



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: Conrad Arthur Nunweiler

Heard: May 25, 2011 in Vancouver, British Columbia
Decision and Reasons: July 4, 2011

DECISION AND REASONS
Re: Two Motions Brought by the Respondent,
Conrad Arthur Nunweiler

Hearing Panel of the Pacific Regional Council:

Stephen D. Gill
Sharon Moskalyk
Cecilia Wong

Chair
Industry Representative
Industry Representative

Appearances:

David Halasz)	For the Mutual Fund Dealers Association of
)	Canada
Gilbert Wong)	Agent for the Respondent Nunweiler
)	

Background

1. By a Notice of Hearing dated October 5, 2010 the Mutual Fund Dealers Association of Canada (“MFDA” or the “Association”) commenced disciplinary proceedings against Conrad Arthur Nunweiler (the “Respondent”). A first appearance took place by teleconference before the Hearing Panel on November 9, 2010; the Respondent appeared by his agent, Gilbert Wong. At that time, the Panel ordered that the Respondent file a Reply on or before November 30, 2010, and also directed disclosure of documents, and disclosure of witnesses and witness lists and statements, in accordance with Rules 10 and 11 of the MFDA Rules of Procedure. A Hearing on the merits was scheduled for January 26, 2011. The Respondent filed a Reply dated November 30, 2010 through his agent Gilbert Wong.

2. On January 26, 2011 the hearing was reconvened in the presence of the Respondent, and his agent Gilbert Wong. Counsel for the MFDA and Mr. Wong updated the Panel on the status of the proceedings pursuant to the previous Order of the Panel. On behalf of the Respondent Mr. Wong requested an adjournment and indicated he wished to raise some matters by way of motion, including a motion with respect to reasonable apprehension of bias. The representatives of both parties made submissions to the Panel with respect to the current state of the proceeding, and the hearing of the various matters.

3. The Panel ordered the Respondent to file a new Reply to the Notice of Hearing by February 14, 2011, and directed that the new Reply comply with Rule 8.2 of the Rules of Procedure; specifically the Panel directed the Reply to identify the facts alleged and conclusions drawn by the Association in the Notice of Hearing and put forward the position of the Respondent in compliance with Rule 8.2.1(a) and (b) or 8.2(2), as the case may be.

4. The Panel further directed the Respondent to file and serve witness lists and witness statements in compliance with Rule 11 by February 28, 2011, and specifically directed the Respondent to comply with Rule 11. The Panel also directed the Respondent, as he hadn’t provided a statement to the MFDA, to provide MFDA staff with a signed witness statement from the Respondent by February 28, 2011.

5. The Panel also directed the MFDA to provide the Respondent with any additions to its

witness list and witness statements by March 25, 2011. The Hearing was adjourned to resume by a teleconference on April 7, 2011.

6. The Hearing before the Panel resumed by teleconference on April 7, 2011 and Mr. Wong, agent for the Respondent, advised that the Respondent intended to bring two motions: (1) a motion for a finding a reasonable apprehension of bias on the part of the Hearing Panel; and (2) a motion to obtain an order pursuant to Sections 20.6.2 and 20.6.3 of MFDA By-law No. 1 that certain persons attend before the Panel at the proceedings to give information and produce for inspection books, records and accounts relevant to the matters being considered. The Panel heard submissions from the representatives of both parties.

7. On April 7, 2011 the Panel ordered that the Respondent shall file, for each of the motions he intends to bring, a Notice of Motion, the supporting evidence, and an outline of submissions, and authorities, on or before April 29, 2011. The Panel directed MFDA staff to file any responding materials to the Respondent's motions, including any evidence, an outline of submissions, and authorities, by May 13, 2011. The Panel directed the hearing of the motions on May 25, 2011.

8. The Hearing reconvened before the Panel on May 25, 2011 in the presence of David Halasz for the MFDA, and Gilbert Wong as agent for the Respondent. The two motions were fully argued, and the Panel reserved its decision. This is the Hearing Panel's decision on the two motions.

The Notice of Hearing

9. In the Notice of Hearing, the MFDA alleges the following violations by the Respondent of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between May 2006 and December 12, 2008, the Respondent borrowed monies from at least two clients totaling approximately \$56,300, thereby giving rise to an actual or potential conflict of interest which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegation #2: Between May 2006 and December 12, 2008, the Respondent failed to comply with the policies and procedures of the Member in respect of conflicts of interest and borrowing from clients by borrowing monies from at least two clients and personally guaranteeing at least one of the loans, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

Allegation #3: On October 31, 2008, the Respondent misled the Member by representing to the Member that he had not borrowed from clients, when he knew that to be an incorrect statement at the time and in the circumstances when he made it, thereby interfering with the ability of the Member to conduct a reasonable supervisory investigation of the Respondent's activities and failing to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

Allegation #4: Commencing March 19, 2009, the Respondent has failed or refused to provide documents, information, and a written statement to the MFDA and to attend an interview requested by the MFDA during the course of an investigation, contrary to s.22.1 of MFDA By-law No. 1.

10. The facts alleged by the MFDA in support of the allegations number some 30 paragraphs; it is not necessary at this time to set out all of the factual allegations verbatim. It is sufficient to say that the factual allegations are that the Respondent, while he was an approved person, entered into personal financial dealings with at least five clients in that five clients reported having loaned monies to the Respondent either directly or indirectly through a company that he operated. The MFDA alleges that due to the Respondent's failure to cooperate with the MFDA's investigation, the facts are unknown with respect to three of the five clients. However, the MFDA does give facts in support of loans from client #1 and client #2.

11. With respect to client # 1, the Particulars in the Notice of Hearing allege the following:

6. The Respondent was the sole officer and director of 577760 BC Ltd. (the "Numbered Company"). In or about May 2006, Client #1 loaned \$50,000 to the Numbered Company, which was evidenced by a promissory note from the Numbered Company to Client #1 dated May 18, 2006 (the "Promissory Note").

7. The Promissory Note stated, among other things, that:

- (a) the Numbered Company borrowed \$50,000 from Client #1 for a term of 12 months at a ten percent annual rate of interest;
- (b) the principal was to be repaid on May 15, 2007;
- (c) the Promissory Note was "secured" by another promissory note and a letter of guarantee provided by the shareholders of "Scicorp Systems Inc." to the Respondent and the Numbered Company; and

- (d) the Respondent personally guaranteed the Promissory Note.
8. By September 15, 2007, four months after May 15, 2007, the date when the loan was to be repaid in full, \$48,345.41 remained owing. Client #1 informed IPC during the course of its review of the Respondent's activities that the Respondent intended to repay the remaining balance owing on the loan when he sold a property in which he or his company had an interest.

The Respondent admits paragraphs 6, 7 and 8.

12. With respect to Client #2, the Particulars allege the following:

- 9. On or about May 31, 2007, the Respondent borrowed \$6,300 from Client #2 at a 12% interest rate, which the Respondent repaid on or about August 3, 2009. The loan was evidenced by a promissory note.

13. With respect to Clients #1 and #2, the Particulars further allege:

- 12. The Respondent did not disclose to IPC that he had borrowed monies from any of the clients described above, including in particular Clients #1 and #2.
- 13. By borrowing monies from Clients #1 and #2, the Respondent placed his own interests above those of the clients, thereby giving rise to an actual or potential conflict of interest which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1.

14. The Particulars also alleged:

- 18. The Respondent resigned from IPC effective December 12, 2008. Thereafter IPC determined, through conversations directly with clients, that the Respondent had borrowed monies from at least Clients #1 to #5, as described above.
- 19. The Respondent misled IPC by representing that he had not borrowed money from clients when he knew that to be an incorrect response at the time and in the circumstances when he made it in respect of at least Clients #1 and #2. In so doing, the Respondent interfered with IPC's ability to conduct a reasonable supervisory investigation of the Respondent's activities and failed to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

The Respondent's Reply

15. Pursuant to the directions of the Hearing Panel, the Respondent, through his agent, has filed three replies: one dated November 30, 2010, one dated February 14, 2011, and one dated March 20, 2011 (Exhibit 5). It is our understanding that each Reply supersedes the previous one, and thus Exhibit 5 is the operative Reply of the Respondent to the Notice of Hearing. We will refer to Exhibit 5 herein as the Respondent's "Reply".

16. In his Reply, the Respondent admits the facts alleged and conclusions drawn in paragraphs 1, 2, 6, 7, 8, 14 and 17 of the Notice of Hearing.

17. In the "DENIALS" section of his Reply, the Respondent, except as otherwise noted, denies the facts alleged and conclusions drawn in paragraphs 9, 12, 13, 15, 16 and 19 of the Notice of Hearing. He then qualifies his denials. For the purposes of the first motion, to summarize, the Respondent states in his Reply that **he** did not borrow \$6,300 from Client #2; he alleges that IPC knew about the \$50,000 loan from Client #1 and the \$6,300 loan from Client #2; he alleges that he addressed any actual or potential conflict of interest through his disclosures of the loans to IPC; and alleges further that he made disclosures to IPC in respect of the loans "as required", and "processed the business (i.e. the loans) through IPC as required". He further states that "he complied with IPC's policies and procedures for the reasons outlined previously in his Reply". (See the Reply, DENIALS, paras. 1 to 6).

