



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

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

Re: Andrew Kazina

Heard: Motion brought in writing on April 14, 2022 in Winnipeg, Manitoba
Decision and Reasons (Motion): July 19, 2022

**DECISION AND REASONS
(Motion)**

Hearing Panel of the Prairie Regional Council:

Sherri Walsh

Chair

Appearances:

Justin Dunphy

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Senior Enforcement Counsel for the Mutual
Fund Dealers Association of Canada

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Andrew Kazina

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Respondent

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I. INTRODUCTION

1. On March 24, 2022, an appearance in this matter was held by videoconference before a Hearing Panel of the Prairie Regional Council of The MFDA (the “Panel”) to schedule the Hearing on the Merits (the “Hearing”) and to address other procedural matters.

2. The parties had last appeared before the Panel on October 5, 2021 to make submissions regarding the Respondent’s request for further disclosure from MFDA Staff (“Staff”) and to address Staff’s position that the Panel not allow the Respondent to call 8 of 17 witnesses he proposed to call at the Hearing; nor issue summonses for the witnesses the Respondent proposed to call.

3. The Panel issued a Decision and Reasons relating to that appearance on February 9, 2022 in which it confirmed that the Respondent is entitled to call and obtain summonses for all of the 16 witnesses he proposes to call.

4. In the same decision, the Panel determined that there was no need to make any Order with respect to the disclosure requested by the Respondent at that time.

5. At the appearance on March 24, 2022, the parties advised the Panel that on March 8, 2022 the Respondent made a new request for disclosure from Staff – this time asking Staff to obtain the dates that the Member had asked consultants to renew their agreements during the period from 1991 to 2017.

6. Staff refused this request on the basis that the requested information was in the possession of a third party, i.e. the Member and was not relevant to the matters raised in these proceedings.

7. The Panel determined that the Respondent needed to bring a formal motion asking it to grant this new request for disclosure.

8. Accordingly, on April 14, 2022 the Respondent filed a Notice of Motion which asked the Panel to do the following:

To compel MFDA staff to request disclosure from Investors Group Financial Services for the following item:

“During the period of October 1, 1991 through October 5, 2017, how many times and the specific dates that Investors Group Financial Services requested their existing consultant base, all or in part, to renew their consultant agreement”.

9. The Respondent also asked that the motion be conducted as a written hearing.

10. Staff filed their written submissions and authorities in response to the Respondent's motion on April 21, 2022 and the Respondent filed a Reply on April 28, 2022.

11. For the reasons set out below, the Panel denies the Respondent's request for further disclosure.

II. THE PARTIES' POSITIONS

The Respondent's Position

12. In the Notice of Motion he filed, the Respondent identified the following grounds as the basis for his request:

1. *MFDA staff has declined the Respondents request for the above disclosure.*
2. *Information has been provided to the Respondent in regards to consultant agreements and the Respondent would like to confirm the accuracy of same.*
3. *The information is relevant to the hearing for the following reasons:*
 - i) *To determine if Investors Group Financial Services followed their written policies in executing consultant agreements and applied those policies in the same manner/standard to all consultants.*
 - ii) *To determine if Investors Group Financial Services applied their contractual relationship to each of their consultants in the same manner/standard or if it differed throughout their consultant base.*
 - iii) *To determine if the Respondent was offered to renew his consultant agreement that was put forth from the Investors Group Financial Services' consultants base and, if not, the reason.*
 - iv) *To determine if a contractual relationship between Investors Group Financial Services and the Respondent did exist and, if so, what that relationship was.*

13. In support of his motion the Respondent relied on Rules 10.4 and 10.5 of the MFDA Rules of Procedure.

14. Rule 10 of the MFDA Rules of Procedure deals with disclosure of documents. It reads in its entirety as follows:

RULE 10: DISCLOSURE OF DOCUMENTS

10.1 Obligation to Disclose Documents and Items – Corporation

(1) The Corporation shall, as soon as reasonably practicable after service of the Notice of Hearing, and in any case at least 14 days prior to the commencement of the hearing of the proceeding on its merits, provide the Respondent with copies of all documents, and a list of items other than documents, that the Corporation intends to rely on at the hearing.

