



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: Michael Andrew Harrigan

Heard: April 7, 2016 in Halifax, Nova Scotia
Decision and Reasons (Motion): April 15, 2016

**DECISION AND REASONS
(Respondent's Motion to Recall Witness)**

Hearing Panel of the Atlantic Regional Council:

Edward W. Keyes	Chair
Ann C. Etter	Industry Representative
Robert G. Malcolm	Industry Representative

Appearances:

Lyla Simon)	For the Mutual Fund Dealers Association of
)	Canada ("MFDA")
)	
Michael Andrew Harrigan)	In person
)	
)	

Introduction

1. During the course of a Disciplinary Hearing, the Respondent brought a motion seeking to recall one of staff's witnesses for additional cross-examination after the witness had completed his testimony (both direct and cross-examination) and been excused by the Panel. The Panel denied the Respondent's motion with these Reasons to follow:

Background

2. Enforcement Counsel with the MFDA conducted direct examination of the witness during the course of three (sometimes partial) days, being September 29, September 30, and October 1, 2015. The Respondent cross-examined the witness over the course of two full days with a break of several days in order to prepare, being October 2 and October 8, 2015, at which time the witness was excused with the caution that he not discuss his testimony with anyone other than his counsel.

3. In January of 2016, mid-hearing, the Respondent filed this motion, which was heard on April 7, 2016 arguing that for fairness reasons he should be permitted to cross-examine the witness further regarding the following issues:

- a) The allegation that the witness had discussed details of the proceeding with persons other than his lawyer over the last several months since the witness testified, in breach of the Hearing Panel's order not to do so;
- b) The witness's business revenues over the last three years;
- c) The allegation that the witness attempted to contact the media during the Nova Scotia Securities Commission proceedings concerning the Respondent, given the anticipated testimony of one of the Respondent's upcoming witnesses; and

- d) Various efforts at recruiting other Plaintiffs to a civil proceeding that the witness is alleged to have made, given the anticipated testimony of one of the Respondent's upcoming witnesses.

4. MFDA staff opposes the Respondent's motion arguing that all relevant issues were addressed with the witness over the course of his two full days of cross-examination. It is staff's position that the issues now raised by the Respondent for which he seeks to recall the witness are in no way relevant to the complaints that have been brought against him.

5. To assist the Panel in deciding the issues on this motion we requested and received from the Respondent the specific questions he wished to put to the witness if he were to be recalled.

Law and Discussion

6. The MFDA Rules of Procedure are silent on the issue of recalling a witness who has completed their testimony. The Rules as set out below, however, do provide direction to a Panel that it has wide discretion to control the proceedings while ensuring fairness to the Parties before it.

7. Rule 1.31 provides:

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

8. Rule 1.5(1)(c) states:

- (1) A Panel may ...

(c) issue directions or make interim orders concerning the practice or procedure to be followed during the proceeding, on such terms as it considers appropriate.

9. Rule 13.2(1) states:

(1) The Order of presentation at the hearing of a proceeding on its merits shall be as follows:

...

(b) The Corporation shall present its evidence and examine its witnesses and the Respondent shall be permitted to cross-examine each of the Corporate witnesses, subject to Rule 13.4;

10. Rule 13.3(2) states:

(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.

11. As the MFDA Rules of Procedure are silent on the issue of recalling a witness, the following decisions of Courts and other Administrative tribunals outlining the circumstances when the recall of a witness is permitted are instructive to the Panel in this matter.

12. In *True Blue Cattle Co. v. Toronto Dominion Bank [2004] A. J. No. 265 (Ct. Q.B.)*, the Alberta Court of Queen's Bench set out a test regarding leave to recall a witness. At paragraph 3, Justice Reed stated:

A trial is a search for the truth, and therefore everything that is relevant should be admissible. However, that does not end the issue. A trial is an orderly process and all evidence is admitted in an orderly fashion. Since the normal order of trials has developed over hundreds of years, it facilitates both the efficiency of the trial process and fairness. Because they are able to predict the trial procedure, parties are able to plan their cases. Disruption of the trial process can have the effect of also disrupting a party's planned attack or defense and can create unfairness. Thus, as a general rule, trials should be run in accordance with the Rules of Court and normal trial procedures unless there is a good reason to depart from them.

13. At paragraph 9, Justice Reed recognized the discretion of the court in some circumstances to permit recall of the witness for further questioning but cautioned that such discretion should only be exercised where "proper grounds" are shown. Justice Reed held that to do otherwise would disrupt the normal trial process and risk unfairness to the opposing side.

14. In *Sheddin v. Patrick* [1861] all E.R. Rep. 724 at 731, as quoted in *Dybongco-Ricardo Estate v. Lee*, [1999] O.J. 5061 (S.C.J.), the court held "the permission to recall a witness is entirely in the discretion of the judges, a discretion usually exercised with great caution, on account of the obvious danger of the proposed evidence being skillfully applied to supply any deficiencies which might have been left in the case...".