18. In his Reply, the Respondent also sets out in 18 numbered paragraphs entitled "ADDITIONAL FACTS AND CONCLUSIONS" which he states he intends to rely on at the Hearing. In those paragraphs, the Respondent sets out certain factual allegations with respect to a Mr. Vaughan Spencer ("Spencer") who he states was IPC's Manager of Commercial Credit for Canada, and who was a commercial finance specialist at IPC Save Inc., and a branch manager of IPC. Further, the Respondent alleges that Gary Legault, Chief Compliance Officer for IPC, was Spencer's immediate supervisor. The Respondent alleges that he was encouraged by IPC (no one named) to find commercial loans for Spencer. He alleges that Spencer encouraged the Respondent to raise funds for a company referred to as SciCorp. The Respondent also alleges that Spencer owed a significant debt to CCRA.

19. Further, the Respondent alleges that the structure of the 577760 BC Ltd. (the “Numbered Company”) promissory note and guarantees given to Client #1 was based on advice the Respondent received from Spencer. He alleges that he received advice from Spencer that IPC’s policies in respect of client loans refers specifically to monies borrowed personally by the approved person.

20. The Respondent also alleges that from September, 2006 to December, 2008 Susan Schulze was the Respondent’s branch manager, responsible for supervising his activities as an approved person. We note, however, he does not allege that he informed Susan Schulze of the various loans involving Clients 1 to 5, or that he informed her of his activities via the Numbered Company.

The “Production” Motion

21. The Respondent’s Motion seeks an Order pursuant to Section 20.6.2 and 20.6.3 of MFDA By-law No. 1, that Vaughan Carmen Spencer, Gary Legault, and Stephen Carson each be required:

- (a) to attend before any of its proceedings and give information respecting any matter involved in the proceedings; and
- (b) to produce for inspection and provide copies of any books, records and accounts of such person within such person’s possession and control, relevant to the matters being considered.

22. In the Motion the Respondent further submits that each of the 3 individuals is compellable under the MFDA By-laws, and submits that if it is shown that the witness is likely to produce relevant evidence, a Hearing Panel should require a witness to attend the hearing, and to give evidence and produce records and documents. The Respondent further submits that each of the 3 individuals has records and knowledge of matters, and evidence to give, in respect of the allegations made against the Respondent in the Notice of Hearing.

23. In support of the Motion, the Respondent filed Gilbert Wong Affidavit #2 sworn April 28, 2011 (“G.W. Affid. #2”). G.W. Affid. #2 is 31 paragraphs, and in it Mr. Wong, acknowledges he is the agent for the Respondent, and he states “...in such capacity have knowledge of the matters to which I hereinafter depose. Where I did not have first hand

knowledge of the matter, I have stated the source of my information and belief.” (G.W. Affid. #2, para. 1).

24. Mr. Wong acknowledges that paragraphs 13, 14, 15, and 23 are on information and belief from the Respondent. Thus, Mr. Wong alleges he has first hand knowledge of all the other facts alleged in the Affidavit.

25. Some paragraphs in G.W. Affid. #2 appear to provide facts derived from attached documentation; for example, para. 2, exhibits a document from IPC’s website describing the Investment Planning Counsel group of companies; in para. 3, a copy of the Notice of Hearing; in para. 6, copies of emails from Gary Legault in which in the “header” below his name he provides a description of his position in the various IPC companies; in para. 7, a copy of a registration form from Mr. Spencer; in para. 12, copies of emails describing Mr. Spencer’s position in IPC Save Inc.; in para. 16, copies of documents from the SciCorp website; para. 17, copies of an email from April, 2006 related to SciCorp; para. 18, a copy of an email from May, 2006 with a document; para. 19, a copy of an email of May, 2006; para. 21, a copy of an email from May, 2006 between Spencer and Nunweiler; and various other documents in paras. 24 to 30. In some cases the documents have been produced from a website, and in some cases they appear to be from productions disclosed by the Association as part of its investigatory process.

26. No evidence was submitted by counsel for the MFDA.

Position of the Parties

27. Both parties filed written submissions as directed by the Hearing Panel. Mr. Wong, the agent for the Respondent, submitted that Section 22 of MFDA By-law No. 1 grants the MFDA broad investigatory powers, and submitted that Section 20.6.2 and 20.6.3 of MFDA By-law No. 1, which gives the Hearing Panel the power to require a person to attend before it, and produce records, was primarily to ensure that Respondents to an MFDA Notice of Hearing would be able to access witnesses and documentation that they may not otherwise be able to obtain on their own. The Respondent submits that if he can show that a witness is likely to produce relevant evidence, the Hearing Panel should grant the order requested.

28. The Respondent submitted that Vaughan Spencer has knowledge of business transactions he conducted with the Respondent and the Numbered Company, and would have records in connection with those business transactions. He submitted that Mr. Spencer's involvement was central to the allegations made against the Respondent in relation to Client #1.

29. The Respondent submitted that Gary Legault, who he said was Mr. Spencer's immediate supervisor, and IPC's chief compliance officer, would have knowledge of, and records relating to, what the Member (IPC) knew about Spencer's dealings with the Respondent, and specifically in relation to the loan from Client #1, and the circumstances surrounding Mr. Spencer's termination of employment with IPC.

30. The Respondent submitted that Stephen Carson has knowledge of the circumstances surrounding Mr. Spencer's termination of employment with IPC.

31. The Respondent further submitted that he had attempted to contact Mr. Spencer and Mr. Carson, but had not received a response.

32. The Respondent submitted that he had adduced evidence (G.W. Affid. #2) to show that Mr. Spencer, Mr. Legault and Mr. Carson each have evidence that is relevant to matters in respect to the allegations in the Notice of Hearing. He submitted that he would be unable to mount a full defence if the order sought was not granted.

33. At the commencement of his submissions, Mr. Halasz, counsel for the MFDA, submitted that G.W. Affid. #2 in support of the Respondent's motion, and Mr. Wong, as agent for the Respondent, speaking to his own affidavit, was improper. He submitted that Mr. Wong, in his capacity as agent for the Respondent, was in the same position as any counsel (for example, a lawyer) speaking to his own affidavit. He submitted that there were very narrow exceptions to this well established principle, namely where the affidavit merely spoke to a purely formal or unconverted matter, or if it was in the interests of justice that the rule not be applied. He submitted that while Mr. Wong was not a lawyer, the spirit underlying the principle should apply equally to him. He submitted that Mr. Wong was an advocate in these proceedings, and the advocate who submits material evidence, by affidavit, and then speaks to it, puts his personal interests and credibility at issue, and his role as advocate is compromised because he is also a

witness. He submitted an advocate must be objective and detached, and by swearing an affidavit on the merits, he loses that position.

34. Counsel for the MFDA submitted that G.W. Affid. #2 addressed controversial issues of fact, and he characterized it as an attempt to give evidence and argument with respect to much of the contents of the Reply.

35. Counsel for the MFDA also submitted that many paragraphs in G.W. Affid. #2 are not proper evidence because they clearly were not within Mr. Wong's personal knowledge. Those paragraphs thus had to be based on information, and Mr. Wong did not give the source of his information in respect of the facts he was purporting to attest to. He submitted the Panel should not be required to speculate on the source of the information. He submitted that the affidavit was improper evidence.

36. Counsel for the MFDA submitted that Mr. Legault and Mr. Spencer are individuals within the jurisdiction of MFDA By-law No. 1, Section 20.6.2(a) but that the Respondent has not established that Stephen Carson was a person to whom the By-law applied, and has not established grounds for Stephen Carson to be required to attend. Further, counsel for the MFDA submitted that the Respondent had not provided a description of the specific books, records or accounts that he seeks from Mr. Legault, Mr. Spencer or Mr. Carson, and that without such a description an order would not be appropriate. Counsel for the Association also submitted that if an order was to go, the Respondent should be responsible for paying the reasonable costs of attendance of any of the witnesses, and pay for reasonable costs associated with the production of any documents.

37. Counsel for the Association reviewed the jurisdiction of the MFDA under Section 20.6.2 (pertaining to a Member, Approved Person, or other person under the jurisdiction of the Corporation) and Section 24.1.4 of the By-law, which gives jurisdiction over former Members (those who have ceased to be a Member, Approved Person or other person subject to the jurisdiction of the Corporation).

38. Counsel for the Association submitted that Section 20.6.3 is applicable to situations where the Hearing Panel requires the attendance before it of an employee or agent of a Member

who is not under the jurisdiction of the MFDA. In those circumstances, it is the Member who is ordered to direct their employee or agent to attend or make production.

39. Counsel for the Association submitted that in order to invoke Sections 20.6.2 and 20.6.3 the Respondent must first establish that the persons sought to be ordered to attend are subject to the jurisdiction of the MFDA, or an employee or agent of a Member. He submitted that Mr. Spencer was an approved person registered with a Member of the MFDA until his registration was terminated on July 18, 2007. He submitted that Mr. Spencer is a person subject to the jurisdiction of the MFDA.

40. Similarly, he submitted that Gary Legault is an approved person and is subject to the MFDA's jurisdiction.

41. Counsel for the MFDA submitted that the Respondent has not established that Stephen Carson is a person subject to either section of the By-law. Further, he submitted that the Respondent has not established that the three individuals are in possession or control of any documents relevant to matters in issue in the proceeding. Counsel pointed out that the Respondent's motion materials do not set out any description of what books, records or accounts are sought from any of the individuals, or how those may be relevant.