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

10.2 Obligation to Disclose Additional Documents and Items - Respondent

(1) A Respondent shall, as soon as reasonably practicable after service of the Notice of Hearing, and in any case at least 14 days prior to the commencement of the hearing of the proceeding on its merits, provide the Corporation and any other Respondent with copies of all documents and a list of all items, other than those already provided by the Corporation, that the Respondent intends to rely on at the hearing.

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

10.3 Failure to Disclose Documents or Items

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

10.4 Corporation's Duty to Disclose

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

10.5 Order and Directions Concerning Disclosure and Inspections

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

Staff's Position

15. In its written submissions, Staff set out the following position with respect to the information requested by the Respondent:

a. Staff is not currently in possession of this information, and would therefore have to request the same from Investors Group Financial Services Inc. (the "Member").

b. Staff has previously disclosed all consultant agreements between the Respondent and the Member to the Respondent (via his former legal counsel) on September 3, 2021;

c. Staff's disclosure obligation pursuant to Rule 10.1 of the MFDA Rules of Procedure (the "ROP") does not include the obligation to produce documents that are not in the possession and control of Staff; and

d. Even in the context of criminal proceedings, in order to trigger an obligation on the crown to make efforts to obtain disclosure from a third party, an accused must demonstrate that the information that is sought is "likely relevant" and the information that the Respondent seeks in this proceeding do not meet that standard.

16. Staff acknowledged that pursuant to Rule 10, it has an obligation to provide the Respondent with copies of all documents on which it intends to rely at the Hearing and to make disclosure as required by common law. It says it has complied with these obligations.

Disclosure Required by Common Law

17. Staff submitted that it generally adheres to the disclosure standard that crown prosecutors are expected to uphold in accordance with the Supreme Court of Canada's decision in *R v Stinchcombe*. That standard requires the disclosure of all information in Staff's possession or control, whether inculpatory or exculpatory, that is not clearly irrelevant or privileged.

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

18. In this case, Staff submitted that because it does not have possession of the information or documentation that the Respondent is requesting, neither Rule 10.4, nor the test in *Stinchcombe* is applicable since Staff's common law disclosure obligations are premised on such disclosure being in Staff's possession or control, which is not the case here.

19. In support of this position, Staff stated that it is generally accepted that securities regulatory authorities are not required to produce materials which are not in the regulators' possession or control. Nor are they required to "hunt down" materials from third parties at the request of a Respondent.

Arbour Energy Inc. (Re), 2010 ABASC 11 at para. 48

20. Staff further relied on the decision of the New Brunswick Court of Appeal in *IIROC v Crandall*, which also considered the disclosure obligations required of a Self-Regulatory Organization ("SRO") with respect to third party disclosure that is not in the SRO's possession or control:

... IIROC's obligation at the adjudicative stage was to disclose to Mr. Crandall all relevant, nonprivileged information in its possession or control, whether inculpatory or exculpatory. IIROC had an obligation to inquire of its investigators to ensure the disclosure was complete. IIROC also had to disclose relevant information obtained from third parties in the course of the investigation, but it had no duty to disclose documents in the exclusive possession of any third party. The information from NBF [the IIROC Member] fell into this category. Whatever relevant information IIROC received from NBF had to be disclosed, but IIROC did not have an obligation to do more than that. (Emphasis added)

IIROC v Crandall, 2020 NBCA 76 at para. 71

Third Party Disclosure Obligations

21. The New Brunswick Court of Appeal in *Crandall* went on to consider the test which is applied in criminal law cases to determine whether the crown is obliged to take active steps to obtain documents from a third party, for the benefit of an accused:

It is true that IIROC's regulatory regime applied to NBF, and although NBF employees seemingly complied with IIROC requests, the fact remains that NBF was a third party to the proceeding against Mr. Crandall. As

a result, disclosure of any documents that had not been given to IIROC fell under the regime the Supreme Court of Canada established in *R. v. O'Connor*, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98 (QL). Again, I turn to *Criminal Pleadings & Practice in Canada* to explain:

"Third-party documents" are governed by the *O'Connor regime*. An *O'Connor* application is a "two-step process". Initially, an accused must demonstrate that the records sought are likely relevant to an issue at trial, such as the credibility or reliability of a witness. In view of the privacy interests at stake, an "accused bears the burden" of demonstrating that the documents sought are "logically probative to an issue at trial or the competence of a witness to testify". If an accused meets the likely relevance threshold, the documents will be produced to the trial judge, who must then weigh the "salutary and deleterious effects" of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. [para. 13:3020A] (Emphasis added)

Crandall, supra at para. 72

22. The Court defined the phrase "likely relevant":

"... Third party disclosure" is dealt with in *O'Connor*. To obtain disclosure of such records, an accused must make a court application. First, the "burden is on the accused" to show that the record is "likely relevant". "Likely relevance" is a lower threshold than "true relevance", and has a "wide and generous connotation" that "includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence".... (Emphasis added)

Crandall, supra at para. 70

23. In *Crandall* the Court of Appeal found that IIROC staff was not obliged to comply with the Respondent's request for third party documents. It also found that the Tribunal which heard the Respondent's appeal from the IIROC Panel's decision, had erred in holding that the duty of procedural fairness imposes upon IIROC an obligation to disclose materials that are in the hands of a third party.

Crandall, supra at paras. 74-75

24. Staff submitted that even if the test for requiring Staff to obtain disclosure from a third party set out in *O'Connor* applies in this case, the Respondent has not met the standard required to trigger that obligation.

25. Specifically, Staff submitted that the Respondent cannot show that the information he is requesting in this motion regarding information about contractual dealings between the Member and other Approved Persons who were affiliated with the Member is "likely relevant" to this proceeding.

26. In its written submission Staff indicated why the four grounds on which the Respondent relies as the basis for his motion, do not demonstrate that the requested information is "likely relevant" to any of the issues raised in the Notice of Hearing or any potential defence by the Respondent.

27. The following sets out Staff's submission with respect to the Respondent's four grounds:

- a) **Respondent's Ground:** *To determine if Investors Group Financial Services followed their written policies in executing consultant agreements and applied those policies in the same manner/standard to all consultants.*

Staff's Response: Whether the Member had a policy regarding consultant agreements, or whether it applied them in a uniform manner to all consultants, is not relevant to the issue of the Respondent's compliance with the policies and procedures of the Member that are relevant to the allegations in the Notice of Hearing.

- b) **Respondent's Ground:** *To determine if Investors Group Financial Services applied their contractual relationship to each of their consultants in the same manner/standard or if it differed throughout their consultant base.*

Staff's Response: The terms and dates of the Member's contractual agreements with Approved Persons other than the Respondent are not relevant to the allegations of misconduct that have been made against the Respondent.

- c) **Respondent's Ground:** *To determine if the Respondent was offered to renew his consultant agreement that was put forth from the Investors Group Financial Services' consultant base and, if not, the reason.*

Staff's Response: Whether or not the Respondent received an offer to renew his consultant agreement with the Member is irrelevant to the matters at issue in this proceeding and in any event, the Respondent does not require disclosure about the Member's dealings with other Approved Persons to demonstrate whether or not the Member offered to renew his agreement.

- d) **Respondent's Ground:** *To determine if a contractual relationship between Investors Group Financial Services and the Respondent did exist and, if so, what that relationship was.*

Staff's Response: Similar to grounds B and C, Staff submits that the specific contractual relationship between the Member and the Respondent has no relevance to these proceedings. The Respondent has admitted (or does not specifically deny), that he was registered in the securities industry between October 1991 and October 2017, and specifically with the Member from January 1992 to October 2017, and was therefore bound by MFDA Rules and applicable securities legislation as a registrant.

28. On this last point Staff also submitted that any consultant or contractual agreement between a Member and its Approved Persons regarding terms of employment has no bearing on a Respondent's regulatory obligations under MFDA Rules or Provincial securities legislation and that Approved Persons are required to comply with MFDA Rules including those requiring compliance with the Member's policies and procedures, namely Rules 2.5.1 and 1.1.2.

