FINANCIAL AND CONSUMER SERVICES TRIBUNAL | TRIBUNAL DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: *New Brunswick (Armstrong v. Mutual Fund Dealers Association)*, 2016 NBFCST 5

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *SECURITIES ACT*, S.N.B. 2004, c. S-5.5

Date: 2016-06-03
Docket: SE-002-2015

BETWEEN:

Scott C. Armstrong,

Applicant,

-and-

Mutual Fund Dealers Association of Canada,

Respondent.

REASONS FOR DECISION ON MOTIONS

Restriction on publication: This Decision has been anonymized to comply with the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6.

PANEL:	Louise Caissie, Panel Chair Jean LeBlanc, Panel Member Don Moors, Panel Member
DATE OF HEARING:	April 6, 2016
WRITTEN REASONS:	June 3, 2016
APPEARANCES:	Arthur T. Doyle and Patrick J.O. Dunn for the Applicant Lyla Simon for the Respondent

TABLE OF CONTENTS

I. OVERVIEW

[1] This decision concerns the filing of a Request for Hearing outside the prescribed time limit and whether an extension of time to file the Request for Hearing should be granted.

[2] On April 30, 2015, Scott Armstrong filed a Request for Hearing seeking a review of a decision of a hearing panel of the Mutual Fund Dealers Association [MFDA] issued on September 27, 2011. In his Request for Hearing, Mr. Armstrong seeks an extension of the time for filing the Request for Hearing pursuant to paragraph 2(3) of Local Rule 15-501 *Proceedings before the Tribunal* [Local Rule 15-501], as it was filed outside the 30-day time limit provided in paragraph 11(1) of Local Rule 15-501.

[3] On November 2, 2015, MFDA Staff filed a motion seeking the following relief:

- An order striking Scott Armstrong's Request for Hearing as being filed out of time, based on the fact that the Applicant did not file the Request for Hearing within 30 days of the Decision, as required under paragraph 11(1) of Local Rule 15-501.

- In the alternative, that the Tribunal refuse to grant an extension of the time limit under paragraph 2(3) of the Local Rule 15-501 for filing a Request for Hearing.

- In the further alternative, that the Tribunal dismiss or stay these proceeding on the grounds of delay.

[4] We advised the parties that we intended to deal with Mr. Armstrong's request for an extension of time and the MFDA's motions at the same time.

[5] We also advised the parties that we only intend to consider the motion for an extension of time as by considering the criteria for granting or refusing an extension of time, we would consider the cause and extent of the delay and any prejudice to the parties such that the MFDA's other motions become redundant. The parties confirmed they agreed with this approach at the hearing of the motion.

[6] For the reasons that follow, we grant the extension of time to file the Request for Hearing.

II. PRELIMINARY ISSUE

[7] In advance of the hearing, we raised as a preliminary issue the potential conflict of interest of panel member Don Moors. We advised the parties to be prepared to address this issue at the start of the hearing.

[8] In reviewing the Affidavits filed in support of the motions, panel member Don Moors discovered that Bears Neal had been the auditor of Armstrong Financial.

[9] Mr. Moors has a consulting business which provided business advisory services in a management consulting capacity to Bears Neal. That relationship ended in September 2014. Mr. Moors did not do any audit work for Bears Neal nor did he provide any assistance or advice to the auditing side of Bears Neal. He did not gain any knowledge of Armstrong Financial or Scott Armstrong during his business relationship with Bears Neal.

[10] After review of the Tribunal's Policy TR1-102: *Conflict of Interest*, Mr. Moors is of the view that he does not have a disqualifying conflict of interest and is able to proceed with the hearing of this matter objectively.

[11] Counsel for both parties confirmed they do not feel panel member Don Moors has a disqualifying conflict of interest.

[12] As such, panel member Don Moors remained on the panel.

III. ISSUE

[13] Should an extension of time for filing the Request for Hearing be granted?

IV. POSITIONS OF THE PARTIES

[14] Mr. Armstrong contends that the time for filing his Request for Hearing should be extended for the following reasons:

a) He has a meritorious defence,

b) There would be no undue prejudice to the MFDA resulting from the granting of the extension, while Mr. Armstrong would be severely prejudiced if the extension were to be denied,

c) Mr. Armstrong has, in his supporting Affidavit, properly explained the delay in filing the Request for Hearing,

d) Mr. Armstrong should not be visited with the consequences of the failure to act and disciplinary suspension of his former solicitor in this matter, and

e) The just determination of this matter on the merits requires the extension.

[15] Mr. Armstrong also argues that the Agreed Statement of Facts he signed on August 19, 2011 is invalid as he did not enter into it voluntarily and on an informed basis. He indicates that at the time of signing the Agreed Statement of Facts, he was overwhelmed by the extensive disclosure and was unable to respond to it without legal representation.

[16] On the other hand, MFDA Staff submits that the delay in filing the Request for Hearing in this matter is excessive and extraordinary. MFDA Staff contends that extending the time limit would not be the most expeditious and least expensive determination of this matter on the merits as required by paragraph 2(1) of Local Rule 15-501 and would not offer certainty or consistency in the administration of proceedings. They further contend that an extension of time would not be in the public interest and would create a flood-gates effect.

V. FACTS

[17] Mr. Armstrong was self-represented during the MFDA's investigation, the disciplinary proceeding and in the two years following the issuance of the MFDA hearing panel's decision.

Investigation and Start of Disciplinary Proceeding

[18] On November 21, 2008, the MFDA received a complaint from Complainant 1 regarding his purchase and subsequent attempts to sell shares in Armstrong Financial Services Inc. [Armstrong Financial]. The MFDA opened a file regarding this complaint.

[19] The MFDA undertook an investigation in relation to the complaint.

[20] Following its investigation, MFDA Staff issued a Notice of Hearing on January 19, 2011 commencing a disciplinary proceeding against Mr. Armstrong. The Notice of Hearing sets out MFDA Staff's allegations of wrongdoing by Mr. Armstrong.

[21] Mr. Armstrong was served with the Notice of Hearing on January 31, 2011. The letter of solicitor Charles Toth accompanying the Notice of Hearing enclosed the Notice of Hearing, the MFDA's Rules of Procedure and the MFDA's Guide to the Disciplinary Hearing Process.

[22] The MFDA's Guide to the Disciplinary Hearing Process provides the following general information about requesting a review of a decision of an MFDA hearing panel:

> 12) Review of Decision — If MFDA Staff or a Respondent believes that the decision of the Hearing Panel was incorrect or unfair, a review of the decision can be requested. In a case involving a Member, the decision can be reviewed by the Board of Directors of the MFDA in accordance with the process described in Rules 16 and 17 of the MFDA Rules of Procedure (See also MFDA By-law No. 1, s. 24.6.) In a case involving an Approved Person or a decision of the MFDA Board of Directors, the decision can be reviewed by the securities commission in the province where the hearing took place in accordance with procedures established in the province's securities legislation. You can contact your provincial securities commission for details (See MFDA By-law No. 1, s. 26.) Strict time limits (usually 30 days

from receipt of the decision) usually apply for filing a request to have a MFDA Hearing Panel decision reviewed. (See for example Rule 16.1 of the Rules of Procedure.)