42. Counsel for the Association submitted that in order for the Hearing Panel to make an order to compel the attendance of persons and documents, there should be clear, cogent evidence before the Panel, and the evidence should make the connection showing the relevance between the persons/documents being sought, and the matters that are at issue in the proceeding. Counsel for the MFDA submitted that the main thrust of the evidence of the Respondent on the motion, and his submissions, were that the witnesses would be able to shed some light on the activities of Mr. Spencer. He submitted there was no real connection between Mr. Spencer's alleged activities as a mortgage broker, and the allegations and issues raised in the Notice of Hearing with respect to the Respondent.

43. Counsel for the MFDA further submitted that the failure by the Respondent to delineate the documents that are sought to be produced and their relevancy to the issues in the case was fatal to the application for documents. He submitted there was nothing in the material before the

Panel to permit a proper production order for documents to be made.

44. Counsel for the MFDA submitted that costs could be awarded with respect to the hearing of the motions, but that issue should be deferred to the end of the hearing when proper submissions could be made.

45. In response, Mr. Wong submitted that he had only recently been advised that objection was being taken to his affidavit, and that he felt he was the best person to give the evidence.

Analysis

46. This motion invokes Rules 20.6.2 and 20.6.3. Rule 20.6 is entitled “Parties to Proceedings and Witnesses”. Rule 20.6.1 is entitled “Parties to a Proceeding”, and describes the parties to proceedings before a Hearing Panel.

47. Rules 20.6.2 and 20.6.3 state:

“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.”

48. We do not agree with the submission of the Respondent that the two rules permitting a hearing panel to require certain persons to attend before it to give information respecting any matter involved in the proceeding, and produce for inspection documents of such person, or

within their possession and control, relevant to the matters being considered, is designed to offset the power to conduct examinations and investigations given to the Association in the Rules. The two Rules for attendance and/or production are available to any party to a hearing that can persuade a hearing panel that an order should be made. It is also possible that a hearing panel could make such an order on its own initiative. In our view the purpose of the two rules is to facilitate the production of relevant evidence at a hearing.

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.

50. It is clear from an analysis of the Notice of Hearing, and the Reply, that the Respondent admits paragraphs 6, 7 and 8 of the Notice of Hearing: that is, that the Respondent was the sole officer and director the Numbered Company; in or about May, 2006 Client #1 loaned \$50,000 to the Numbered Company which was evidenced by a promissory note from the Numbered Company; and the Respondent personally guaranteed the promissory note. Further, that by September 15, 2007, four months after the date the loan was to be repaid in full, \$48,344.41 remained owing. Further, as to the loan from Client #2 alleged in paragraph 9 of the Notice of Hearing, from his Reply it appears the Respondent denies the loan was to him personally, but says that IPC knew about the \$50,000 loan from Client #1 and the \$6,300 loan from Client #2. He says in his Reply that he addressed any actual or potential conflict of interest through his disclosures of the loans to IPC, and that he processed the business (i.e. the loans) through IPC as required. He also says he complied with IPC's policies and procedures. Thus, in our view, the potential issues in this case have now been significantly narrowed.

51. The evidence in support of the Motion is G.W. Affid. #2. Counsel for the MFDA objects to the Affidavit: he submits that the affidavit of the agent for the Respondent is improper, and that significant portions of the affidavit are inadmissible in that they are clearly not within the

personal knowledge of Mr. Wong, and he does not give the source of his information. Mr. Wong responds by submitting that it was his opinion that he was the best person to give the evidence on this Motion.

52. We agree with the submission of counsel for the MFDA that Mr. Wong's affidavit, dealing with important factual evidence, is improper. Notwithstanding Mr. Wong is not a lawyer, but appears as "agent" of the Respondent, in our view he either knew, or should have known of the stricture that an "advocate" ought not to speak to his own affidavit. In *Mapletoft v. Service et al* [2008] CanLII 6935 (ONSC) on a summary judgment application there was a procedural objection to a defendant's affidavit material. In support of the motion for summary judgment the defendant tendered an affidavit of a partner of defence counsel. The court took the opportunity to discuss the issue of counsel swearing the affidavit, which the Court described as problematic, and a matter that should be taken seriously. The court stated:

"[9] In motions court evidence is normally tendered by way of affidavit. As a matter of practical convenience it is not uncommon for affidavits to be sworn by a staff member or by another lawyer of the firm. This practice is followed and permitted for the obvious reason that it would be unnecessarily cumbersome and costly to require routine facts be deposed by the client or by an outside independent source. In some circumstances the first hand knowledge is peculiar to counsel or the law firm and the knowledge of the client would actually be second hand. This might be true of procedural information such as receipt or service of documents, correspondence, file management or chronology. Convenience, cost effectiveness and efficiency are important considerations. **The countervailing concern however is that the practice not be allowed inappropriately in circumstances where counsel becomes a material witness.** Relevant on this point is Rule 4.02 of the *Rules of Professional Conduct*.¹ The rule and the commentary read as follows:

4.02 THE LAWYER AS WITNESS

Submission of Affidavit

4.02(1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.

¹ Law Society of Upper Canada. See also ch. IX, Code of Professional Conduct, Canadian Bar Association. As to the relationship between the Rules of Professional Conduct and the Court, see *Iroquois Falls Power Corp. v. Jacobs Canada Inc.* (2006) 83 O.R. (3d) 438 (Master)

Submission of Testimony

4.02(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

[10] Counsel who becomes a material witness for trial will normally have to withdraw from the case and this may mean his or her law firm will have to withdraw entirely. This principle is grounded in the rules governing conflict of interest and the need for counsel as an officer of the court to retain an appropriate level of professional objectivity. The court cannot countenance counsel for a party placing his or her own credibility in issue on an important point of evidence.² It may be possible to determine an issue on a motion without the evidence being necessary for the trial and in that case it may be possible for counsel to be cross examined for the purpose of the motion but nevertheless resume his or her role as counsel with carriage of the trial. Nor is the rule absolute. There are examples of counsel giving evidence at trial without being removed from the record but those are always with the specific approval of the trial judge in unusual circumstances.

[11] Generally speaking the decision concerning who should swear an affidavit is a legitimate tactical decision because the deponent may be subject to cross examination. **I pause to observe however that both the right of cross examination and the choice of a deponent are open to abuse. It would be improper to have an affidavit sworn second hand just to protect the person with important knowledge from cross examination on a contentious issue.**³ It is equally improper to engage in unnecessary cross examination of a deponent who is swearing to facts that are not in dispute. Thus to a very real extent a test of propriety might be whether the party tendering the affidavit should reasonably have anticipated that the facts were disputed and cross examination might be necessary. By virtue of Rule 39.01 (4) evidence based on information or belief is admissible on a motion but that does not mean it will be given undue weight or that adverse inferences may not be made.⁴ **On contentious matters the best evidence from**

² See *Bluestone v. Silverman* [2005] O.J. No.3219 (Master) and authorities referred to. See also *Rules of Professional Conduct*, Rule 4.02(2) and commentary, *supra*

³ In any event if the deponent has no actual knowledge undertakings may be sought or the person with knowledge could be examined – with leave if necessary – under Rules. 39.02 & 39.03.

⁴ See generally *Prodigy Graphics Group Inc. v. Fitz-Andrews* [2000] O.J. No. 1203 (S.C.J.) @ para.46 & 47 Rule 20.02 specifically permits an adverse inference to be drawn on a summary judgment motion.

the person with most direct knowledge will be the strongest and most persuasive evidence.” (*Emphasis added*)

53. In the case of *Weber v. Erb and Erb Insurance Brokers Ltd.*, [2006] CanLII 9987 (ONSC) before the court on various motions was the affidavit of a lawyer who was the partner of plaintiff’s counsel. Objection was taken to that Affidavit. The court reviewed the Law Society of Upper Canada Rules of Professional Conduct relating to the lawyer as witness, and then stated:

“[33] The *Rules of Professional Conduct* are not binding on the court, but are persuasive as an important statement of public policy: see *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at para. 18 (S.C.C.).

[34] The use of solicitor’s affidavits has long been prohibited for other than consent or undisputed matters. Some years ago, the issue was addressed by Schroeder J.A. in *Imperial Oil Ltd. v. Grabarchuk* (1974), 3 O.R. (2d) 783 (Ont.C.A.). In paragraph 2 he said:

Both counsel for the appellant and the respondent who appeared before this Court had made affidavits which had been submitted to the Court of first instance in support of and in opposition to the appellant’s application. It was not until the question was raised by the Court that either counsel appreciated the impropriety of counsel who had been a witness in the proceedings appearing as counsel on the appeal. This is a well-settled rule which the Court has strictly enforced over the years. In the circumstances we felt it necessary to adjourn the hearing of this appeal to the May sittings in order to facilitate the appointment of other counsel for both parties.

[35] Solicitor’s affidavits, as here, often contain hearsay evidence which, generally speaking, is unreliable. The solicitor is exposed to cross-examination, a futile exercise as there is no personal knowledge but might, by necessity, expose communications between client and counsel. **In some cases, the purpose of the solicitor’s affidavit is to shield the client from cross-examination. Such is improper.**

[39] Far too often, affidavits from solicitors, or other persons in the employ of the law firm, are tendered in contentious proceedings. This is an unacceptable practice. **The best evidence is from a deponent with actual knowledge, usually the client.** The solicitor, as here, relies on others for information. As subsequently discovered, the information was incomplete which further demonstrates the dangers associated with the use of such affidavits.