Botha (Re), 2021 ABASC 11 at paras. 150-155

29. Staff further pointed out that the contractual information that the Respondent has requested is confidential as between the Member and its other Approved Persons and the Respondent has failed to demonstrate that the information sought is "logically probative to an issue ... or to the competence of a witness to testify", as per the test in *O'Connor*.

30. In summary, Staff submitted that the information requested by the Respondent in this motion is not in its possession or control and has no relevance to the matters at issue in this proceeding.

31. Staff confirmed that the Respondent has received disclosure of his own consultant agreements and can ask Member witnesses about those agreements.

32. Staff submitted, therefore, that the Respondent has failed to meet the burden imposed on him to establish that he is entitled to receive any of the additional disclosure requested.

Respondent's Reply

33. In his Reply, the Respondent submitted that he is entitled to procedural fairness. Citing the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para. 28, he submitted that the values underlying the duty of procedural fairness require that the individual affected should have the opportunity to present their case fully and fairly and have discussions affecting their rights, interest or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision.

34. The Respondent noted that this principle was referenced and previously considered by the Panel in its Reasons for Decision (Motion) dated January 6, 2021 and is applicable to this current request for disclosure.

35. The Respondent acknowledged that Staff has disclosed all the consultant agreements he entered into with the Member but submitted that there may have been consultant agreements which were presented by the Member to other Approved Persons, that were not presented to him.

36. In this regard, he stated that he is not asking Staff to produce a document but rather to produce information advising if there were other consultant agreements provided to other consultants and, if so, the date of those agreements.

37. Finally, the Respondent relied on a decision of the Ontario Securities Commission (“OSC”): *Eda Marie Agueuci et al*, 2012 ONSEC 44 (CanLII) where the Respondents brought a motion seeking further disclosure from Staff of the Ontario Securities Commission.

38. In that decision, the OSC noted that as a matter of law, Staff has an obligation to disclose to Respondents all documents that are relevant to the proceeding, whether inculpatory or exculpatory, in accordance with the principles articulated in *Stinchcombe*. There was no dispute between Staff and the Respondents in that case with respect to the articulation of that principle; rather, the dispute related to the application of the principle in the circumstances of the case.

39. The OSC confirmed that Staff should apply a low threshold of relevance in deciding what to disclose to the Respondents.

40. The decision did not, however, address whether or when Staff is obliged to seek disclosure of documents and information from third parties. It is of limited assistance, therefore.

III. ANALYSIS

41. The Panel accepts and agrees with the submissions made by Staff that Staff is not obliged to obtain the information the Respondent has requested, from the Member.

42. Rule 10.1 of the MFDA Rules of Procedure requires Staff to produce all documents on which it intends to rely at the Hearing. It does not require Staff to produce documents that are not in its possession or control.

Staff's Disclosure Obligation at Common Law

43. Rule 10.4 of the MFDA Rules of Procedure goes on to confirm that nothing in that Rule derogates from Staff's obligation to make disclosure as required by common law.

44. As set out in its submission, Staff generally adheres to the disclosure standard that crown prosecutors are expected to uphold in accordance with the Supreme Court of Canada's decision in *Stinchcombe*, requiring the disclosure of all information in Staff's possession or control, whether inculpatory or exculpatory, that is not clearly irrelevant or privileged.

R v Stinchcombe, supra at paras. 19-23

45. The information which is the subject of the Respondent's motion in this instance is not information which is in Staff's possession.

46. As the Alberta Securities Commission stated in *Arbour, supra*, in regulatory proceedings, Staff are not required "to hunt down" materials from third parties at the "behest" of a respondent.

Arbour, supra at para. 48

47. Further, the Alberta Securities Commission in *Arbour*, noted that in *Deloitte & Touche LLP v Ontario (Securities Commission)*, 2003 SCC 61 the Supreme Court of Canada determined that application of the *Stinchcombe* standard of relevance was "reasonable" – "not required" – in securities regulatory enforcement proceedings and that the Supreme Court made no suggestion that any extension of that disclosure obligation was needed.

