# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Saturley v. Nova Scotia (Securities Commission)*, 2024 NSCA 15

**Date:** 20240201
**Docket:** CA 521894
**Registry:** Halifax

**Between:**

Adrian Saturley and Adonis Asset Management

Appellants

v.

The Nova Scotia Securities Commission and the Attorney General of Nova Scotia

Respondents

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| **Judge:** | The Honourable Chief Justice Michael J. Wood |
| **Appeal Heard:** | October 16, 2023, in Halifax, Nova Scotia |
| **Subject:** | Administrative Law – Procedural Fairness<br>Securities Act – Hearing and Review |
| **Summary:** | The appellants sought registration under the *Securities Act*. Securities Commission staff recommended the Director dismiss the applications because of unsuitability. They based their recommendation on a Compliance Report prepared in relation to another registrant where Mr. Saturley had previously been employed. Under the *Securities Act* there was a presumption in favour of registration unless unsuitability could be established. The Director dealt with the matter through written submissions. She accepted the staff recommendation and dismissed the applications.<br>The appellants requested a "hearing and review" of the Directors decision under s. 6 of the *Act* and a panel was appointed for that purpose. The record filed included the earlier Compliance Report. The appellants requested an order for the attendance of the authors of the report for questioning |

at the hearing. The panel denied the request on the basis they would have no relevant evidence to offer.

After a hearing where Mr. Saturley testified and explained his disagreement with the Compliance Report, the panel dismissed the applications for registration. They found that Mr. Saturley was unable to rebut the findings in the Compliance Report and adopted the Director's reasons as the basis for their decision.

The appellants challenge the panel decision on several grounds, including a breach of procedural fairness for preventing the questioning of the Compliance Report authors.

**Issues:** (1) Did the panel breach the duty of procedural fairness?
(2) If there was a breach of procedural fairness what remedy should follow?

**Result:** The *Securities Act* as well as the Commission's Procedural Rules outline the process for a "hearing and review". The Court found a high degree of procedural fairness for the panel hearing by application of the test in *Baker v. Canada (Minister of Citizenship and Immigration*), 2 S.C.R. 817. The Commission itself describes it as a hearing *de novo* akin to a new trial. The Court found a breach of procedural fairness in the panel relying on the Compliance Report while denying the appellants the opportunity to question the authors about the basis for their conclusions and opinions.

The matter was remitted to a differently constituted panel for a new "hearing and review".

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| | |
|---|---|
| **Judges:** | Wood, C.J.N.S.; Fichaud and Bryson, JJ.A. |
| **Appeal Heard:** | October 16, 2023, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed without costs, per reasons for judgment of Wood, C.J.N.S.; Fichaud and Bryson, JJ.A. concurring |
| **Counsel:** | Christopher I. Robinson, for the appellants<br>Daniel Boyle, for the respondent Nova Scotia Securities Commission<br>Edward Gores, KC for the respondent Attorney General of Nova Scotia (not participating) |

**Reasons for judgment:**

[1] In September 2021 the Nova Scotia Securities Commission ("the Commission") received applications for registration under the *Securities Act*, R.S.N.S. 1989, c. 418 ("the *Act*") from Adrian Saturley and Adonis Asset Management ("Adonis"). Adonis sought registration as a portfolio manager and Mr. Saturley as the Ultimate Designated Person ("UDP"), Chief Compliance Officer ("CCO") and Sole Advising Representative ("SAR") of Adonis. When the Commission receives applications for registration, they are reviewed by staff who make written recommendations to the Director.

[2] When, as here, staff recommend against registration, applicants are advised of this and given an opportunity to make written submissions to the Director in response. The legislative provision setting out the Director's authority is s. 32 of the *Act*, which provides:

> 32 (1) Unless it appears to the Director that the applicant is not suitable for registration or re-instatement of registration or that the proposed registration, re-instatement of registration or amendment to registration is objectionable, the Director shall grant registration, re-instatement of registration or amendment to registration to an applicant.
>
> (2) The Director may in his discretion restrict a registration by imposing terms and conditions thereon and, without limiting the generality of the foregoing, may restrict the duration of a registration and may restrict the registration to trade in certain securities or derivatives or a certain class of securities or derivatives.
>
> (3) The Director shall not refuse to grant, re-instate or amend a registration, or impose terms and conditions on a registration, without giving the applicant an opportunity to be heard.