[40] If there are legitimate reasons for not tendering a proper affidavit from the client or persons with actual knowledge, such as the individual being at sea, control should be seeking leave to tender evidence in some other form.” (*Emphasis added*)

54. In the result the court declined to edit the affidavit in issue, and ordered it struck from the motion's record.

55. Thus, it can be seen that there is not a blanket prohibition against affidavits by counsel. The evidence given may be non-contentious, or it may be matters which are solely within counsel's knowledge, such as when service of proceedings or documents occurred. In a recent B.C. case, this issue was addressed and the court stated:

“[19] In my view, it would be a mistake to recognize or create a special rule requiring the rejection of affidavits sworn by counsel if those affidavits contain both admissible and inadmissible evidence. Insofar as admissibility is concerned, solicitors' affidavits are governed by the same rules as any other affidavit. Inadmissible content may be ignored or formally struck, but the affidavit as a whole need not be rejected.”

The Los Angeles Salad Company v. Canadian Food Inspection Agency, 2011 BCSC 503.

56. The difficulty in this case with G.W. Affid. #2 is not where Mr. Wong has attached a copy of a document to put in some corporate information, such as paragraph 2. The admissibility of materials from the Internet is another issue, but we will ignore that for the moment. However, where Mr. Wong is simply attaching a non-contentious document to prove certain facts, it is likely admissible. The source (Internet) may be a matter of weight.

57. However, in the bulk of the affidavit, it is clear, and as Mr. Wong acknowledge during submissions, Mr. Wong is giving evidence with respect to material matters that are in issue. Further, upon careful examination of some of the documentation attached to the affidavit, for example the content of emails, it was apparent that Mr. Wong was presenting argument, often by way of inference, from copies of documents that were unexecuted or that did not reflect the matters Mr. Wong deposed to. For example, in paragraph 17, Mr. Wong states:

“17. In April, 2006 Mr. Spencer solicited the Respondent's participation in a \$2,500,000 financing to purchase SciCorp through a company named Warden Lane Stables Inc. The transaction is summarized in an April 19, 2006 e-mail, a true copy of which is attached hereto as **Exhibit “H”**.

58. In this paragraph, Mr. Wong states that Mr. Spencer “solicited the Respondent's

participation” in a financing to purchase SciCorp. However, Exhibit “H” appears to be a reproduction of an email that Mr. Wong received from Susan Goodman, an administrator at IPC. The email attaches an email dated 19 April 2006 from Vaughan Spencer to Conrad Nunweiler which appears to contain, in the email chain, an email from Vaughan Spencer to a “Paul@Redley.ca” which email was sent 11/04/2006. In the April 11 email the subject is SciCorp, and in the introduction Mr. Spencer states: “Paul, this is somewhat the story about the transaction...”. Then there appears an “executive summary” in respect of a \$2.5M loan and the funding date is stated to be April 21, 2006. The email ends with the statement: “Paul, clearly we are not sending the enclosures but the above gives you a sense of the transaction. Vaughan C. Spencer, Manager – Canada Commercial Finance IPC Save Inc.” Thus, on analysis, there is nothing in Exhibit H to indicate that in April, 2006 Mr. Spencer solicited the Respondent’s participation in a financing to purchase SciCorp. There is nothing in the April 19 email from Spencer to Nunweiler to indicate why the attachment was forwarded.

59. During submissions, Mr. Wong acknowledged that he had received this email chain (Exhibit H) from the Respondent. It was pointed out to Mr. Wong that the April 11 email is from Spencer to Paul@Redley.ca but he did not know who “Paul” was. Mr. Wong acknowledged that there was no evidence that Mr. Spencer solicited the Respondent, there was no evidence of what his participation was to be, and he acknowledged that this information had been provided to him by Mr. Nunweiler. Thus there would have been no point in cross-examining Mr. Wong because he clearly was not the source of much of the material information in the affidavit.

60. During submissions, a number of examples, similar to paragraph 17, were pointed out to Mr. Wong and he quite properly acknowledged that he did not have personal knowledge of the facts therein, and hadn’t given the source of the information. We would include paragraphs 17, 18, 19, 20, 21 and 22 in this category. In our view those paragraphs are inadmissible.

61. In paragraph 14, Mr. Wong states the Respondent is the source of his information; and the paragraph goes on to describe “...several business dealings with Mr. Spencer” and later in the paragraph “...that IPC was aware of and approved of these dealings and receipt of fees therefrom.” The problem we have with this paragraph is that the “business dealings” are not described, and are not connected with the allegations in the Notice of Hearing.

62. With respect to paragraph 15, again on information from the Respondent, it is alleged that IPC Save Inc. received a \$100,000 fee from a corporation said to be a client of the Respondent, but there is no evidence that a \$100,000 fee was in fact received. The documentation attached is prospective: was it signed? Was it paid? Further, it appears again to be transactions involving IPC Save Inc., and not the Respondent's Member company.

63. Similarly, in paragraph 23, based upon information of the Respondent, it is alleged that in the Fall of 2006 Spencer sold a portion of his shares in Wardley Stables Inc. to another company, for proceeds of \$500,000. However that evidence is not connected to the issues arising in this case.

64. Thus, in our view, G.W. Affid. #2 does not contain admissible evidence where it is clear Mr. Wong did not have personal knowledge of the facts deposed to, and where he did not give the source of the information. We are ignoring those paragraphs. In our view the Hearing Panel should have clear and cogent evidence to prove relevance, and in this case that may have been the evidence of the Respondent; we don't know. However, if the Respondent had sworn an affidavit, he may well have been subjected to cross-examination, something he may have sought to avoid. In our opinion we do not have clear and cogent evidence establishing relevance for the order sought.

65. We also agree with counsel for the MFDA's submissions that the affidavit, G.W. Affid. #2, was an attempt to buttress and argue some of the matters alleged in the Respondent's Reply. It appears from some of the outside corporate and Association documentation that has been produced that Mr. Spencer was not simply an Approved Person, but also had other titles, and other positions in the IPC group of companies. Significantly, it appears that he was employed as a mortgage broker or agent. This evidence may go towards the purpose to which the loans which the Respondent admits he arranged were put. We fail to see how that evidence, even if we received it, would be relevant to the issues raised in this case. Submitting argument as part of an affidavit is improper, and those portions will also be ignored.

66. Further, on careful examination, we fail to see how Gary Legault, Spencer's immediate supervisor, would have relevant evidence on the issues raised in this case. For example, there is no allegation in G.W. Affid. #2 that the Respondent informed Mr. Legault of the loans from his

clients.

67. With respect to Stephen Carson, in paragraph 25 of G. W. Affid. #2 Mr. Wong attaches a copy of a January 14, 2011 email from Stephen Carson, IPC's Director of Banking Operations, to Gary Legault and David Halasz (counsel for the MFDA) advising that Vaughan Spencer ceased to be a licensed mortgage agent with IPC Save on November 1, 2007 at their request. It went on to state: "Vaughan is no longer licensed as a mortgage agent according to FFCO'S records." At the end of the email Mr. Carson gives his designation as follows:

"Stephen Carson, FICB, AMP
Director, Banking Operations
Investment Planning Counsel"

68. Having reviewed G.W. Affid. #2 carefully, we do not see anything which establishes that Stephen Carson would have relevant evidence or documentation concerning the matters in issue in this case. Further, we agree with counsel for the MFDA, that the Respondent has not submitted evidence to establish that Mr. Carson is within the jurisdiction of the Rules.

69. Further, we agree with the submission of counsel for the MFDA that on an application to produce documents, the applicant should describe the documents, or class of documents that are sought to be produced. For example, it could request "all documents in the possession, power or control of Mr. X in relation to his participation in the May, 2006 loan of \$50,000 by Client #1 to the Numbered Company". Only if the applicant describes with particularity the documents sought to be produced, will the Panel hearing the application be able to determine if those documents have relevance to the issues before the Panel. In this case, the Respondent has failed to describe the documents he seeks produced, or their relevance to the issues.

Decision on Motion #1

70. In conclusion, having carefully considered the evidence, the submissions on behalf of the parties, the Rules, and relevant authorities, it is our view that the Respondent has not provided clear and cogent evidence establishing that the 3 persons sought to be produced have relevant evidence, or relevant documentary evidence, bearing on the issues raised in this case. The motion for production is therefore dismissed. Costs in relation to this motion may be spoken to at the conclusion of the hearing on the merits.