Reply and Disclosure

[23] On February 14, 2011, Mr. Armstrong files a 14-page Reply denying the vast majority of the allegations contained in the Notice of Hearing. At the time of filing his Reply, Mr. Armstrong had not received disclosure from MFDA Staff.

[24] Mr. Armstrong requests disclosure from Mr. Toth on February 15, 2011, March 2, 2011 and again on April 8, 2011. In his March 2, 2011 email, Mr. Armstrong requests that the disclosure be provided to him in advance of the March 25, 2011 first appearance. In a return email dated March 7, 2011, Mr. Toth indicates that he would provide disclosure in advance of the first appearance and specifies that the first hearing is not a hearing on the merits and that at the first appearance, they would set the dates for the hearing on the merits and address any procedural or administrative issues, but would not adduce evidence or call witnesses.

[25] Mr. Armstrong responds that same day stating that he would await the materials.

[26] Mr. Armstrong receives some limited disclosure late on March 24, 2011 consisting of interview statements.

[27] At the March 25, 2011 first appearance, the hearing on the merits is scheduled for July 6 to 8, 2011. At that first appearance, Mr. Armstrong indicates that he did not have the disclosure when he prepared his Reply and that when he receives the disclosure, he may want to add something to his Reply. Mr. Toth, not the panel, advises him that if he wishes to amend his Reply after reviewing the disclosure, he will need to seek that relief before the hearing panel.

[28] MFDA Staff provides Mr. Armstrong with full disclosure on May 4, 2011, two months before the hearing on the merits.

[29] On June 22, 2011, exactly 14 days before the start of the hearing on the merits, Mr. Toth advises Mr. Armstrong of the witnesses he intends to call at the hearing.

[30] Two days before the start of the hearing, Mr. Armstrong advises Mr. Toth of some of the witnesses he intends to call at the hearing. Mr. Armstrong does not provide summaries of witness testimonies as required by the MFDA Rules of Procedure.

July 6-8, 2011 Hearing

[31] The hearing on the merits begins on July 6, 2011 and continues until July 8, 2011.

[32] It quickly becomes apparent that the three days scheduled for the hearing would be insufficient and likely would only suffice for the presentation of the MFDA's case. At the start of the July 6, 2011 hearing day, Mr. Toth indicates to the panel chair that the hearing would certainly exceed the scheduled three days and that he wasn't even sure they would get to Mr. Armstrong's case in the three days.

[33] The hearing starts with a preliminary matter brought by Mr. Armstrong. Mr. Armstrong sought to call five witnesses which he had identified to MFDA Staff two days before the hearing, but for which he had not provided summaries of testimony. Mr. Armstrong also sought to call additional witnesses.

[34] MFDA Staff opposed Mr. Armstrong's motion because they were not advised of the names of Mr. Armstrong's witnesses until two days before the hearing and Rules 11.1 and 11.2 of the MFDA Rules of Procedure set out that a party has to provide 14 days' notice that a witness is going to testify and 14 days' notice of the substance of their evidence.

[35] The panel chair grants Mr. Armstrong the permission to call the five witnesses he had already identified so long as he provides summaries of their testimony at least 14 days before the hearing dates that would be scheduled for the continuation of the hearing. However, the panel chair refuses Mr. Armstrong's request to call additional witnesses.

[36] During the July 6, 2011 hearing day, Mr. Armstrong also indicates to the panel that he might want to appeal. He is not provided any information on how to do so.

[37] The MFDA presents its case from July 6 to 8, 2011. Its first witness is Complainant 1.

[38] Before Mr. Toth begins his direct examination of Complainant 1, he advises the panel that Complainant 1 is only available that day for testimony. This was the first time that Mr. Toth advised of Complainant 1's limited availability. The panel indicates to Mr. Armstrong that he would have until 5 p.m. to complete his cross-examination of Complainant 1, when they would no longer have the room available.

[39] Mr. Toth completes his direct examination of Complainant 1 at approximately 3 p.m. The panel then takes a 10-minute break, after which the hearing resumes. Mr. Armstrong begins his cross-examination of Complainant 1 at approximately 3:10 p.m.

[40] At approximately 4 p.m., Mr. Armstrong enquires whether he can recall Complainant 1 as a further witness at some other time.

[41] During an exchange with the panel chair, Mr. Armstrong requests to recall Complainant 1. After this request is denied by the panel, Mr. Armstrong indicates that he has no more questions for Complainant 1.

[42] At the start of the July 7, 2011 hearing day, Mr. Armstrong asks the panel whether he can continue his cross-examination of Complainant 1 as he had less than two hours to cross-examine Complainant 1 and he only found out July 6th that Complainant 1 was only available for that single day. This request is denied by the panel.

[43] After the MFDA completed presenting its case, the hearing is adjourned to August 22-26, 2011. This adjournment was required because the three days of hearing initially scheduled was not sufficient and also to allow Mr. Armstrong to comply with the MFDA rules with respect to advising of the substance of the evidence of his witnesses.

The Agreed Statement of Facts

[44] On July 11, 2011, Mr. Armstrong leaves a voicemail message for Charles Toth indicating that he does not wish to proceed with the hearing.

[45] On July 18, 2011, Mr. Armstrong sends an email to Mr. Toth again advising that he does not want to proceed with the hearing as he does not have the resources to defend himself properly and "it would be impossible to gather all the material [he] would need to put on a proper defense". Mr. Armstrong also indicates in that email:

> I would need ample time to obtain the necessary documents and witness statements necessary for a proper defence. I am in no hurry to close my defence or this investigation. Although the panel chair said I could give my side of the storey when I appear as a witness, it is obvious to me that I would also need the proper documention to substantiate my defense.[…] Given the time frame the rules and procedures give me I would like to know how the MFDA would expect me to get all the material necessary for my defense.[…] Mr. Toth, I could go on with a litenay of reasons why your investigation is not on the mark. I would like the chance and time to properly defend myself and believe I desrve the right to do that.[…] The allegations the MFDA has made against me are very serious. I want the time to defend myself properly.[…] There are witnesses who know all of this. The MFDA must let me defend myself properly. Why did the MFDA not call other relavant witnesses […]. Please let me know where to proceed from here. [*Exact reproduction of the original*]

[46] On July 19, 2011, Mr. Armstrong and Mr. Toth have a telephone conversation during which Mr. Armstrong asks what penalties MFDA Staff would seek in the proceeding against him. Mr. Toth advises that he will seek instructions with respect to this request.

