondent's communications showed there was a risk he would dispose of the information in a way that did not protect its confidential nature, it would not be appropriate to invest Staff's resources in providing disclosure where there was no assurance the information would be properly maintained. Nor would it be an effective use of Staff resources, it argued, to spend the time to redact confidential information before providing the Respondent with disclosure.

119. I caution that the balancing of the efficient use of Staff resources against a Respondent's rights to disclosure and a fair hearing will generally result in requiring Staff to provide a Respondent with disclosure in accordance with the Rules of Procedure.

120. Given the importance of disclosure to a Respondent's ability to make full answer and defence to the allegations set out in a Notice of Hearing, Staff will only be relieved of its disclosure obligations in the clearest of cases. This is particularly so where a Respondent is self-represented.

121. A Respondent's conduct may amount to a waiver of his disclosure rights thereby relieving Staff of its obligations in that regard.

122. The question then becomes, whether the Respondent in a given case has waived his right to disclosure?

123. Waiver comes into effect when "a party knowingly acts in a manner where he waives or foregoes reliance upon some known right or defect. It is important that the right or defect, as the case may be, be known, since one should not be able to waive rights of which one was not fully aware or apprised." *Marchischuk* v *Dominion Industrial Supplies Ltd.* 1989 CarswellMan 148 at para.6; upheld (1989) 62 Man.R. 2d 240 MBCA; upheld [1991] 2 SCR 61 SCC.

124. As identified above, the Judge in *Payton* found that the written notices the Court sent to the accused, telling him of his right to disclosure, constituted notice of that right, and the Crown had therefore met its obligation in that regard. The Judge cautioned, however, that in the overall context of trial fairness to an unrepresented accused, this was not enough. He stated that whether by the Crown or the Court, some inquiry should have been made to determine whether the accused understood his right to disclosure and whether he wished to assert or waive that right. This was not done. In the circumstances of that case, therefore, the Judge found there was an absence of evidence that the accused had waived his right to disclosure.

125. One should keep this caution in mind when determining whether a Respondent to a disciplinary hearing under MFDA By-law No. 1 has waived his right to disclosure. In my view, before such a finding can be made, Staff and the Hearing Panel must be satisfied that:

a. Staff has taken careful measures to notify the Respondent of his right to disclosure; and
b. having received such notice the Respondent has clearly waived his right to receive disclosure either expressly or through conduct.

126. Where the Respondent is self-represented, Staff has a more stringent level of responsibility to ensure that both aspects of this test are met.

127. That said, there are no special rules of procedure for a self-represented party either at common law or under the MFDA Rules of Procedure, beyond the basic notice requirements prescribed by natural justice. These include being informed of the opportunity to be provided with disclosure.

128. Accordingly, where, upon being given notice of the opportunity to avail himself of his right to disclosure, a Respondent clearly chooses not to avail himself of that right, Staff is not obliged to provide disclosure to him.

129. As the Court of Appeal for British Columbia recently identified in a matter dealing with a self-represented litigant in an arbitration proceeding, self-represented litigants do not have "some kind of special status that allows them to ignore rules of procedure." *0927613 B.C. Ltd.* v *0941187 B.C. Ltd.*, 2015 BCCA 457 (CanLII) at para.64

130. The Court said that the comments applied equally to an arbitration forum chosen by the parties, as to a court process.

131. The Court went on to say: "While some latitude is to be given to self-represented parties who may not understand or be unfamiliar with the arbitration process, an arbitrator, like a judge, is not required to ensure that a self-represented party participate in a proceeding if that party chooses not to do so." *0927613 B.C. Ltd., supra,* at para.65

132. In my view these comments apply equally to a discipline hearing brought pursuant to s.20 and s.24 of MFDA By-law No. 1. So long as it is clear that a Respondent has been informed of his procedural rights and has been given a fair opportunity to take advantage of those rights, a Hearing Panel is not required to ensure that a self-represented party participate in a proceeding if that party chooses not to do so. This includes not forcing a Respondent to receive disclosure he clearly does not want to receive.

133. To summarize:

- Staff is obliged to ensure that a Respondent has been fully informed of his right to receive disclosure in accordance with the Rules of Procedure and the common law.

- Where a Respondent is self-represented Staff must exercise particular diligence and may be required to take extra steps, as ordered in this case, to ensure that the Respondent has been fully informed of his rights.
- Depending on the Respondent's response to such notice, however, and the circumstances of each case, Staff is not obliged to automatically provide disclosure.
- In particular, where a Respondent waives his right to disclosure Staff will be relieved of its obligation to provide disclosure.
- This is true whether the Respondent has counsel or is self-represented.
- Whether a Respondent has waived his right to disclosure, either expressly or through conduct, will depend on the facts of each case.