Further Directions Order

71. The Hearing Panel, having had the opportunity to carefully review the allegations in the Notice of Hearing, and in the Respondent's Reply, and having heard the submissions of the parties in respect of the Production motion, are of the view that additional directions would likely clarify the issues, and perhaps shorten any hearing on the merits. We order the Respondent to provide full particulars to Association staff in respect of his Reply (Exhibit 5) as follows:

- (a) In the Denials section of his Reply, in respect of paragraph 2, full particulars of the basis for the assertion "that IPC **knew** about the \$50,000 loan from Client #1 and the \$6,300 loan from Client #2." Without restricting the generality of the foregoing, particulars to include the facts in support of this paragraph, including matters such as the date or dates of disclosure; whether verbal, in writing, email, etc.; the names of the persons to whom disclosure was made; who at IPC knew, and how; etc.
- (b) Similarly in respect of the Reply, Denials, paragraph 3, full particulars of paragraph 3(b) "has addressed any actual or potential conflict of interest through his disclosure of loans to IPC." Without restricting the generality of the foregoing, the date or dates upon which disclosure was made; the manner in which disclosure was made, whether verbally, in writing, email, etc.; the names of the persons to whom disclosure was made; by whom the disclosure was made; and full particulars of what was disclosed; etc.
- (c) In respect of the Reply, Denials, paragraph 4(b) and (c), full particulars of the "disclosures to IPC in respect of the loans as required;" and "processed the business (i.e. the loans) through IPC as required". Without restricting the generality of the foregoing, the date or dates upon which disclosure was made; the manner in which disclosure was made; the names of the persons to whom disclosure was made; whether particulars of the clients from whom the loans were obtained was given; etc. Further, particulars of how the business was processed; who did the processing; who received the processing; the dates or dates upon which the business was processed; the manner in which it was processed; etc. And with respect to the statement

“through IPC as required” full particulars of the material facts demonstrating that the processing was as required by IPC.

- (d) In respect of the Reply, Denials, paragraph 5, full particulars of how the Respondent “complied with IPC’s policies and procedures” in respect of Clients #1 and #2. Without restricting the generality of the foregoing, a description of the specific policies and procedures that were complied with; how they were complied with; who provided the compliance from the Respondent; who received the compliance at IPC; etc.

72. The Particulars from the Respondent aforesaid are to be delivered to the Panel and Association staff within three weeks of the publication of this decision.

The “Reasonable Apprehension of Bias” Motion

73. The Respondent brings a second Motion for:

- “1. A declaration that a reasonable apprehension of bias has arisen on the part of the Hearing Panel.
2. A determination that all three members of the Hearing Panel be disqualified from hearing this matter.
3. An order that the Hearing Panel be struck.
4. An order that a new Hearing Panel be constituted to hear this matter *de novo*.”

(Notice of Motion, pages 1-2)

74. The Grounds for the motion are:

- “1. All three members of the Hearing Panel have previously served, and currently serve, on the MFDA’s Pacific Regional Council with Susan Schulze, a witness to be called by Staff of the MFDA in this matter. In similar situations, Canadian courts, administrative tribunals and hearing panels have determined that a reasonable apprehension of bias arose and adopted an appropriate remedy.
2. Two of the three members of the Hearing Panel served with Susan Schulze on the hearing panel in the matter of *Re: Patrick Dennis Sullivan*, MFDA File No. 200802. In similar situations, Canadian courts, administrative tribunals and

hearing panels have determined that a reasonable apprehension of bias arose and adopted an appropriate remedy.”

(Notice of Motion, page 2)

75. In support of the Motion, the Respondent submitted the Affidavit of Gilbert Wong #1 sworn April 27, 2011 (“G.W. Affid. #1”). In G.W. Affid. #1, Mr. Wong gives evidence that staff of the MFDA had not contacted the Respondent’s former Clients Nos. 1 to 5 referred to in the Notice of Hearing. Further, he states that staff of the MFDA relies on an internal investigation directed by IPC Investment Corp. (“IPCIC”) and information and materials provided by IPCIC. He states that the IPCIC investigation was primarily conducted by or under the direction of Susan Schulze and Gary Legault. He states further that Ms. Schulze was the Respondent’s branch manager from September, 2006 until December 12, 2008; and refers to an email from David Halasz dated January 12, 2011 in which Mr. Halasz indicates they intend to call Ms. Schulze, who in their view would provide the best evidence on the issues. We note that this email predates the amendments to the Reply of the Respondent.

76. Mr. Wong, in G.W. Affid. #1 attaches documentation indicating that Ms. Schulze has been a member of MFDA’s Pacific Regional Council since 2006, and continues to the present time to be a member of the Pacific Regional Council. Similarly, Cecilia Wong and Sharon Moskalyk, both members of the Hearing Panel constituted to hear this matter, have been members of the MFDA’s Pacific Regional Council since 2006, and continue to be members of the Pacific Regional Council.

77. G.W. Affid. #1 also attaches documentation indicating that the Chair, Stephen Gill, has also served on the MFDA’s Pacific Regional Council since 2006, and is a current member of the Pacific Regional Council.

78. Mr. Wong in G.W. Affid. #1 attaches documentation indicating that the Chair Mr. Gill, Ms. Moskalyk and Ms. Schulze served on an MFDA Hearing Panel on August 6, 2008 at Vancouver, BC in respect of a Settlement Agreement dated July 25, 2008. The Settlement Agreement was approved at the hearing and Reasons were given August 11, 2008; see *Re: Patrick Dennis Sullivan*, MFDA File No. 200802 (Exhibit E to G.W. Affid. #1) (the *Sullivan Settlement Hearing*).

79. G.W. Affid. #1 does not contain any allegation of actual bias by any member of the Hearing Panel. Further, there is no statement from the Respondent, or from Mr. Wong on information and belief, that the Respondent has an apprehension of bias in respect of this panel.

80. The Association did not submit any affidavit evidence in response to the Motion.

81. During submissions, Mr. Wong agreed that there was no evidence before the panel on this motion, and no suggestion in his submissions, that any member of the Hearing Panel has had any contact with Ms. Schulze about the Nunweiler case.

82. During submissions, Mr. Wong also acknowledged that there was no evidence on the motion before this panel of any contact between the aforesaid individual members of the Pacific Regional Council from August 12, 2008 to date.

83. Further, there is no evidence before us of any meetings between Ms. Schulze and any of the panel members, and no evidence that Ms. Schulze had any discussions about the evidence relating to this case with any panel members.

84. During submissions, the panel advised the parties that, in respect of the *Sullivan* decision, neither the Chair nor Ms. Moskalyk had any real memory of the *Sullivan* hearing, or the panel deliberations.

85. Further, the Hearing Panel can confirm that they have not had any contact with Ms. Schulze about this case, or about her evidence. Also, neither Mr. Gill nor Ms. Moskalyk have had any contact with Ms. Schulze after the *Sullivan* case.

Position of the Parties

86. Pursuant to the directions of the Panel, both parties filed written submissions, and presented a brief of authorities. The Panel wishes to thank counsel and Mr. Wong for the assistance these afforded the Panel.

87. The position of the Respondent is that there is a reasonable apprehension of bias on two

grounds: firstly, by reason of the “association” of the three members of the Panel and Ms. Schulze in that they are all members of the Pacific Regional Council; the second ground is the fact that the Chair Mr. Gill, and Panel Member Ms. Moskalyk, sat with Ms. Schulze as members of the same hearing panel in August, 2008 in the *Sullivan* case. The Respondent submits that there is a reasonable apprehension of bias with respect to Panel Member, Cecilia Wong, due to the fact that Ms. Wong is “tainted” by reason of her participation in this Hearing Panel from commencement to the present.

88. The Respondent submits that the test for reasonable apprehension of bias is the oft quoted statement of Justice de Grandpré in *Committee for Justice and Liberty v. Canada (National Energy Board)*, (1978) 1 S.C.R. 369 at 394:

“The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, the test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.” I can see no real difference between the expressions found in the decided cases, be they “reasonable apprehension of bias”, “reasonable suspicion of bias”, or “real likelihood of bias”. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the “very sensitive or scrupulous conscience”.

89. The Respondent submits that MFDA Hearing Panels are adjudicative in nature, and would be expected to comply with the standards applicable to courts. In support he cites *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, (1990) 1 S.C.R. 623.

90. The Respondent also relies on *De Cotiis v. De Cotiis*, (2009) B.C.J. No. 150 as a case which demonstrates the critical importance of the facts in respect of the grounds for the reasonable apprehension of bias. The court stated:

“As counsel have pointed out, it is awkward for counsel to argue the issue of whether or not a judge should refrain from sitting on a matter. The nature and quality of the judge’s previous association will be known to the judge him or herself. While I might not put it as bluntly as Mr. Hordo in saying the judge

“effectively becomes a witness”, the fact remains that the judge must disclose the facts surrounding the previous association. That disclosure will be critical to the decision as to whether or not the judge should refrain from hearing a matter.”

(De Cotiis, para. 8)

91. In that case, having reviewed the relevant facts, the court stated:

“I have concluded that no reasonable apprehension of bias arises in the case at bar. The connection between myself and Davis & Company was too brief, not sufficiently recent, and not sufficiently close to give rise to any reasonable apprehension that it would bias me for or against Mr. Sanderson’s clients on the applications before me.”

(De Cotiis, para. 16)

92. The Respondent also relied on the decision of *Spence v. Prince Albert (City) Police Commissioners*, (1987) 53 Sask. R. 35 (Sask.C.A.) as an example of a case where one of the adjudicators had a prior involvement with a witness who was to (and did) testify against the Respondent. The principal witness admitted that she had met privately prior to the hearing with the Chairman of the police commissioners to discuss the charges against the appellant. The decision was quashed.

93. The Respondent also relies on an MFDA, and a Securities Commission decision: *Re: Gary Allan Price*, MFDA File No. 200814, Decision and Reasons October 30, 2009; and *Re: John Frederick Brighten, et al*, 2005 BCSECCOM 576, Decision, September 9, 2005. The *Price* decision was cited for the proposition that a reasonable apprehension of bias arose where the presence of one member of the panel, who had since resigned from the panel, had tainted the other members of the panel.