[3] The staff recommendation against the applications of Mr. Saturley and Adonis relied heavily on a Compliance Report dated July 24, 2020 ("the Compliance Report"), which had been prepared by Commission staff in relation to another registrant, High Tide Wealth Management Inc. ("HTWM"). Mr. Saturley had been the CCO and SAR of HTWM for the period covered by the Compliance Report.

[4] The Compliance Report said there were multiple deficiencies in relation to the operation and management of HTWM including with respect to areas which were the responsibility of Mr. Saturley. HTWM surrendered its registration in January 2021.

[5] Mr. Saturley disagrees with many of the factual conclusions and opinions found in the Compliance Report and says these are based upon incorrect assessments of the circumstances and lack of information. Mr. Saturley argues the report was prepared by persons with inadequate training and experience.

[6] After considering the staff recommendations and the submissions of counsel for Mr. Saturley and Adonis, the Director refused to grant their registrations. She issued a written decision dated February 14, 2022 ("the Director's Decision").

[7] After receipt of the Director's Decision, Mr. Saturley and Adonis requested a hearing and review pursuant to s. 6(2) of the *Act* which provides:

> 6(2) Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.

[8] The Commission appointed a three member panel ("the Panel") to conduct the hearing and review of the Director's Decision.

[9] In accordance with the Commission's General Rules of Practice and Procedure (the "Rules"), the record was compiled and provided to the Panel. It consisted of the Director's Decision, the staff recommendations as well as the submissions of staff and the applicants. The record included the Compliance Report.

[10] The Panel held a pre-hearing conference on June 24, 2022, at which time counsel for Mr. Saturley and Adonis applied for an order requiring the attendance of the authors of the Compliance Report so they could testify concerning the contents of the report and the opinions expressed therein. The Director opposed the application. The Panel issued a decision, (2022 NSSEC 5), dismissing the application (the "Pre-Hearing Decision"). In it, the Panel summarized the parties' positions:

> [14] The Applicants submit that every applicant to the Commission is entitled to test and challenge the evidence of an accuser, and that fairness dictates that but for rare circumstances the accuser cannot be allowed to be shielded behind their written words so as to avoid examination. When Staff reports are sought be to admitted into evidence during substantive hearings, the process is accomplished through the author of the report, who is then subject to cross examination.
>
> [15] The Applicants submit that the Compliance Report is central to the Director's decision to deny registration to the Applicants. The facts, opinions and

> conclusions of the Report with respect to Mr. Saturley's proficiency and past experience were accepted in their entirety and the Report is the reason for the Director's refusal. The Applicants submit that the Compliance Report contains inaccuracies, lacks supporting evidence and pertinent exculpatory information, contains opinion and speculation, draws improper conclusions and ignores the realities of market forces in play during the period covered by the Compliance Report. A bona fide testing of the Report can only be provided through cross examination of the Report's author regarding the opinions expressed, the characterizations advanced, the support for the findings reached, along with the conclusions drawn.
>
> …
>
> [29] The Director submits that given the Hearing will be a hearing *de novo* it does not matter what evidence the Director relied on in reaching her decision. The Commission is now tasked with considering the matter anew, based on the record, which includes the Compliance Report. The issue before the Hearing is not whether there were problems with the Compliance Report and its conclusions, but whether the Applicants are suitable for registration. Mr. Saturley can introduce evidence directly on this point to contradict the contents of the Compliance Report. Cross examination of the author of the Report would add nothing to this process, as any potential contradicting evidence can be obtained directly from Mr. Saturley.
>
> [30] The Director submits that requiring Staff to attend the Hearing would be inefficient where there is no prospect of useful evidence being obtained that cannot be obtained from another source.