Staff's Obligation to Make Disclosure in this Case

134. In this case, to determine whether the Respondent has waived his right to disclosure, the questions that must be answered are:

a. did Staff discharge its obligation to give the Respondent notice of his right to receive disclosure? and
b. if Staff discharged its obligation in that regard did the Respondent expressly or by his conduct waive that right?

135. On the facts of this case, I find the answer to both these questions is "yes".

136. I find that the Respondent was advised of his right to receive disclosure as follows:

- On July 25, 2015, Staff served the Respondent with its letter of July 21, 2015 which clearly stated that the Respondent was entitled to receive "copies of the documents and witness statements that the MFDA Staff will be relying on at the disciplinary hearing" and invited the Respondent to contact Staff to arrange delivery of those materials to him.

- on October 29, 2015 Staff sent a second letter to the Respondent which indicated that at the first appearance which was held by teleconference on September 1, 2015 this Panel made an order which required Staff:

    - to provide pre-hearing disclosure, including copies of all documents and a list of all items other than documents that Staff intends to rely on at the hearing of this matter on its merits, by no later than November 5, 2015;

- The letter of October 29 went on to confirm that since the Respondent had not filed a Reply and in his written correspondence had indicated he did not wish to participate in the disciplinary proceeding, Staff would be making its disclosure available to him for inspection upon his request. It asked that the Respondent advise Staff by November 4, 2015 if the Respondent wished to review any documents that Staff intended to rely upon at the hearing on the merits.

137. I further find that having received such notice the Respondent clearly conveyed to Staff that he did not want to receive Staff's disclosure, as follows:

- On July 25, 2015, the Respondent sent an email to Staff acknowledging having received the Notice of Hearing and Staff's cover letter. The Respondent went on to say that he had destroyed the documents and would not be showing up to anything. He also asked Staff to stop sending him material and ended his email by stating: "I DON'T CARE";
- On October 1, 2015, the Respondent sent Staff another email again asking Staff to stop sending him material;
- After receiving Staff's further communications regarding disclosure on October 29, 2015, the Respondent sent an email on October 30, 2015 asking why Staff was still sending him material; and
- On November 19, 2015, the Respondent sent Staff emails again asking why Staff was still sending material. In response to information about how to participate in the hearing of this motion, he replied: "NO".

138. Based on the totality of the evidence, therefore, I find that the Respondent, having had full notice of his right to receive disclosure expressly waived that right,

139. That said, although I determined at the hearing of this motion that the Respondent had waived his right to disclosure, given the seriousness of the allegations which the Respondent was facing and the consequences that could flow from a finding that those allegations had been proven, together with the fact that the Respondent was self-represented, I ordered that Staff give the Respondent one more opportunity to exercise his right to receive disclosure by sending him a letter to that effect, prior to the hearing on the merits. I further ordered that the letter should indicate that if the Respondent failed to exercise his right to receive disclosure the hearing would nonetheless proceed.

140. I have reached my decision by interpreting the Rules of Procedure in a manner which is consistent with the common law principles of procedural fairness and natural justice. I will only make the briefest comment, therefore, with respect to Staff's alternative submissions regarding the operation of Rules 7.3 and 8.4 as conditions precedent to entitlement to disclosure.

141. Rule 10.4(1) stipulates that nothing derogates from the Corporation's obligation to make disclosure as required by common law. In my view, interpreting the Rules of Procedure to suggest that filing and serving a Reply and attending a first appearance are conditions precedent to entitlement to disclosure is not consistent with the common law duty of fairness. There may be instances where the conduct of a Respondent who has not filed a Reply or has not made a first appearance contributes to a finding of waiver, or an exercise of the Panel's discretion to waive or vary any of the Rules of Procedure, however, each case will turn on its specific facts.

142. On the facts of this case, I have found the Respondent did waive his right to disclosure. Both through his written communications and his conduct he made it clear that he was deliberately not engaging in the disciplinary process, including not wanting to receive disclosure from Staff.

143. I find, therefore, that Staff is relieved of its disclosure obligation to the Respondent. It would serve no useful purpose to require Staff to provide the Respondent with copies of documents, including material which contains client information of a confidential nature, which the Respondent has clearly indicated he does not want to receive and is unlikely to maintain in a secure fashion.

144. Based on the totality of the evidence and for all of the reasons set out above, I find that relieving Staff of the obligation to provide disclosure in this case, will secure the most expeditious and cost effective determination of the proceeding on its merits, consistent with the requirements of fairness.

DATED this 16th day of February, 2016.

"Sherri Walsh"

Sherri Walsh
Chair

DM 467043 v1