[47] On July 20, 2011, Mr. Toth sends an email to Mr. Armstrong attempting to clarify whether he does not intend to participate in the hearing any further, or is requesting more time and/or

additional materials to prepare his defence. Mr. Toth advises Mr. Armstrong that his options are: (1) to not participate further in the hearing; (2) to continue to participate in the hearing and call evidence to support his defence; or (3) to continue with the hearing without calling any evidence and make submissions regarding the evidence adduced by MFDA Staff. Mr. Toth also advised Mr. Armstrong that if he chooses options (2) or (3) and wants more time to prepare his defence, he should contact the CSO and make this request to the hearing panel immediately. Mr. Toth also advises that MFDA Staff will oppose any request to adjourn or otherwise delay the hearing.

[48] On July 26, 2011, Mr. Toth sends Mr. Armstrong an email outlining the penalties that MFDA Staff would seek in the disciplinary proceeding based on 3 options: resolution of the matter by a settlement agreement, resolution of the matter by an Agreed Statement of Facts, or proceeding with a contested hearing.

[49] On July 28, 2011, Mr. Armstrong phones Mr. Toth regarding the proposed resolutions set out in the July 26, 2011 email. During this telephone call, Mr. Toth explains the various options to Mr. Armstrong and the latter indicates that he wants to resolve the proceeding by way of an Agreed Statement of Facts.

[50] Discussions and negotiations surrounding the Agreed Statement of Facts continue until August 15, 2011. During this period of time, Mr. Armstrong appears to have difficulty deciding how to proceed – on the one hand indicating he wants to proceed with the Agreed Statement of Facts and on the other hand indicating that he disputes MFDA Staff's allegations against him.

[51] On August 15, 2011, Mr. Armstrong calls Mr. Toth and again indicates that he wants to resolve the proceeding with an Agreed Statement of Facts. During that telephone conversation, Mr. Armstrong states that he wants an appeal "one day in the future". Mr. Toth tells Mr. Armstrong that he cannot advise him on this, that the issue is between him and the New Brunswick Securities Commission, and that he cannot get a re-hearing with the MFDA. Mr. Toth also advises that the MFDA does not have independent counsel to provide him assistance. Finally, Mr. Toth tells Mr. Armstrong that he has until the following day to advise whether he wants to proceed with the Agreed Statement of Facts as he needs to prepare it for his review.

[52] Mr. Armstrong contacts Mr. Toth later that same day and advises that he wants to proceed with the Agreed Statement of Facts.

[53] On August 16, 2011, Mr. Toth emails the draft Agreed Statement of Facts to Mr. Armstrong for his review.

[54] On August 18, 2011, Mr. Armstrong advises Mr. Toth that he has read the Agreed Statement of Facts and will sign it.

[55] Later that same day, Mr. Toth emails Mr. Armstrong a copy of the Agreed Statement of Facts, which had been signed by MFDA Management.

[56] Mr. Armstrong signs the Agreed Statement of Facts and emails a copy of it back to Mr. Toth on August 19, 2011.

[57] The content of the Agreed Statement of Facts is very similar to the Notice of Hearing. Mr. Toth indicates at the August 23, 2011 hearing that "it is substantially similar" to the Notice of Hearing "with the exception of a sentence or two".

[58] In addition to providing a factual scenario, the Agreed Statement of Facts recommends the following sanctions:

(a) a permanent prohibition on Mr. Armstrong's authority to conduct securities related business in any capacity over which the MFDA has jurisdiction, which will be reduced to a 5 year suspension if Complainant 1 is repaid the sum of $51,500 by Mr. Armstrong on or before the date determined by the Hearing Panel; and

(b) a fine in the amount of $51,500, which will be reduced to a fine in the amount of $10,000 if Complainant 1 is repaid the sum of $51,500 by Mr. Armstrong on or before the date set by the Hearing Panel in paragraph (a) above;

(c) and costs in the amount of $5,000.00.

[59] Mr. Armstrong does not receive independent legal advice before signing the Agreed Statement of Facts.

[60] Mr. Armstrong states in his Affidavit that he experienced personal difficulties in the years leading up to the MFDA investigation and proceeding which include:

- In December 2008: he was dealing with depression,
- March 1, 2009: his father passed away,
- July 2009 - 2013: he was unemployed and had no income,
- 2010: he began to abuse alcohol, and
- 2011: he joined Alcoholics Anonymous.

Continuation of the Hearing – August 23, 2011

[61] The Agreed Statement of Facts is provided to the hearing panel on August 19 or 20, 2011.

[62] The hearing resumes on August 23, 2011. Given the Agreed Statement of Facts, there are no witnesses. The panel's role is to determine the appropriate sanctions based on the Agreed

Statement of Facts and the submissions of the parties.

[63] At the start of the August 23, 2011 hearing, there is a lengthy discussion between the panel chair and Mr. Toth regarding the substantial similarities between the Agreed Statement of Facts and the Notice of Hearing and whether an order from an MFDA hearing panel can be made into an enforceable judgment. This is followed by a lengthy discussion between the panel chair and Mr. Armstrong regarding the time to pay the fine.

[64] The only discussion between the panel and Mr. Armstrong regarding his understanding of the Agreed Statement of Facts is at p. 35 of the transcript, where the panel chair asks a single question of Mr. Armstrong:

> CHAIRMAN: And you have agreed to all of the statement of facts and you signed them?
>
> MR. ARMSTRONG: Yes. And my only import for there would be I think that…

[65] This is the first time Mr. Armstrong speaks at the August 23, 2011 hearing. There ensues a lengthy discussion between the panel chair and Mr. Armstrong regarding the time to pay the fine, which is followed by arguments by Mr. Toth. Mr. Toth then invites the panel to allow Mr. Armstrong to make submissions and the panel chair states the following to Mr. Armstrong:

> CHAIRMAN: Do you intend to say anything further? I mean you have pretty well told us what your situation is and you have agreed to the facts, so there is not much in dispute. And you agree that some penalty will follow?
>
> The nodding is yes.

[66] There is no discussion between the hearing panel and Mr. Armstrong regarding the fact that he is self-represented, whether he has received independent legal advice before signing the Agreed Statement of Facts, or whether he understands the meaning of the Agreed Statement of Facts.

[67] At the August 23, 2011 hearing, Mr. Armstrong makes submissions on the length of time he would have to repay Complainant 1. MFDA Staff requested that Mr. Armstrong be provided until December 31, 2012 to repay Complainant 1. Mr. Armstrong argued that he would need at least five years to repay Complainant 1. Mr. Armstrong advises the panel that he is not employed, is fifty years old and his job prospects are not good. He also argues that even if he obtained employment that allowed him to repay $12,000 per year, it would take him five years to repay the full amount.