94. Similarly, the Respondent cited the *Brighten* decision as raising a reasonable apprehension of bias because one member of the Hearing Panel had also sat on a different hearing panel that dealt with another member, and the same facts, and heard evidence and submissions, and in the course of their reasons made findings critical of Brighten. The concern was the prior involvement of a member of the hearing panel in the previous case, raising a concern that there be no prejudgment of issues or predetermination in respect of the facts.

95. The *Brighten* panel had deliberated and delivered their decision. The Securities Commission held that although the panel member who had participated in the earlier case was only one of three members of the panel, there was still a reasonable apprehension that the other members might also become tainted.

96. Mr. Wong, for the Respondent, also referred the Panel to a letter dated January 19, 2011 from counsel for the Association to the Panel (Exhibit A), alerting the Panel to the allegation by the Respondent of a reasonable apprehension of bias. No evidence in support of the allegation was given, and the letter presented certain “options” to the Panel. However, as can now be seen, the Panel decided that the proper procedure was for the Respondent to file a motion, with evidence; and also directed that the parties each file written submissions with authorities, and the Panel would then conduct a hearing, and decide the matter on the merits. In our view, the parties respective positions were fully argued at the hearing of this motion and the letter is now irrelevant.

97. Counsel for the MFDA submitted that there was no evidence to suggest that an actual bias or conflict of interest exists in this case on the grounds asserted by the Respondent, and the motion should be dismissed. The Association further submitted that a reasonable apprehension of bias has not arisen in the circumstances of this case, and neither of the two grounds upon which the Respondent relies satisfies the legal test for a reasonable apprehension of bias. Counsel submitted that a reasonably well informed member of the public would not ascertain that there was a real likelihood of bias on the part of the Hearing Panel that would require that any of the relief sought by the Respondent on the motion be granted.

98. In its submission, the Association states that it expects to call Ms. Susan Schulze as a witness at the hearing on the merits, and that Ms. Schulze would give evidence with respect to her positions, duties and responsibilities at IPCIC; her responsibility with respect to the Member’s investigation into the Respondent; the policies and procedures of the Member with respect to the prohibition of borrowing monies from clients, and for conflicts of interest; and the communication of such policies and procedures to representatives of the Member; the results of the investigation and communications with clients, the Respondent and other witnesses in respect of the matters referred to in the Notice of Hearing; and the registration history of Mr. Spencer with IPCIC, and his employment with IPC Save Inc.

99. With reference to the previous association of Chair Gill and Panel Member Ms. Moskalyk, the MFDA did not take issue with the fact that they had sat with Ms. Schulze as a Panel on the *Sullivan* decision. Association Counsel pointed out that it was a Settlement Hearing that was heard on August 6, 2008, and that the Panel accepted the Settlement Agreement. The Association also did not take issue with the fact that Ms. Moskalyk, Ms. Schulze, Ms. Wong and Chair Gill were all members of the MFDA Pacific Regional Council since 2006.

100. With respect to the test for finding a reasonable apprehension of bias, the Association referred to the decision of the Supreme Court of Canada, *Newfoundland Telephone Co.*, supra, at page 12 (of report in the brief), and also referred to the Supreme Court of Canada decision of Justice de Grandpré in the *Committee for Justice and Liberty* case. The Association agreed that the application of the test to administrative tribunals with respect to a reasonable apprehension of bias with regard to their decision is similar to the standard applicable to the courts: *Newfoundland Telephone*, supra, at page 13. The Association submitted that the basic principle applicable to both administrative tribunals and courts is that natural justice be rendered: *Committee for Justice and Liberty* at page 15.

101. The Association also referred to the 1997 Supreme Court of Canada decision in *R. v. RDS* [1997] 3 S.C.R. 484. In that case Justice Cory stated that the onus is on the applicant to prove that a reasonable apprehension of bias exists, and the threshold for finding a real or perceived bias is high since it calls into question an element of judicial integrity: *R. v. RDS* at paras. 113-114.

102. The Association also quoted Justice Cory on the test for a reasonable apprehension of bias:

“This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, supra, at pp. 54-55; *Gushman*, supra, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including “the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold”: *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, supra, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34.”

R. v. RDS [1997] 3 S.C.R. 484 at para. 111.

103. The Association also cited the Supreme Court of Canada decision in *Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50 at para. 60 which cited and adopted the criteria as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394. The Association submitted that the Supreme Court of Canada had set out three points with respect to the application of the test for reasonable apprehension of bias:

“First, the reasonable apprehension of bias **must rest on serious grounds**, in light of the strong presumption of judicial impartiality and not merely on grounds that would meet the standard of a very sensitive or scrupulous conscience.”

“Second, the inquiry must be thorough without any shortcuts and remain highly fact-specific. The facts must be addressed carefully in light of the entire context and the particular circumstances.”

“Third, the standard remains the same, whenever the issue of disqualification is raised.”

Wewaykum at paras. 76, 77 and 78.

(Emphasis added).

104. The Association submitted that with respect to hearing panels of the MFDA, there is a presumption that they will act fairly and impartially in discharging their adjudicative responsibilities, just as there is a presumption that commissioners of the Securities Commissions will act fairly and impartially. The Association cited in “*Re: Norshield Asset Management (Canada) Ltd.*, (2009), 32 OSCB 1249 citing the E.A. Manning decision of the Ontario Court of Appeal in a case where it was alleged there was a reasonable apprehension of bias in respect of the Ontario Securities Commission:

“Securities Commissions, by their very nature, are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. They may have repeated dealings with the same parties in carrying out their statutory duties and obligations. **It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case.**”

Norshield, para. 68.

(Emphasis in original).

105. Counsel for the Association cited the *De Cotiis* decision and pointed out that in *De Cotiis*, the court cited with approval the Ontario Court of Appeal decision of *Re Currie and Niagara Escarpment Commission*, (1984), 14 D.L.R. (4th) 651 (Ont. C.A.) at 679:

“That in matters such as the one at bar, the court must concern itself with what a “reasonable” person might apprehend rather than satisfying “the cynical, the capricious, the excessively suspicious, the paranoid or the perfectionist.”

De Cotiis, at paras. 14 and 15.

106. The Association also cited *Dempsey v. Envision Credit Union*, [2005] B.C.J. No. 2689, a decision of Justice Garson (as she then was) in respect of an application by the plaintiffs that the case management judge in the action recuse herself from presiding over the matter because, inter alia, the judge had been counsel for one of the defendants in the past, the judge’s decisions in the case, etc. The judge did not recuse herself, and cited with approval the *De Cotiis* decision. With respect to the duty of the judge (or panel) hearing an application alleging reasonable apprehension of bias, it is the duty of the court to consider, rather than give effect to, every objection:

“Mr. Sanderson mentions in the case of *Locabail (UK) Ltd. v. Bayfield Properties Ltd.*, (2000) QB 451, a case in which the English Court of Appeal considered, in the context of a variety of applications for leave to appeal, the question of when a judge should recuse him or herself from hearing a case. The point that it is the duty of the court to consider, rather than give effect to, every objection, is made starting at paragraph 21:

If objection is...made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.

I believe that this principle is implicit, as well, in the judgment of Bastarache J. in *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 850.

....

The test to be applied in a situation such as the present is that of whether an informed and fair-minded observer **could reasonably apprehend that the judge might be biased by the previous association.**”

(Emphasis added).

107. Justice Garson also stated:

“In *Liszky v. Robinson*, [2003] B.C.J. No. 2163 (C.A.), the British Columbia Court of Appeal upheld an order by the Chief Justice of the B.C. Supreme Court that a trial judge take over a case from which another judge recused himself due to a conflict of interest. In discussing the test in *Committee for Justice*, the court cautioned against judges recusing themselves too hastily, “We agree with the appellant that recusal is not warranted merely by a trial judge raising the possibility of an apprehension of bias. For a judge to disqualify himself on trifling or invalid grounds obviously raises concerns about wasted resources and delay with the attendant risk of injustice.”

108. Counsel for the Association also cited the case of *Construction and Specialized Workers Union, Local 1611 v. British Columbia (Labour Relations Board)*, [2009] B.C.J. No. 1069. In that case the Vice Chair, on the first day of proceedings, made comments regarding the merits of the complaint, before all the evidence was tendered and before submissions of the parties; it was suggested that the Vice Chair had closed his mind to the issue. Justice Walker in his Reasons, stated:

“When reviewing allegations concerning a breach of natural justice or lack of procedural fairness, such as bias, courts do not limit their analysis of the impugned conduct or remarks made in isolation, but in the context of all of the circumstances and in light of the whole proceeding: *R.D.S.* In *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, 267 D.L.R. (4th) 54, the Federal Court of Appeal considered that in spite of the absence of a “smoking gun”, an analysis of the “entire factual matrix of this case” would lead a reasonable person to conclude that the hearing panel was biased: at para. 60.

The court’s inquiry into allegations of bias is “highly fact specific”: *United Food, R.D.S.*, and *Wewaykum*. “[C]ontext and the particular circumstances of the case are of utmost significance”: *United Food* – Trial at para. 103...”

Construction at paras. 116 and 117.