[11] In explaining why they would not compel the attendance of the authors of the Compliance Report, the Panel said the Director's Decision and her reliance on the Compliance Report were not in issue:

> [31] A hearing under section 6.2 is a hearing *de novo*. As such, the Commission is not bound by the Director's decision in this matter, nor required to consider the conclusions reached by the Director or any or all of the evidence relied upon by her in reaching her decision. The purpose of the Hearing is for the Commission to consider the Applicants' application for registration afresh, conduct an independent examination of the evidence and come to its own conclusions as to whether or not registration should be granted without reference to the Director's decision.

[12] The Panel rejected the arguments of counsel for Mr. Saturley and Adonis that it would be unfair to prevent them from questioning the authors of the Compliance Report. They explained their conclusion this way:

> [43] The Applicants claim it would be unfair not to allow them to cross examine staff because the Compliance Report was foundational to the Director's decision. But as stated above, the Director's decision is not subject to review in this proceeding. As a hearing *de novo*, it is up to the Commission to determine the weight to be given to the contents of the Compliance Report and whether any aspects of the Compliance Report, after hearing from the Applicants, are sufficient to rebut the statutory presumption in favour of registration. The extent to which the Director relied on the Compliance Report, in whole or in part, is immaterial for the purpose of this proceeding.
>
> [44] The Applicants submit that the Compliance Report contains a litany of opinions, speculation, errors and inaccuracies and lacks pertinent exculpatory information. They object to the underlying narrative which they allege frames the bulk of the report's core conclusions. However, the Applicants have not indicated how cross examination of Staff would elicit relevant information that would rebut the alleged opinions, inaccuracies and errors or revise the narrative. The party best placed to provide relevant information as to why the Compliance Report is inaccurate, why its conclusions are in error and what the underlying narrative should be is Mr. Saturley himself. Mr. Saturley has personal knowledge of those aspects of the Compliance Report relevant to him and is thus in the ideal position to provide exculpatory evidence. Indeed, it is difficult to see how Staff could be in a position to produce evidence that rebuts the conclusions they made in their own report. At best, Staff could hypothetically agree that exculpatory evidence provided by Mr. Saturley rebuts their conclusions. But the most relevant source of that evidence is Mr. Saturley.
>
> …
>
> [46] Based on the foregoing, we are of the view that the attendance of Staff at the Hearing would not result in relevant information, is not necessary for a full hearing of the matter before the Commission and, in the applicable context, is not required for procedural fairness. Accordingly, we decline to make an order compelling the attendance of Staff at the Hearing to answer questions posed by the Applicants counsel regarding the Compliance Report.

[13] The Panel held a hearing over four days in October and November 2022. The Director did not file any additional evidence beyond the record nor call any witnesses. Mr. Saturley filed an affidavit which responded in detail to the deficiencies raised in the Compliance Report. He also testified and was cross-examined by counsel for the Director. The Panel issued a written decision (2023 NSSEC 1) dismissing the applications of Adonis and Mr. Saturley ("the Merits Decision") for the following reasons:

> [79] Based on Mr. Saturley's failure to comply with Nova Scotia securities laws when he was the CCO and an AR of HTW and his lack of understanding of securities law requirements, particularly as they related to KYC, KYP and

> suitability, we find there is clear and convincing proof that Mr. Saturley does not meet the general proficiency requirement in subsection 3.4(1) of NI 31-103 for registration as an AR and a UDP. We also find there is clear and convincing proof that Mr. Saturley does not meet the proficiency requirement in subsection 3.4(2) of NI 31-103 for registration as a CCO. Accordingly, we refuse to grant the registration of Mr. Saturley as CCO, UDP and AR.
>
> [80] Our decision is based on the totality of the evidence, including (i) the deficiencies noted in the Compliance Report related to (a) the use of risky investments; (b) the failure to implement and maintain an appropriate compliance system; (c) a demonstrated lack of proficiency in performing the CCO functions; and (d) a failure to meet the regulatory requirements to comply with KYC, KYP and suitability obligations, most of which involved compliance related matters for which Mr. Saturley was responsible; and (ii) Mr. Saturley's testimony and exhibits, which did not alter our view that the material conclusions in the Compliance Report are borne out by the evidence and demonstrate his unsuitability for registration, and which in many cases served to highlight Mr. Saturley's lack of awareness of his responsibilities as CCO and AR.
>
> [81] We agree with and adopt paragraphs 77 through 80 of the Director's Decision with respect to the registration of AAM as an advisor in the category of a portfolio manager. For the reasons set forth in the Director's Decision, we refuse to grant this registration.