[68] The hearing panel issues its decision on September 27, 2011 in which it orders:

a) a permanent prohibition on Mr. Armstrong's authority to conduct securities related business in any capacity over which the MFDA has jurisdiction, which will be reduced to a 5 year suspension if Complainant 1 is repaid the sum of $51,500 by Mr. Armstrong on or before the date determined by the Hearing Panel; and

b) a fine in the amount of $51,500, which will be reduced to $10,000 if Complainant 1 is repaid the sum of $51,500 on or before the date set by the Hearing Panel in paragraph (1) above;

c) costs in the amount of $5,000.00.

[69] The panel rejects Mr. Armstrong's argument that he should have five years to repay Complainant 1 and instead orders that Mr. Armstrong would have until December 31, 2013 to repay Complainant 1– a period of just over 2 years.

[70] Neither the MFDA hearing panel nor the MFDA advises Mr. Armstrong when the decision is issued that he has 30 days to seek a review of the decision by the New Brunswick Securities Commission.

Mr. Armstrong's Conduct after the Decision

[71] Between September 28, 2011 and December 19, 2012, Mr. Armstrong takes no steps to have the decision reviewed.

[72] On December 19, 2012, Mr. Armstrong contacts Mr. Toth by telephone and states that he expected that the New Brunswick Securities Commission would overturn the MFDA's decision against him. He also requests all information about his case. Mr. Armstrong also advises that he was not in his right mind during the hearing. Mr. Toth requests that Mr. Armstrong put his request in writing.

[73] That same day, Mr. Armstrong sends correspondence to Mr. Toth requesting all information associated with his proceeding.

[74] On January 10, 2013, Mr. Toth sends Mr. Armstrong correspondence attaching the prehearing disclosure which had previously been provided to him during the MFDA's proceeding against him.

[75] On January 18, 2013, Mr. Armstrong again calls Mr. Toth and asks how he can challenge the contents of the Agreed Statement of Facts. Mr. Toth tells him that he would need to consult his own lawyer on this issue.

[76] Mr. Armstrong retains solicitor Howard Peters in October 2013.

[77] Mr. Peters sends a letter dated November 27, 2013 to Mr. Toth indicating that he intends to apply for a review of the decision of the MFDA panel.

[78] Mr. Peters takes no further action to represent Mr. Armstrong and is suspended from the practice of law by the Law Society of New Brunswick in June 2014 for conduct including failure to communicate with clients and to act on their matters. Mr. Peters is disbarred on November 9, 2015 by the Law Society of New Brunswick.

[79] Mr. Armstrong contacts solicitor Arthur Doyle of Cox & Palmer on July 29, 2014.

[80] Mr. Armstrong retained Cox & Palmer on August 7, 2014.

[81] Cox & Palmer begins receiving documents in connection with this matter on August 27, 2014 and receives the bulk of the documents in connection with the MFDA investigation and proceeding between January 2015 and mid-February 2015.

The Request for a Review

[82] There is no right to appeal a decision of an MFDA hearing panel. Rather, an individual can seek a review of a decision of an MFDA hearing panel. In 2011, a person could seek a review of a decision of an MFDA hearing panel by the New Brunswick Securities Commission.

[83] The right to request a review is set out in section 44 of the New Brunswick *Securities Act,* S.N.B. 2004, c. S-5.5. Section 44 does not provide a limitation for requesting a review.

[84] The New Brunswick Securities Commission's Local Rule 15-501 ***PROCEDURES FOR HEARINGS BEFORE A PANEL OF THE COMMISSION*** set out a 30-day limitation for requesting a review. Paragraph 11(1) of Local Rule 15-501 provided:

> **11(1) Requesting a review** - A person wishing to have a decision of the Executive Director or an SRO reviewed by the Commission must file with the Secretary a Request for Hearing within 30 days of the decision.

[85] As of July 1, 2013, the New Brunswick Securities Commission was continued as the Financial and Consumer Services Commission and the adjudicative functions of the New Brunswick Securities Commission were transferred to the newly created Financial and Consumer Services Tribunal. The Tribunal's procedural rules remain Local Rule 15-501 and the 30-day limitation period remains at paragraph 11(1) of that Rule. However, paragraph 11(1) of Local Rule 15-501 now provides:

> **11(1) Requesting a review** – A person wishing to have a decision of the

> Executive Director of Securities or of an exchange, a self-regulatory organization, a quotation and trade reporting system, a clearing agency or an auditor oversight body reviewed by the Tribunal must file with the Registrar a Request for Hearing within 30 days of the decision.

[86] Pursuant to paragraph 11(1) of Local Rule 15-501, Mr. Armstrong had until October 28, 2011 to file his Request for Hearing requesting a review of the decision of the MFDA panel.

[87] On April 30, 2015, Mr. Armstrong files his Request for Hearing seeking a review of the decision and also seeking an extension of the time for filing the Request for Hearing.

VI. ANALYSIS

[88] We find, considering all the circumstances, that the justice of this case requires that an extension of time must be granted for filing the Request for Hearing.

A. AUTHORITY TO GRANT EXTENSION

[89] Paragraph 2(3) of Local Rule 15-501 provides the Tribunal the discretionary authority to extend any time limit found in Local Rule 15-501, including the 30-day time limit to file a Request for Hearing found at paragraph 11(1) of Local Rule 15-501. Paragraph 2(3) states:

> **2(3) Extension of time –** Any time period prescribed by this Rule may be extended or abridged by the Panel.

[90] We also mention paragraph 2(2) of Local Rule 15-501, which provides the panel a broad authority to vary the requirements of the procedural rules. That paragraph reads:

> **2(2) Variation of rule –** The purpose of this Rule is to provide certainty and consistency in the administration of Proceedings. However, a Panel or single Panel member assigned to a matter may waive or vary any provision of this Rule and may issue general or specific procedural directions at any time, if it is of the opinion that to do would be in the public interest or would otherwise be advisable to secure the just and expeditious determination of the matters in issue.

[91] Local Rule 15-501 does not set out any additional criteria or factors to consider in determining whether to grant or refuse an extension of time. To obtain the criteria, we must look to the caselaw.

B. THE TEST FOR GRANTING AN EXTENSION

[92] We mention at the outset that the parties did not set out the same test for granting an extension. However, MFDA Staff conceded at the hearing of the motion that decisions from

New Brunswick were likely the most appropriate.

[93] We are mindful of the New Brunswick Court of Appeal's decision in *Hill v. Mattatall* (1996), 176 N.B.R. (2d) 343 (C.A.) where it stated that New Brunswick courts do not take as strict a view of time limits as do some other Canadian jurisdictions.

[94] As such, we are of the view that we should follow the test for an extension of time as adopted by New Brunswick courts.

[95] The New Brunswick Court of Appeal recently repeated in *A.A. v. Human Rights Commission (N.B.)* (2013), 414 N.B.R. (2d) 30 [*A.A. v. Human Rights Commission*] that the test and factors applicable in New Brunswick are as set out by the Supreme Court of Canada in *R. v. Roberge*. We are of the view that they are equally applicable to a request for an extension to file a Request for Hearing.