109. Justice Walker stated at paragraph 138:

“Given the importance of an unbiased tribunal to the administration of justice, I cannot accept any submission that this court’s review must be confined to only those specific portions of the transcript containing the impugned words of the Vice Chair. *R.D.S.*, *Wewaykum*, *Geza* and *United Food* make it very clear that it is the entire context or factual matrix of the case that must be considered since bias calls into question the integrity of the entire administration of justice.”

110. Counsel for the Association cited the *De Cotiis* decision pointing out that the judge did not recuse himself on the facts of that case. He submitted that the court held that the connection between the judge and his former firm was too brief, not sufficiently recent, and not sufficiently close to give rise to any reasonable apprehension of bias.

111. On the facts of this case, counsel for the Association submits that when the nature and the quality of the two Panel Members association to Ms. Schulze as a result of the *Sullivan* case are examined, and then applied against the test for apprehension of bias, the association was too brief, not sufficiently recent, and not sufficiently close to merit a finding of a reasonable apprehension of bias.

112. Counsel for the Association also referred to the *Spence v. Prince Albert* case cited by the Respondent, and submitted that the facts in the *Spence* case are clearly distinguishable from the facts in the present case. The Association submitted that the Settlement Hearing in August, 2008, was almost three years before the date of the motion; that is, it wasn't recent. He submitted that there is no evidence that Ms. Schulze has had any interaction with any members of the Hearing Panel since the *Sullivan* case in August, 2008. Further, the Panel in the *Sullivan* case was not considering facts or contraventions that are the subject matter of the proceeding against the Respondent.

113. The Association also submitted the *Price* case, and the *Brighten* case, are distinguishable on their facts, and the facts of this case do not meet the test for establishing any reasonable apprehension of bias.

114. Counsel for the Association cited the MFDA case of *Marlene Legare*, File No. 200813, where Mr. Wong, as agent for the Respondent in that case, brought a motion alleging reasonable apprehension of bias because certain Hearing Panel members served as members of the Pacific Regional Council in the same period as two officers of the Member firm which terminated the Respondent. Evidence originating from the two officers of the Member firm was used at the hearing; the officers themselves were not witnesses at the hearing.

115. The *Legare* Hearing Panel dismissed the Respondent's motion and stated:

“The Panel finds that there is no evidence presented on this motion or to support this motion of any relationship, association, communication or contact whatsoever, direct or indirect, between panel member Thomas and Gail Winzoski and Greg Cameron during the time they were members of the Pacific Regional Council of the Mutual Fund Dealers Association, and no evidence of any relationship, association, communication or contract between those persons that related to, directly or indirectly, the respondent, Marlene Legare, at any time; that is to say, before or during the period when they were members of the Mutual Fund Dealers Association Pacific Regional Council.

In our view, being on a roster of potential panel members does not imply that those potential panel members are associates or associating, as is suggested”.

Reasons of the Hearing Panel in the June 30, 2010 transcript, pages 59-60.

116. The Panel further stated:

“The panel concludes that an informed and reasonable person, hearing the matter realistically and practically and having thought the matter through, would not be persuaded in this motion that: The fact that panel member Thomas was a member of the MFDA’s Pacific Regional Council at the same time as Gail Winzoski and Greg Cameron and in the circumstances of this particular disciplinary hearing presents a conflict of interest which raises a reasonable apprehension of bias on the part of panel member Thomas. Accordingly, the motion is dismissed.”

Reasons of the Hearing Panel in the June 30, 2010 transcript, page 63.

117. The Association submitted that courts in Canada have found no reasonable apprehension of bias in situations where there is some past social and/or professional contact or association between an adjudicator and a witness who gives evidence at a proceeding. Counsel cited the Alberta Court of Appeal decision, *Price v. Hanna (Town)*, [1986] A.J. No. 515, where it was alleged that there was an apprehension of bias on the part of the Land Compensation Board because one of the witnesses for the Town had once been a member of the Board. The witness had subsequently retired from the Board, and gave expert evidence when called as a witness by the Town. The appeal was dismissed; the Court of Appeal stated:

“We are unable to find, in the absence of any other factor, that the former association of the witness with the Board, which association has been discontinued, precludes him from ever appearing before the Board. No authority was advanced for the contrary proposition. The Board considered this evidence in the light of their own expertise, and of their own knowledge of the area. As well, the evidence given for the owner was considered in the light of defects which were apparent in it.”

Per Laycraft, C.J.A. at page 3.

118. The Association also cited the case of *Ibrahim v. Giuffre*, [2000] A.J. No. 305 (Alta Q.B.), where the plaintiff brought an application to have the judge disqualify himself from presiding over her trial (a medical negligence action) because when counsel for the parties outlined who their medical witnesses would be, the judge advised that he knew one of the doctors to be called by the defendant as an expert in the field of neurology. After the issue was raised, the judge compiled a resume of what he could recall of his relationship with the doctor, and gave it counsel. The judge had no prior knowledge of the case, had not been involved at any time with any of the parties to the litigation, nor had members of his old law firm. There was no suggestion of actual bias. The judge stated he was not a close personal friend of the doctor.

119. The plaintiff argued that there wasn't a level playing field because of the court's prior association with the doctor. The court pointed out that the doctor was not a close personal friend, and that the court would receive that doctor's opinion, as well as the opinions of other medical specialists, and the evidence may call into question the plaintiff's credibility. The judge pointed out that as with any case, the judge would have to examine the evidence in its entirety and arrive at a decision on the merits.

120. The court considered various authorities and concluded, based on counsel's submissions, that at most the plaintiff can be said to have a **suspicion** of bias, and dismissed the motion. The court stated:

“I have asked myself the question posed by our Court of Appeal in *Laframboise* and my answer is that a reasonable and right-minded person with full knowledge of the facts would not have a reasonable apprehension that I as the trial judge will be biased against her.”

Ibrahim at para. 12.

121. The court stated:

“As Mr. Justice Cory pointed out in the *R. v. S.(R.D.)* decision the reasonable person must be an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background must be apprised also of the fact that impartiality is one of the duties that judges swear to uphold. His Lordship also pointed out that the grounds for an apprehension of bias must be substantial...”

Ibrahim at para. 13.

122. The Association also cited the decision of the Saskatchewan Court of Queen's Bench, *Bussiere v. Grain Services Union*, [1998] S.J. No. 590. In this case there was an application by the respondent union to set aside a decision of the Saskatchewan Labour Relations Board regarding an unfair representation by the union. A witness, who was an officer of the union, was the primary witness for the union; the LRB's panel accepted his evidence and dismissed the application. The union officer had served as a part time Board member, and had sat on two different panels with the chairperson while the decision in this matter was reserved. The applicant union alleged a reasonable apprehension of bias. The union argued that the union officer should have taken a leave of absence from the Board, and not decided two other cases while the applicants case was pending, and that the union officer should not have sat on panels with the chairperson while the decision in the matter was pending.

123. The Board's decision was set aside. The headnote states:

"A Board member was not required to take a leave of absence while personally involved in a case pending before the Board. No bias or reasonable apprehension of bias arose simply because a Board member had a matter before a panel of the Board. As the tri-party panel was legislatively mandated, it was an institutional constraint inherent to labour relations boards that part-time board members, who remained active, would know each other. Simply knowing a person was not grounds for disqualification of a part-time board member as there was no reasonable apprehension of bias. A reasonable person would not form the opinion that the appearance of justice was compromised since he would be aware of the institutional constraints. However, a litigant Board member could not sit with a member of the panel who had heard his case, while a decision was still pending. There was a reasonable apprehension of bias when Wagner sat with the chairperson on the two subsequent panels. The appearance of impartiality required that a decision-maker remain free of any influence by one party in the absence of the other, pending a decision. This was jeopardized since it could not be said that the chairperson was not influenced by the performance or comments of the litigant Board member in the subsequent matters."

Bussiere, page 2.

124. In that case, on the facts, the court held that an apprehension of bias was established when the witness sat with the chairperson on two subsequent panels prior to a decision being rendered in the case in which the part-time Board member had given evidence. Counsel for the Association submitted that the facts of this case are clearly distinguishable.

125. The Association also cited the Alberta Court of Appeal decision of *Boardwalk REIT LLP*

v. Edmonton (City), [2008] A.J. No. 515 (Alta C.A.). In this case a motion was brought to disqualify all three members of the Court of Appeal panel on the basis that one of the justice's hearing the appeal in the case was also a party in an unrelated assessment proceeding involving his own house. It was suggested that the third judge had a conflict of interest which tainted the rest of the panel. The third judge ultimately voluntarily indicated that he would take no part in deciding the appeal.

126. The court dismissed the motion and found there was no legal reason to disqualify the third judge.

127. In the *Boardwalk REIT* decision, the court cited ten other cases identifying fact specific situations where, at various times, judges have had prior contact with counsel or witnesses. Those cases serve to demonstrate that it is a fact intensive examination, and prior contact or association is not in and of itself a ground for a finding of a reasonable apprehension of bias. No reported case disqualifies a judge because of a friendship association: *Boardwalk*, para. 29.

128. The Association also cited the Alberta Court of Appeal case of *R. v. Mohan*, [1995] A.J. No. 924 (C.A.) (appeal to the Supreme Court of Canada dismissed). It was alleged that there was a reasonable apprehension of bias because the trial judge had personally known an important Crown witness, who was also a lawyer, for 35 years. Both the trial judge and the witness had practised law in the same city for 35 years. The trial judge dismissed the motion. The Court of Appeal upheld the trial judge's decision that no reasonable apprehension of bias arose as a result of the association between the trial judge and the witness.