[14] On March 7, 2023, Adonis and Mr. Saturley filed a Notice of Appeal pursuant to s. 26 of the *Act*. The grounds set out in the Notice of Appeal were as follows:

> 1. The Securities Commission erred in mixed law and fact as regards to the application of the test regarding the Registration as follows:
>
> a. The Securities Commission made their decision absent clear and convincing proof.
>
> b. The Securities Commission improperly relied on speculation to support their decision.
>
> 2. The Securities Commission erred in mixed law and fact in making findings related to the Appellant without proper evidentiary foundation.
>
> 3. The Securities Commission erred in mixed law and fact in conducting a historical analysis of the circumstances without having full evidence, and discarding or ignoring evidence that had been advanced by the Appellant, thereby resulting in a failure to consider and weigh critical evidence that contradicted the Respondent's evidence.
>
> 4. The Securities Commission erred in mixed law and fact in making credibility findings which were not supported by the evidence, and making adverse credibility findings against the Appellant but not the Respondent.

> 5. The Securities Commission erred in mixed law and fact in placing too much weight on hearsay/opinion evidence, interpreting it in a manner prejudicial to the Appellant and charitable to the Respondent.
>
> 6. The Securities Commission erred in law in failing to provide adequate reasons on their decision to not approve the Registration with conditions.

[15] In their factum and oral submissions, Mr. Saturley and Adonis argued it was unfair for the Panel to rely on the Compliance Report when they were not permitted to question the authors with respect to its contents. During the appeal hearing, the Court raised an issue with respect to whether the arguments concerning procedural fairness fell within the scope of the Notice of Appeal. In response, counsel for the appellants indicated that he wished to make a motion to amend the Notice of Appeal and the Court gave permission for that issue to be addressed through post hearing written submissions.

[16] For the reasons which follow, I would permit the amendment of the Notice of Appeal and allow the appeal on the basis that the Panel breached its duty of procedural fairness to Mr. Saturley and Adonis. In these circumstances, I need not address the other issues raised by the Notice of Appeal.

## Amendment of the Notice of Appeal

[17] Following the hearing, counsel for the appellants wrote the Court and advised he wished to amend the Notice of Appeal to include the following:

> The Securities Commission erred in law, to wit, it breached procedural fairness insofar as it denied the appellants' request to require Commission Staff to give evidence and be cross-examined on their report dated July 24, 2020.

[18] *Civil Procedure Rule* 90.39 deals with amendment of documents in the Court of Appeal. It provides:

> 90.39 Amending notice of appeal
>
> (1) A party may amend a notice of appeal, notice of cross-appeal, or notice of contention no more than fifteen days after the day the notice is filed.
>
> (2) A judge of the Court of Appeal may permit a party to amend a document filed at any time.
>
> (3) An amended document must be filed and served immediately after it is amended

[19] Permission to amend a document is discretionary and may be considered at any time, including at the appeal hearing. The applicable principles were described in *Annapolis County (Municipality) v. Heritage Wooden Shingles*, 2016 NSCA 58:

> [29] In *R. v. Marriott*, 2012 NSCA 76, Justice Fichaud set out the considerations governing a judge's exercise of discretion under Rule 90.39(2). Although he was considering an amendment to a Notice of Appeal prior to the appeal hearing, the same considerations apply when considering whether to exercise the discretion at or after the appeal hearing. They are as follows:
>
> > [5] The judge's exercise of discretion under Rule 90.39(2) should be governed by whether: (1) the amendment is arguable on its face, (2) the amendment is reasonably necessary for the administration of justice by enabling the presentation and determination of a material issue between the parties, and (3) the interval between the original, and properly timed notice of appeal and the amendment would cause irreparable prejudice to the respondent. On the first point, if the amendment is arguable on its face, the merits of the amendment are for the panel on the appeal, not the motions judge. Another way to express the second point is to say that the amendment must be sought in good faith, and not for an ulterior purpose. On the third point, the mere fact that the respondent will now have to reply to the issue in the amendment does not constitute prejudice. [citations omitted]
>
> [30] Applying those principles to the proposed amendments in this case will result in one being allowed, and the others refused. I am satisfied that 5B which relates to the consideration of the refusal of the Development Permit is raised in good faith and is arguable on its face. Perhaps more importantly, the amendment is reasonably necessary for the presentation and determination of a material issue between the parties on this appeal. However, the other proposed amendments are not reasonably necessary for the determination of this appeal.
>
> [31] Finally, I am satisfied that any prejudice to the respondents can be remedied in addressing costs on the appeal.

[20] Although the issue of procedural fairness was not specifically raised in the Notice of Appeal, it was referenced in the appellants' factum and their oral submissions. For example, paragraph 58 of the factum says:

> 58. Further, the Panel's statement that "Even if Staff were to change their conclusions and opinion on cross examination, that would not determine the outcome of the Hearing…"[51] is also very telling, and an error of law. The entirety of the Decision was predicated on the conclusions in the Report being correct, and the Appellants' inability to rebut them, therefore, obviously, had Staff changed those conclusions during cross-examination, the impact of those changes could very well have determined the outcome of the proceeding. We will never know,

> and that 'never knowing' constitutes a fundamental breach of procedural fairness. Such as approach, as adopted by the Panel in arriving at the Decision, is an error of law.

[21] The respondent's factum recognized the procedural fairness argument but noted that it was not raised in the Notice of Appeal:

> 60. The Appellants argue at paragraphs 50 through 58 of their Factum, under the heading "*The Compliance Report and Cross Examination*", that the Commission committed an error of law by failing to compel the attendance of staff to be cross-examined before the panel.
>
> 61. Issues surrounding the procedural fairness of the Commission's interlocutory decision not to compel staff attendance were not set out as a ground of appeal and should therefore not be considered as a separate ground of appeal, per *Civil Procedure Rule* 90.11(1).
>
> 62. It is not material what may or may not have arisen from staff attendance at the hearing for cross-examination. The issue before this Honourable Court is whether the evidence that was before the Commission supported the ultimate decision.

[22] I am satisfied that we ought to exercise our discretion and permit the amendment to the Notice of Appeal. The parties filed supplemental facta dealing with the amendment issue as well as the merits of the procedural fairness argument. The lack of procedural fairness from the refusal to permit examination of the authors of the Compliance Report was a constant theme of the submissions made on behalf of Mr. Saturley and Adonis before the Panel and in this Court. It is a material issue which should be addressed in order to resolve the dispute between the parties.

[23] While the respondent was required to undertake additional work related to filing the supplemental factum, this does not amount to sufficient prejudice to deny the amendment motion.

**Denial of Procedural Fairness**

[24] Where an appellant raises an issue of procedural fairness, no deference is owed to the administrative decision maker. In *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92, this Court outlined the approach to be taken:

> [41] The reviewing judge correctly identified the principle that no standard of review analysis governs judicial review, where the complaint is based upon a

> denial of natural justice or procedural fairness. (See for example, **T.G. v. Nova Scotia (Minister of Community Services)**, 2012 NSCA 43, leave to appeal refused, [2012] S.C.C.A. No. 237, at ¶90).
>
> [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge (see: **T.G. v. Nova Scotia (Minister of Community Services), supra**, at ¶8; **Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.**,2010 NSCA 19, ¶28; **Nova Scotia (Community Services) v. N.N.M.**, 2008 NSCA 69, ¶40; and **Kelly v. Nova Scotia Police Commission**, 2006 NSCA 27, ¶21-33.