[96] In *R. v. Roberge*, 2005 SCC 48 at par. 6, the Supreme Court of Canada stated, in considering the test for granting an extension, that "[t]he ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted".

[97] The Supreme Court stated that it has traditionally adopted a generous approach in granting extensions of time. It set out a non-exhaustive list of factors to guide a court or tribunal in the exercise of this discretion, which are:

1. Whether the applicant formed a *bona fide* intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time,

2. Whether counsel moved diligently,

3. Whether a proper explanation for the delay has been offered,

4. The extent of the delay,

5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties, and

6. The merits of the application for leave to appeal.

[98] The New Brunswick Court of Appeal also recognized in *Atlantic Pressure Treating Ltd. v. Bay Chaleur Construction (1981) Ltd.* (1987), 81 N.B.R. (2d) 165 (C.A.) [*Atlantic Pressure Treating*] that not every factor need be satisfied in order to extend time – the test is always whether justice requires that an extension be granted.

[99] We turn now to our analysis of the factors and the overall justice of the case.

C. ANALYSIS OF THE FACTORS

1) Intent to Seek a Review

[100] The hearing panel issued its decision on September 27, 2011. Pursuant to Local Rule 15-501, Mr. Armstrong had until October 28, 2011 to file a Request for Hearing seeking a review of the decision. We find Mr. Armstrong did not manifest an intent to seek a review of the decision in the 30 days following the issuance of the decision.

[101] It is important in considering this factor to repeat that Mr. Armstrong was self-represented and the MFDA did not inform him when the decision was issued that he could seek a review of this decision by the New Brunswick Securities Commission and that he had 30 days to seek this review.

[102] We find that Mr. Armstrong manifested an intent to seek a review of the decision before the decision was rendered. However, each time he raised the possibility of "appealing", he was not provided information on how to do so. This finding is based on the following facts:

- On July 6, 2011, the first day of the MFDA hearing, Mr. Armstrong raised the possibility of appealing the MFDA panel's decision. He stated at pages 20 and 21 of the transcript:

  > MR ARMSTRONG […] I understand the time is short. However, if the panel or Mr. Toth, the investigator, were to agree that I could call further witnesses, should I list them now? For two purposes, either to have them after the three days or during an appeal. [pages 20-21 of the July 6, 2011 transcript]

- The hearing panel did not inform Mr. Armstrong of how to seek a review of its future decision.

- On August 15, 2011, during a telephone conversation with Charles Toth, Mr. Armstrong advised that he "wants to appeal one day in the future". Mr. Toth wrote in his Record of Conversation that he "cannot advise you on this".

[103] We find that Mr. Armstrong again manifested an intent to seek a review of the decision from December 19, 2012 to April 30, 2015 when the Request for Hearing was finally filed. This finding is based on the following facts:

- On December 19, 2012, Mr. Armstrong contacted Mr. Toth, requested all information about his case, and stated that he expected that the New Brunswick Securities Commission would overturn the MFDA's decision against him.

- On January 18, 2013, Mr. Armstrong again called Mr. Toth inquiring how he could challenge the contents of the Agreed Statement of Facts. Mr. Toth advised him that he should consult his own lawyer on this issue.

- Mr. Armstrong retained Howard Peters to seek a review of the decision in October 2013.

- On November 27, 2013, Howard Peters sent a letter to Mr. Toth stating that he intended to request a review of the MFDA's decision.

- Upon Mr. Peters being suspended from the practice of law commencing in June 2014, Mr. Armstrong quickly retained Cox & Palmer on August 7, 2014.

- From late summer 2014 to early winter 2015, Cox & Palmer obtained documentation and reviewed it. They filed the Request for Hearing on April 30, 2015.

2) Whether Counsel Moved Diligently

[104] We find this factor is partially satisfied for the reasons set out below.

[105] In considering this factor, we note there are three relevant periods to consider:

- The period from September 27, 2011 to October 2013 during which Mr. Armstrong was self-represented,

- The period from October 2013 to the end of July 2014 when Mr. Armstrong was represented by solicitor Howard Peters, and

- The period from July 29, 2014 to April 30, 2015 when Mr. Armstrong was represented by Cox & Palmer.

(i) Conduct of Scott Armstrong

[106] We find that between September 27, 2011 and October 2013, Mr. Armstrong did not act diligently in seeking a review of the decision of the MFDA. This finding is based on the following chronology of Mr. Armstrong's actions from September 27, 2011 to October 2013:

- From October 29, 2011 to December 18, 2012, a period of fourteen months, Mr. Armstrong took no action whatsoever to seek a review of the decision.

- On December 19, 2012, Mr. Armstrong called Mr. Toth and requested a copy of all information about his case. He advised Mr. Toth that he was not in his right mind during the hearing, and that he expected that the New Brunswick Securities Commission would overturn the MFDA's decision. Mr. Toth requested that he put his request in writing.

- Mr. Armstrong sent an email to Mr. Toth on December 19, 2012 requesting all information about his case.

- Mr. Armstrong received a letter dated January 10, 2013 from Mr. Toth attaching the MFDA's pre-hearing disclosure which had been previously provided to him during the MFDA's proceeding against him.

- On January 18, 2013, Mr. Armstrong called Mr. Toth and again told him that he was not in his right mind during the hearing. He asked how he could challenge the contents of the Agreed Statement of Facts. Mr. Toth told Mr. Armstrong to consult his own lawyer.

- Mr. Armstrong retained solicitor Howard Peters in October 2013.

[107] While we find that Mr. Armstrong did not act diligently, we reiterate that he was self-represented before, during and for approximately two years after the MFDA hearing. As such, we are concerned with the lack of information provided to Mr. Armstrong when the decision was issued regarding his right to seek a review of the hearing panel's decision.

[108] We repeat that neither the MFDA hearing panel nor MFDA staff informed Mr. Armstrong of his right to request a review of the decision by the New Brunswick Securities Commission and the 30-day period for doing so when the decision was issued.

[109] While we have no evidence that Mr. Armstrong would have sought a review had he been made aware of the 30-day period for doing so, we also do not have any evidence that he would not have sought a review within the prescribed time had he been informed of the right to seek a review and the time limit for doing so.

[110] This failure to advise Mr. Armstrong of his right to seek a review is particularly troublesome given his indication during the July 6, 2011 hearing that he might appeal and his subsequent telephone conversation with Mr. Toth on August 15, 2011 when he again indicated that he wanted to appeal one day in the future.

(ii) Conduct of Howard Peters

[111] We find that Howard Peters did not act diligently in seeking a review of the MFDA decision. However, we consider that Mr. Peter's failure to act should not be held against Mr. Armstrong [*Jollymore v. Jollymore Estate,* 2001 NSCA 116].

[112] MFDA Staff argues that Mr. Armstrong is finger pointing in respect to Mr. Peters and that Mr. Amstrong's Affidavit does not provide any detail of what happened with Mr. Peters. We reject that argument.