Arbour, supra at para. 57

48. The Panel in *Arbour* also noted, citing the Supreme Court's decision in *R v McNeil*, 2009 SCC 3 that the *Stinchcombe* regime of disclosure extends only to material in the possession or control of the crown.

R v McNeil, 2009 SCC 3 at para. 59

49. As the New Brunswick Court of Appeal ("NBCA") confirmed in *Crandall*, while a regulator has an obligation to disclose relevant information it has obtained from third parties in the course of its investigation, it has no duty to disclose documents which are in the exclusive possession of any third party.

Crandall, supra at para. 76

50. As an aside, the Panel notes that in *Crandall*, IIROC Staff had actually made numerous requests of the Member for the information the Respondent was seeking. The Member was not able, however, to locate the requested information. The Respondent appealed the IIROC Panel's decision citing a number of arguments including that the records he had requested, were not provided. The Court's determination that IIROC Staff had no obligation to disclose documents which were in the exclusive possession of any third party was not premised on the fact that Staff had asked the third party Member for the documents in question.

51. The Court in *Crandall* discussed the test which is applied in criminal cases to decide whether the crown is obliged to take active steps to obtain documents from a third party for the benefit of an accused – the *O'Connor* regime.

52. In that regime, an accused must first demonstrate that the records sought are “likely relevant” to an issue at trial such as the credibility or reliability of a witness. Where privacy interests are at stake, the accused also bears the burden of demonstrating that the documents sought are “logically probative” to an issue at trial or the competence of a witness to testify.

Crandall, supra at para. 72

53. The NBCA went on to define “likely relevance” in the *O'Connor* context as follows:

"Likely relevance" is a lower threshold than "true relevance", and has a "wide and generous connotation" that "includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence..."

Crandall, supra at para. 70

54. Applying this standard, the Panel agrees with Staff's submission that the Respondent has failed to demonstrate that the information or documents he is seeking are “likely relevant” to an issue in these proceedings.

55. However broadly one defines “relevance” for the purposes of the disclosure obligations Staff owes to the Respondent in this matter, the information the Respondent is requesting does not meet that definition.

56. Information relating to the terms and dates of the Member's contractual agreements with Approved Persons other than the Respondent are not relevant to the allegations of misconduct that have been made against the Respondent in these proceedings and will therefore not assist him in making full answer and defence.

57. The Panel further agrees with Staff's submission that whether the Member treated all consultants in a uniform manner is not relevant to the issue of whether the Respondent complied with the policies and procedures of the Member, as per the allegations in the Notice of Hearing.

58. In this regard, the Panel finds that any issues that the Respondent has with respect to how the Member treated him, including whether or not the Member treated him differently from how it treated other Approved Persons, is a matter for private dispute resolution between the Respondent and the Member. It is not the subject of these regulatory proceedings.

59. The Panel agrees that the Respondent is owed a high level of procedural fairness in these proceedings and that he must be given a full and fair opportunity to participate in and respond to the case Staff brings. This includes having the benefit of full and timely disclosure of the case he has to meet. It does not include an obligation that Staff request disclosure from the Member of the information the Respondent is seeking in this motion.

60. As the New Brunswick Court of Appeal said in *Crandall*:

Procedural fairness is a contextually based broad concept that imposes certain obligations on administrative decision-makers. Among these obligations is a requirement for an administrative body exercising disciplinary powers over one of its members to inform the individual concerned of the case to be met and of the evidence against him or her and to give all parties an opportunity to be heard (the *audi alteram partem* rule) ...

Crandall, supra at para. 2

61. The Panel finds that this requirement has been satisfied and that the Respondent has been provided with disclosure of the case he has to meet.

62. Staff have confirmed that they have disclosed all consultant agreements between the Respondent and the Member to the Respondent, via his former legal counsel.

63. In the Panel's view, a refusal to extend Staff's disclosure obligation to seek the information requested by the Respondent in this motion from the Member, does not jeopardize the fairness of this process, nor the Respondent's right to make full answer and defence to the allegations contained in the Notice of Hearing.

64. For all of the above reasons the Panel denies the Respondent's request for further disclosure.

DATED this 19th day of July, 2022.

"Sherri Walsh"

Sherri Walsh
Chair

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