15. In *Griffi v. Lee* [2007] O. J. No. 1448 (Ont. S. J. C.) the Ontario Supreme Court set out a number of factors that should be considered when deciding whether to permit the recall of a witness:

- (a) It is fundamental under sub rule 53.01(3), for the moving party to clearly explain why it is proposed that a witness be recalled.
- (b) In the presumably rare event that counsel for a moving party fails to explain why it is necessary to recall a witness, leave should not be granted.

- (c) Where counsel for a moving party has made a conscious and informed decision to conduct his or her case in a certain fashion and then, perhaps because things are going badly, wishes to take a different approach requiring additional evidence from a witness who has already testified, a court probably should not grant leave particularly where the decision is rooted in tactics.
- (d) When considering an explanation as to why a witness is to be recalled, the court must be mindful of maintaining the integrity of the Rules of Civil Procedure.
- (e) In circumstances where counsel for a moving party misapprehends the law and conducts his or her case consistent with the misapprehension, leave is likely to be granted so long as irreparable prejudice is not caused to the other side.
- (f) If recalling a witness is necessary to correct some other mistake, such as misapprehension of the evidence, leave should be granted, however, again, only where there will be no irreparable prejudice to the opposite party.
- (g) Where counsel for a moving party through inadvertence, omits to ask a question or questions of a witness, leave should be granted if, to do so, will not cause irreparable prejudice to the other side.
- (h) Has an intervening event rendered further questions of the witness necessary?
- (i) It is not sufficient that counsel for a moving party desires to put a few more questions to a witness. Recalling a witness is not meant to allow a litigant to polish his or her case. Instead, it is intended to cure a material omission in the evidence of a party such that, to refuse leave, will create the reasonable risk of a complete failure of justice based upon the court record as it stands at the time (in other words, miscarriage of justice).
- (j) What will be the effect upon the opposing party, if leave is given to a moving party to recall a witness? Costs and adjournment will cure most instances of prejudice to the opposing party.

- (k) In the end, after all factors have been considered, one should and look at the whole picture and ensure that a proper balance is struck between the accountability of counsel and the interest of justice. Will the decision of the court be fair overall?

16. In *Breyer v British Columbia Veterinary Medical Assn.* [2011] B.C.H.R.D.T. No. 330, a decision of the British Columbia Human Rights Tribunal, the complainants had filed a complaint against the BC Veterinary Medical Association and an individual alleging that they had been discriminated against under the Human Rights Code. The hearing of the matter was ongoing and the evidence was scheduled to continue at a later date. The Respondents filed an application seeking, among other things, orders that three of the complainants be recalled to be cross-examined on how they had obtained (and possibly used) confidential and privileged communications. The tribunal in *Breyer* held that while it did have jurisdiction to recall a witness (including a party) pursuant to its general powers to control its proceedings, this was “an extremely unusual request” and it was not prepared to grant such an order, in the absence of a sufficient foundation.

17. In *Ricard v. Deputy Head (Canada Border Services Agency)*, [2014] C.P.S.L. R.B. No. 72 the Canada Public Service and Labour Relations Board held that the rules regarding recalling the witness apply equally where a party does not have legal counsel. There, the Grievor’s spouse (who was not legally trained) initially acted as her representative. On the second day of the hearing, following the conclusion of the employer’s case and after the first of the Grievor’s witnesses had testified, the spouse advised that he did not feel competent to continue as the Grievor’s representative. The Grievor subsequently advised that a friend who had been present throughout the proceedings would take over her representation. The adjudicator ruled that the Grievor would not be permitted to recall the employer’s witness for further cross-examination as she had already been given full opportunity to cross-examine them. The tribunal held that the rules of evidence and procedure cannot be “stretched to the point where they cease to apply”.

18. In order for the Respondent to be successful in this motion, he must, in the Panel's opinion, satisfy us that further cross-examination would be probative and assist in the determination of the issues and allegations being brought against him. A witness cannot be recalled simply to allow the party to go on a fishing expedition or to seek answers to questions that are not relevant or probative of the issues at hand. In this case, the Respondent conducted cross-examination of the witness over the course of two full days, which cross-examination included a break of 6 days between the first and second days of cross-examination. In the Panel's opinion, his cross-examination of the witness was detailed and thorough.

Disposition of Motion

19. The Panel asked for and received a copy of the proposed questions that the Respondent intends to put to the witness if he is granted permission to recall the witness. In the Panel's opinion, the proposed questions are not related to the allegations being brought against him nor are they probative of the issues at play in this matter. The proposed questions do not address any material omission, mistake or misapprehension of the evidence. In any event, if the Respondent feels it is important to establish that the witness breached the Panel's order not to discuss his evidence with anyone, he is free to call evidence to establish this fact.

20. In conclusion, the proposed additional questions the Respondent wishes to put to the witness, if recalled, do not relate to the allegations being brought against him by the MFDA. In our opinion, there is no reasonable risk of a complete failure of justice, based on the record to date by not permitting the Respondent to recall the witness for further cross-examination. The Respondent's motion to recall the witness is denied.

DATED this 15th day of April, 2016.

“Edward W. Keyes”

Edward W. Keyes
Chair

“Ann C. Etter”

Ann C. Etter
Industry Representative

“Robert G. Malcolm”

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Industry Representative

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