[113] Mr. Armstrong retained Mr. Peters in October 2013.

[114] On November 27, 2013, Mr. Peters sent a letter to Mr. Toth indicating that he intended to seek a review of the MFDA's decision.

[115] Mr. Peters was suspended from the practice of law commencing in June 2014. He was eventually disbarred on November 9, 2015.

[116] We take judicial notice of the Notice of Disbarment of Howard Peters by the Law Society of New Brunswick dated November 10, 2015, for violating numerous provisions of the *Law Society of New Brunswick Code of Professional Conduct,* including quality of service and advising clients.

[117] The evidence put forth by both Mr. Armstrong and MFDA Staff reveals that Mr. Peters took no further action after November 27, 2013 to represent Mr. Armstrong. We accept that Mr. Peters took no further action, and it is the only evidence presented on the issue.

(iii) Conduct of Cox & Palmer

[118] We find that Cox & Palmer moved diligently in seeking a review of the decision.

[119] Mr. Armstrong first contacted Arthur Doyle of Cox & Palmer on July 29, 2014. This is shortly after Mr. Peters was first suspended from the practice of law.

[120] Mr. Armstrong retained Cox & Palmer on August 7, 2014.

[121] Cox & Palmer began receiving documents in connection with this matter on August 27, 2014 and received the bulk of the documents in connection with the MFDA investigation and hearing between January 2015 and mid-February 2015.

[122] The Request for Hearing seeking the review of the MFDA decision and requesting an extension of the time for filing was filed on April 30, 2015.

[123] Given that considerable time would have been required to meet Mr. Armstrong, review the

voluminous documentation relating to the MFDA proceedings, and draft the Request for Hearing, we are satisfied that Cox & Palmer moved diligently.

3) Explanation for the Delay

[124] The majority of the panel is satisfied with Mr. Armstrong's explanation for the delay.

[125] While we have concerns regarding the lack of any supporting evidence regarding Mr. Armstrong's assertions that he was in a vulnerable state of mind, was depressed and suffered from alcoholism, we accept that he was overwhelmed and unable to properly defend himself before, during and after the hearing.

[126] In our view, several circumstances during the MFDA proceedings contributed to Mr. Armstrong's sense of being overwhelmed which in turn affected his ability after the decision was issued to seek a review with the prescribed time limit. These circumstances are discussed under the heading "Overall Justice of the Case" below.

[127] In our view, it is crucial in analyzing this factor to keep in mind that Mr. Armstrong was self-represented before, during and for approximately two years after the hearing.

[128] With this in mind, we are concerned by MFDA Staff's and the hearing panel's failure to inform Mr. Armstrong of his right to seek a review of the decision.

[129] During the July 6, 2011 hearing, Mr. Armstrong raised the possibility of appealing the panel's decision. The panel did not advise him of how to seek a review of its decision.

[130] Then, on August 15, 2011, Mr. Armstrong indicated to Mr. Toth that he wanted to appeal one day in the future. Mr. Toth told Mr. Armstrong he could not advise him on this.

[131] Each time Mr. Armstrong mentioned the possibility of "appealing" to either MFDA Staff or the hearing panel, he was not provided any information on how to seek a review of the decision.

[132] In our view, there is nothing untoward with a hearing panel or enforcement counsel informing a self-represented litigant of the procedure for seeking a review of a decision. Of course, neither the hearing panel nor enforcement counsel could advise Mr. Armstrong of what to indicate in his Request for Hearing.

[133] We again note that the MFDA did not inform Mr. Armstrong of the right to request a review of the hearing panel's decision when the decision was issued.

[134] According to MFDA Staff, Mr. Armstrong was advised of the right to request a review of the decision when he was provided with the Guide to the Disciplinary Hearing Process on

January 25, 2011, 8 months before the decision was issued. While section 12 of the Guide provides general information regarding obtaining a review of a decision, it does not provide specifics with respect the precise time limit and the body that hears the review.

[135] We accept that when the decision was issued, Mr. Armstrong was not aware of how to have the MFDA decision reviewed or of the 30-day time limit for seeking a review.

[136] We are also of the view that the legislative scheme establishing the right to a review of a decision of an MFDA hearing panel is complex and not easily discernible to a self-represented litigant.

[137] From his conversation with Mr. Toth on August 15, 2011, Mr. Armstrong likely knew that the New Brunswick Securities Commission heard reviews of decisions of an MFDA hearing panel.

[138] In order to determine his right to a review and the time limit for doing so, Mr. Armstrong would have had to find subsection 44(1) of the New Brunswick *Securities Act*, and understood that the MFDA was a self-regulatory organization within the meaning of that section. Subsection 44(1) reads as follows:

> 44(1) The Executive Director or a person directly affected by a decision, ruling, order or direction made under a by-law or other regulatory instrument or practice or policy of an exchange, self-regulatory organization, quotation and trade reporting system, clearing agency, auditor oversight body, a trade repository or a derivatives trading facility may apply to the Tribunal for a hearing and review of the decision, ruling, order or direction.

[139] Had Mr. Armstrong been able to understand that subsection 44(1) applied to a decision of the MFDA, he still would not have known that the review was subject to a 30-day time limit as that section does not provide a limitation for seeking a review.

[140] In order to find this 30-day time limit, Mr. Armstrong would have to refer to the New Brunswick Securities Commission's Local Rule 15-501 ***PROCEDURES FOR HEARINGS BEFORE A PANEL OF THE COMMISSION.*** Paragraph 11(1) of Local Rule 15-501 at that time provided:

> **11(1) Requesting a Review** – A person wishing to have a decision of the Executive Director or an SRO reviewed by the Commission must file with the Secretary a Request for Hearing within 30 days of the decision.

[141] In our view, the MFDA's failure to advise Mr. Armstrong of the specifics of his right to request a review of the decision and the 30-day time limit for doing so contributed to the delay.

[142] Mr. Armstrong was unemployed during and after the MFDA proceedings. While this does not excuse the delay, we note that as soon as Mr. Armstrong became employed again in August 2013, he almost immediately retained solicitor Howard Peters to challenge the decision.

[143] Unfortunately, Mr. Peters was not diligent in his representation and was eventually disbarred. This contributed to the delay in this matter, but is in no way Mr. Armstrong's fault.

[144] We also note that Mr. Armstrong went about retaining new legal counsel upon Mr. Peters being suspended. Upon being retained in August 2014, Cox & Palmer had to obtain the file materials. In light of the fact that Cox & Palmer only received the bulk of the documents relating to the MFDA proceedings in January and February 2015 and required time to review the materials to prepare the Request for Hearing, we are satisfied with the explanation for the delay after they were retained.

4) Extent of the Delay

[145] We find the delay of three and a half years is not a bar to granting an extension of time.

[146] The delay started on October 29, 2011 when the 30-days for seeking a review expired and ended on April 30, 2015 – the day the Request for Hearing was filed.