129. The Association submitted that MFDA hearing panels play a similar role to that of courts, and hearing panel members play a role similar to that of judges. It was submitted that hearing panels are also in the nature of expert tribunals, and the members are expected to have special knowledge of the matters within their jurisdiction. The MFDA's hearing panels are appointed from the members of the regional council, being one public representative who acts as chair, and two industry representatives. After their appointment to Council, the role of members of the regional councils is restricted to acting as members of MFDA hearing panels in their respective regions. If a member is never selected to participate in a disciplinary hearing, there is no other function or duty which they are required to perform. Council members are assigned to a roster of

available persons and may be asked to sit on hearing panels.

130. The Association submitted that peer review is inherent in the nature of a Self Regulatory Organization (“SRO”) and panel members are expected to have specialized knowledge and experience as a result of their industry experience and participation. The Association submitted that because of their industry participation, it is a distinct possibility that a Council member might at some point be a witness in an MFDA disciplinary proceeding. It was submitted that this fact alone, that is a Council member attending as a witness before an MFDA hearing panel, is not sufficient to raise a reasonable apprehension of bias. They have no special status as a witness.

131. In summary, the Association submitted that the Respondent has not, by cogent evidence, satisfied the test to prove a reasonable apprehension of bias. Further, the Association submitted that a reasonable person, fully informed of the circumstances, would also conclude that the members of the hearing panel would not be unfairly or inappropriately influenced by a prior association with a proposed witness with whom they had sat as hearing panel members in a case involving different issues, and different parties, three years prior to the present case.

Analysis

132. The Association, in its brief, stated the first issue on the motion as follows:

“Has the Respondent satisfied his onus to prove that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it is more likely than not that the Members of the Hearing Panel would not decide this matter fairly because Susan Schulze, a witness expected to be called by Staff at the pending hearing of this matter on the merits, served and currently serves as a member of the MFDA’s Pacific Regional Council (“PRC”) at the same time as the members of the current Hearing Panel?”

133. The second issue was stated as follows:

“Has the Respondent satisfied his onus to prove that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it is more likely than not that the Members of the Hearing Panel would not decide this matter fairly because Susan Schulze, a proposed witness at this hearings served on a Hearing Panel with Chair Stephen Gill and with Industry Representative Sharon Moskalyk at the MFDA settlement hearing *Re Patrick Dennis Sullivan* in August 2008?”

We adopt these statements of the issues.

134. With respect to the hearing panels of the MFDA, we agree with the submission of counsel for the Association that there is a presumption that hearing panels will act fairly and impartially in discharging their adjudicative responsibilities. Further, we agree that MFDA hearing panels are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. Indeed one of the safeguards in the MFDA system of hearing panels is that there are two industry representatives on each panel. It is the experience of this Panel that all hearing panel members take their responsibilities very seriously, and to the best of their abilities act fairly and impartially in discharging their adjudicative responsibilities, particularly in considering the facts and circumstances of the case which comes before them.

135. We also agree that it is important in deciding this motion that this Panel consider the entire factual matrix which has been presented. Further, it is important that the Hearing Panel not disqualify themselves on trifling or invalid grounds, and we are cognisant of, and concerned about, wasted resources and delay with the attendant risk of injustice.

136. With respect to the facts of this case, and Issues 1 and 2, that is the members of this Hearing Panel, and Ms. Schulze, a witness expected to be called at the pending hearing, currently being members of the MFDA's Pacific Regional Council, and having served on the *Sullivan* panel, we can state that we have had no contact with Ms. Schulze in respect of this case, or her evidence. In fact, it appears that there has been no contact between two of the members of this Hearing Panel and Ms. Schulze since the conclusion of the *Sullivan* case on August 11, 2008. None of the members of the Hearing Panel are involved with Ms. Schulze in any social, commercial or professional capacity. Simply put we four are all members on the roster of the Pacific Regional Council of the MFDA, and two Hearing Panel Members sat with Ms. Schulze, on another case, being a Settlement Agreement Hearing in August, 2008. Those two members of the Hearing Panel state that they have no current recollection of the *Sullivan* hearing or deliberations.

137. As to the law, the parties are in essential agreement as to the test for finding a reasonable apprehension of bias in these circumstances. As Justice Cory said in the *R. v. R.D.S.* case, the test "...contains a two fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of

the case....Further, the reasonable person must be an **informed** person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold.” (Emphasis added.)

138. Further, the onus on the applicant to prove that a reasonable apprehension of bias is present is high since it calls into question an element of judicial integrity with respect to the panel. The Supreme Court of Canada has also stated that the standard refers to an apprehension of bias that rests on serious grounds; those grounds must be substantial: *Wewaykum* decision at para. 76.

139. The Panel has reviewed the evidence in support this motion very carefully. With respect to the Hearing Panel members and a probable witness, Ms. Schulze, all being members on the roster of the Pacific Regional Council, we cannot identify any evidence of any relationship, communication, or contact between the proposed witness and the Hearing Panel which would satisfy the high onus on the Respondent. All four are simply members of the Pacific Regional Council. We agree with the Panel in the *Legare* case that simply being on a roster of potential panel members does not imply that those potential panel members are associates or associating. In our view the roster relationship will not cause an informed person, with knowledge of the facts, viewing the matter realistically and practically – and having thought the matter through – to conclude that the Hearing Panel members are more likely than not, whether consciously or unconsciously, to decide unfairly, or be biased against the Respondent. That informed person would not conclude that the integrity and impartiality of this Hearing Panel had been compromised in any way.

140. A potential witness who is a member of the Pacific Regional Council, or perhaps a former member of the Council, has no special status. If called, they are simply another witness presenting evidence to the Hearing Panel, and presumably they would be subject to cross-examination in relation to their evidence. Like any other witness, their experience and involvement in relation to the material facts may or may not put their credibility in issue. That is a matter to be decided at the hearing, but they have no special status. In our view it would be unreasonable for a right minded person to conclude otherwise, without significant cogent evidence. We find no such evidence.

141. We cannot identify evidence on the motion that amounts to serious grounds in support of the allegation of a reasonable apprehension of bias. This case is somewhat similar to *Price v. Hanna*, and *Ibrahim v. Giuffre*, supra; the roster association does not meet the test as set out by the courts.

142. If this ground were accepted, it would mean that no current member of Council, in a region, could appear before a Hearing Panel, in that region, as they would all have the “association” complained of here. The composition of MFDA hearing panels is dictated by the Association’s Bylaws and Rules. If it were thought that Council members who are part-time hearing panel members ought not to testify as witnesses as a result of their professional or occupational responsibilities, the Association could easily have enacted rules to that effect. They did not. The Respondent agreed to abide by, and comply with, the MFDA Bylaws and Rules.

143. The second ground advanced by the Respondent in support of an alleged reasonable apprehension of bias is the previous association by two members of the Hearing Panel with the proposed witness, as a Panel Member, on another unrelated MFDA case in August, 2008 (*Sullivan*). At issue in that case was the approval of a Settlement Agreement; the Panel did not hear witnesses or decide liability or penalty; the allegations involving that member are not similar to the allegations in this case. The two Hearing Panel Members have stated their lack of recollection of that particular Hearing Panel or its deliberations. There is no evidence on the motion before this Panel to suggest anything other than that brief prior association. An association of 35 years by a judge and a critical witness was not grounds to disqualify the judge (*R. v. Mohan*).

144. We have carefully considered the evidence on this second ground, and the authorities. In our view the analysis done by the court in the *De Cotiis* decision is, on the facts, very similar to the evidence in this case. We are of the view that the connection between the two members of this Hearing Panel and the proposed witness was too brief, not sufficiently recent, and not sufficiently close to give an informed person, viewing the matter realistically and practically, and having thought the matter through, any reasonable apprehension that it would bias the members of this Hearing Panel for or against the proposed witness, or the Respondent.

145. Further, the Respondent has now made significant admissions in his Reply, and has been

ordered to provide further particulars of various matters raised in his Reply. Those admissions, and the particulars we have ordered, may significantly alter the need for certain evidence from the Association witnesses. We suspect that the issues will be narrowed by reason of the Reply and Particulars.

146. In summary, based upon all of the evidence submitted at the hearing we do not think that an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that this Hearing Panel would not decide the matter fairly.

Decision on Motion #2

147. In conclusion, having carefully considered all of the evidence, the submissions on behalf of the parties, and the authorities, it is our view that the Respondent has not discharged the high onus of proof to show serious grounds in support of a reasonable apprehension of bias, according to the well established tests referred to in the authorities. We would answer the questions posed in the issues as per paras. 131 and 132 herein in the negative. The motion is therefore dismissed. Costs in relation to this motion may be spoken to at the conclusion of the hearing on the merits.

148. We would request that the Hearings Coordinator take appropriate steps to obtain convenient dates for the hearing on the merits.

149. These Reasons may be signed in counterpart.

DATED this 4th day of July, 2011.

“Stephen Gill”

Stephen D. Gill,
Chair

“Sharon Moskalyk”

Sharon Moskalyk,
Industry Representative

“Cecilia Wong”

Cecilia Wong,
Industry Representative

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