[147] While we find the delay was lengthy, and that extensions of time have been refused in matters with shorter delays, the below decisions involve lengthier delays in which extensions of time were granted.

- *McQuillen (Re),* [2014] 37 O.S.C.B. 8580 : In May 2014, seven years after the decision of the Market Regulation Services was issued, Mr. McMillen filed a request for review of the decision and requested an extension of the 30-day time limit under the *Securities Act* to file a request for a review. A hearing panel of the Ontario Securities Commission granted the extension.

- *2010-625-AD (Re),* 2011 CanLII 3407 (NS WCAT): The Nova Scotia Workers' Compensation Appeals Tribunal rendered a decision in 1995 deciding that a worker's carpal tunnel syndrome was not compensable. The worker did not have legal counsel in 1995. In 2009, more than fourteen years later, the Worker's representative contacted the Board seeking to appeal the 1995 decision. The Act provided a 30-day appeal period from the date of being notified of the decision. The Appeals Tribunal extended the time for filing the appeal period, namely as the worker had not been advised of the appeal period and the prejudice to the worker outweighed the prejudice to the employer.

5) Undue Prejudice

[148] In considering undue prejudice, we consider the effect of granting the extension of time on the MFDA and the effect of refusing the extension of time on Mr. Armstrong. We find that refusing an extension of time will cause undue prejudice to Mr. Armstrong.

[149] With respect to Mr. Armstrong, we are particularly concerned by the fact that Mr. Armstrong never presented his defence on the merits in the MFDA proceedings. It is clear that Mr. Armstrong disputed the MFDA's allegations as evidenced by his fourteen page Reply. In addition, there are numerous mentions in the Affidavits on this motion of Mr. Armstrong's desire to defend these allegations and in particular his July 18, 2011 email to Mr. Toth.

[150] We are of the view that Mr. Armstrong fully intended to defend the allegations against him. However, several circumstances affected his ability to make full answer and defence and in particular:

- The disclosure by MFDA Staff just two months before the hearing of over 1,000 pages of documents. We are particularly concerned that MFDA Staff did not respond to Mr. Armstrong's three requests for disclosure on February 15, 2011, March 2, 2011 and April 8, 2011.

- The hearing panel's refusal to allow Mr. Armstrong to call additional witnesses to those he had identified, despite the indication by MFDA Staff that the three days initially scheduled for the hearing would be insufficient and likely would only suffice for the presentation of the MFDA's case.

- The hearing panel's allowance of less than two hours for Mr. Armstrong's cross-examination of Complainant 1 - the main complainant.

- The hearing panel's refusal on July 7, 2011 to allow Mr. Armstrong to continue his cross-examination of Complainant 1, despite Mr. Armstrong's misunderstanding that they only had the room until 4 p.m. instead of 5 p.m., the fact that he was only advised on July 6, 2011 that Complainant 1 was only available that day, and the fact that he had less than two hours to cross-examine Complainant 1.

- The Book of Documents used at the hearing did not have the same numbering as the disclosure provided to Mr. Armstrong two months before the hearing and this affected Mr. Armstrong's ability to cross-examine the MFDA's witnesses.

- The lack of inquiry by the hearing panel to ascertain whether Mr. Armstrong received independent legal advice before signing the Agreed Statement of Facts

and whether Mr. Armstrong entered into the Agreed Statement of Facts voluntarily with full knowledge of its legal consequences.

[151] After participating in three days of hearing from July 6 to 8, 2011 during which the MFDA presented its case, Mr. Armstrong called Mr. Toth and advised that he did not want to continue with the hearing. The transcription of the recording of the telephone call indicates: "I just don't have the resources nor obviously if you seen last week the ability to really defend myself, so there is no sense wasting any more time or money on that scenario". [*Exact reproduction of the original*]

[152] If the extension is not granted, Mr. Armstrong will never have the opportunity to present his defence and will remain subject to a lifetime prohibition on his ability to conduct securities related business in any capacity over which the MFDA has jurisdiction and be prevented from being licensed to conduct other regulated business under the Financial and Consumer Services Commission's jurisdiction.

[153] The MFDA contends that it will be unduly prejudiced if the extension is granted for three reasons:

a) MFDA Staff does not have the ability to compel the attendance of witnesses and certain witnesses may not be willing to re-attend to testify.

b) The transcripts from the MFDA hearing are incomplete such that it is difficult to know with any accuracy what evidence was adduced at the hearing.

c) The further passage of time since the events that gave rise to the MFDA proceeding may impact witnesses' memories.

[154] We do not accept that the MFDA will sustain undue prejudice should the extension be granted.

[155] The MFDA's first argument with respect to their inability to compel witnesses to attend the review and the reluctance of witnesses to attend the review to testify is without merit. The Tribunal has the authority pursuant to paragraph 38(1)a) of the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30 to summon and enforce the attendance of witnesses at a hearing.

[156] With respect to the MFDA's argument relating to incomplete transcripts and the inability to accurately know the evidence adduced at the MFDA hearing, this could create an important prejudice in a typical appeal. However, a review before the Tribunal is conducted like a hearing de novo. All parties have the opportunity to call their witnesses to testify and present their evidence as if the hearing before the MFDA did not occur. Thus, although paragraph 11(4) of Local Rule 15-501 stipulates that the transcript, if any, of the oral

evidence given at the hearing before the MFDA should be included in the Record, this transcript is not crucial as the Tribunal will hear from the witnesses directly.

[157] Finally, with respect to the MFDA's argument relating to the passage of time and witnesses' memories, MFDA Staff has not provided any evidence to support this argument. It bears mentioning that Mr. Armstrong will sustain the same prejudice, if not worse. The MFDA's witnesses testified in the MFDA proceeding and their memories can be refreshed with the remaining transcripts. This, however, is not true of Mr. Armstrong's witnesses, who did not testify in the MFDA hearing.

[158] In our view, Mr. Armstrong will sustain the greater prejudice should the extension of time not be granted.

6) Merits of the Review

[159] We find there may be merit to the review. In considering this factor, we are in no way pronouncing ourselves on the final outcome of the review.

[160] While we do not accept Mr. Armstrong's argument that he was coerced into signing the Agreed Statement of Facts, we are concerned that he may not have fully understand the legal consequences of that document. Mr. Armstrong did not receive independent legal advice before signing the Agreed Statement of Facts. This is compounded by the hearing panel's lack of inquiry into whether Mr. Armstrong entered into the Agreed Statement of Facts voluntarily with full knowledge of its legal consequences.

[161] More importantly, given that Mr. Armstrong did not present his defence, we feel that the outcome of the matter could be different. Mr. Armstrong did not call any witnesses and did not elaborate on his defence that the promissory note in favour of Complainant 1 was made on the basis that Mr. H would see to Complainant 1's repayment once Mr. H assumed control of Armstrong Financial Services Inc.

[162] Given that Mr. Armstrong did not present his defence during the MFDA proceedings, we are also concerned with the appropriateness of the lifetime prohibition on his ability to conduct securities related business in any capacity over which the MFDA has jurisdiction.

[163] We are of the view that the final outcome, on liability and sanctions, could be different if Mr. Armstrong is afforded the opportunity to put forth his defence.

D. OVERALL JUSTICE OF THE CASE

[164] We have found that Mr. Armstrong satisfies the majority of the factors set out in *Roberge, supra*. However, as indicated in *Atlantic Pressure Treating,* not every factor need be satisfied in order to extend time. As stated by the Supreme Court of Canada in *Roberge,* what matters in each request for an extension, is whether the justice of the case requires that an

extension of time be granted. We are convinced in all the circumstances and considering the factors discussed above that it does.

[165] We turn now to the circumstances of this case.

[166] Procedural fairness contains four elements, including the right to know the case and reply. [*Baker v. Canada (Minister of Citizenship & Immigration*), [1999] 2 S.C.R. 817] The Supreme Court of Canada also stated in *Baker* that the duty of fairness is variable and its content is to be determined in the specific context of each case.

[167] Disciplinary proceedings such as the one before the MFDA panel attract a high level of procedural fairness given the consequences for the respondent, namely loss of employment and important monetary sanctions.

[168] We recognize that it is not our role to conduct a judicial review of the MFDA panel's decision. However, in considering the motion for an extension, we must look at the overall justice of the case. It is in this context that we voice our concerns regarding potential procedural fairness issues in the MFDA proceedings. Of note are the following:

1. The requirement that Mr. Armstrong file a Reply without the benefit of any disclosure and advising Mr. Armstrong that if he wanted to amend his Reply after receipt of the disclosure, that this would require leave of the panel.

2. The failure of MFDA Staff to provide disclosure despite Mr. Armstrong's repeated requests for same.

3. The timing of the voluminous disclosure by MFDA Staff – just two months before the hearing – despite Mr. Armstrong's repeated requests for disclosure.

4. The treatment of Mr. Armstrong's request to call witnesses, whereby the usual order for a motion was not followed. Rather, MFDA Staff advised the panel of Mr. Armstrong's motion and then proceeded to argue against it. After twelve pages in the transcript, Mr. Armstrong enquired whether he could respond to his own motion.

5. The refusal during the hearing to allow Mr. Armstrong to call additional witnesses to those he identified before the hearing, despite Mr. Armstrong's argument that these witnesses were necessary for his defence and the fact that additional hearing dates would be required given that insufficient time had been scheduled for the hearing and the three days would suffice only for the presentation of the MFDA's case.

6. The imposition of a less than two hour time limit on Mr. Armstrong's cross-examination of Complainant 1 and the refusal to allow Mr. Armstrong to recall Complainant 1 to continue his cross-examination.

7. The lack of inquiry by the panel as to whether Mr. Armstrong had independent legal advice before signing the Agreed Statement of Facts, the lack of explanation of the legal meaning of the Agreed Statement of Facts, and the failure to ensure that Mr. Armstrong understood the Agreed Statement of Facts and signed it voluntarily, knowing its legal consequences.

8. The failure of the MFDA to advise Mr. Armstrong when the decision was issued of the right to obtain a review of the decision and the 30-day time limit to do so.

[169] We are also concerned that some of the language employed by the panel chair may have discouraged Mr. Armstrong from pursuing his defence.

[170] The following exchange between the panel chair and Mr. Armstrong at pages 177 and 178 of the July 6, 2011 hearing transcript occurred during Mr. Armstrong's cross-examination of Complainant 1.

> CHAIRMAN: And I am not trying to stop you, but I am trying to -- I am trying to suggest to you that there is a way to do it. Ask your question, you get an answer. If you ask a question you shouldn't have had, you are going to get an answer you don't want. This is the way it is with lawyers, you ask the one question that you don't know what the witness is going to say and you are in trouble. […]
>
> MR. ARMSTRONG: Okay.
>
> CHAIRMAN: Now, we have to hear from you to see if there is a difference. Do you understand?
>
> MR. ARMSTRONG: Yes.
>
> CHAIRMAN: Do you understand that you are able to give evidence at this hearing? You are able to sit where he is sitting and tell your story?
>
> MR. ARMSTRONG: Okay. Yes.
>
> CHAIRMAN: I hope you -- I hope you understand that because I mean that's part of the game. You can't establish your side through him. You may challenge some of the things that he said, but you establish your evidence by giving it.

MR. ARMSTRONG: Okay. I have nothing further then.

[171] The panel chair also has the following discussion at pages 22-23 of the July 6, 2011 transcript with Mr. Armstrong regarding compliance with the rules and the leeway he is afforded given that he is self-represented:

> CHAIRMAN: -- we would have to say to you, well, we are sorry, but you don't comply with the rules, and we can't just adjourn to give you a chance to abide by the rules again. I mean we are here. We have got three days scheduled. So far it is a very expensive proceeding and it is just getting underway. So we just can't turn everything around and say oh, yes, sure we will give you the opportunity. Because the fact that you are not represented, we do give you a lot of leeway, but the leeway would be maybe a day or two on the rules, but it is not -- it is not a complete disregard of the rules. So normally I would say well, sorry, you are too late, Mr. Armstrong. You are just going to have to make due [sic] with dealing with the other witnesses or any other – any witness that you have here that might be a different situation. But so far you have one half a loaf.
>
> CHAIRMAN: The opportunity to deal with these witnesses that appear, and when you put more in -- and maybe you should be satisfied with that?
>
> CHAIRMAN: I am not trying to make a -- you know, a grounds of appeal for you by saying we denied you the witnesses and we should have expanded the list so that you could call anybody you want. I think I have to be fair to you to say you have -- the MFDA through Mr. Toth have given you an opportunity to call witnesses that you did at least set out something about what they are going to say.

[172] Finally, we note that failure to advise a party of the right to appeal (or request a review) of a decision when the decision is issued, has been found to constitute a breach of procedural fairness justifying the extension of time to file an appeal. [*2010-625-AD (Re)*, 2011 CanLII 3407 (NS WCAT) and *2012-738-AD (Re*), 2013 CanLII 24892 (NS WCAT)]

[173] We have serious concerns that the potential procedural fairness issues we have discussed may have discouraged Mr. Armstrong from presenting his defence.

[174] Finally, we would grant the extension regardless of any potential procedural fairness issues as the overall justice of the case requires that Mr. Armstrong be permitted to present his defence.

VII. DECISION AND ORDER

[175] For the reasons set out above, the Tribunal grants the extension of time to file the Request for Hearing.

DATED this 3rd day of June, 2016.

"original signed by"

Christine M. Bernard
Registrar
Signed for panel members Louise Caissie, Jean LeBlanc, and Don Moors
pursuant to subsection 40(3) of the *Financial and Consumer Services Commission Act*