[25] There is no question the Panel owed a duty of procedural fairness to Mr. Saturley and Adonis when it held a hearing to determine whether to deny their applications for registration under the *Act*. The issue is the content of that duty and whether it was breached by the Panel, as alleged by the appellants.

*Content of the Duty*

[26] In *Jono Developments*, the Court set out the principles to be applied in determining the content of the duty of fairness:

> [52] I now turn to the content, or degree of procedural fairness that applies to the particular case. In **Kelly v. Nova Scotia Police Commission**, **supra**, Cromwell J.A. (as he then was) wrote:
>
> > [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. (…)
> >
> > [21] The first step -- determining the content of the tribunal's duty of fairness - must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step -- assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if it is of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding

> should be taken into account. Court procedures are not necessarily the gold standard for review.

[53] In **Baker, supra**, Justice L'Heureux-Dubé set out what have become the guiding principles to define the content of the duty:

> 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". ...
>
> 22 ... I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. [Emphasis added]

She then goes on to describe five non-exhaustive factors to consider, which can be summarized as follows:

> 1. the nature of the decision being made and the process followed in making it;
>
> 2. the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates;"
>
> 3. the importance of the decision to the individual or individuals affected;
>
> 4. the legitimate expectations of the person challenging the decision; and
>
> 5. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

See **Baker**, **supra**, at ¶ 23-28. In **Canada (Attorney General) v. Mavi**, [2011] 2 S.C.R. 504, Justice Binnie reiterated that this list is non-exhaustive (¶42).

[27] The nature of the proceeding and its importance to the parties is obvious. For Mr. Saturley and Adonis to work in the investment industry as portfolio managers, UDP, CCO or AR, they must be registered under the *Act*. In considering applications for registration, the Commission and Director act in the public interest by ensuring that only those with the requisite qualifications are registered. These factors suggest a high degree of procedural fairness, and this is confirmed by the practices and procedures adopted by the Commission.

[28] In determining the content of the duty of procedural fairness, I will focus on the following two factors:

1. The statutory scheme and the procedures adopted by the Commission; and
2. The legitimate expectations of Mr. Saturley and Adonis.

*Securities Act* and the Commission's Procedural Rules

[29] Section 32 of the *Act* governs the Director's responsibilities in considering applications for registration such as those of the appellants:

> 32 (1) Unless it appears to the Director that the applicant is not suitable for registration or re-instatement of registration or that the proposed registration, re-instatement of registration or amendment to registration is objectionable, the Director shall grant registration, re-instatement of registration or amendment to registration to an applicant.
>
> (2) The Director may in his discretion restrict a registration by imposing terms and conditions thereon and, without limiting the generality of the foregoing, may restrict the duration of a registration and may restrict the registration to trade in certain securities or derivatives or a certain class of securities or derivatives.
>
> (3) The Director shall not refuse to grant, re-instate or amend a registration, or impose terms and conditions on a registration, without giving the applicant an opportunity to be heard.

[30] The Commission interprets s. 32(1) as a statutory presumption in favour of registration which may be rebutted by evidence presented by staff. In the Director's Decision, she described the import of this provision:

> 17. In light of the presumption of suitability for registration, there must be evidence that demonstrates that an applicant is not suitable for registration or that the registration is objectionable.
>
> 18. As implied by the presumption in favor of an applicant, the onus is on staff of the securities regulator to demonstrate that an applicant is not suitable for registration or that a proposed registration is objectionable.

[31] In the Merits Decision, at paragraph 15, the Panel expressly adopts this statement of the law.

[32] Section 32(3) requires an applicant be given notice and an opportunity to be heard prior to a decision being made. This would include responding to evidence and recommendations put forward by staff.

[33] The hearing before the Panel arose pursuant to s. 6(2) of the *Act* which refers to it as a "hearing and review". The Commission says this is a hearing *de novo*. In paragraph 31 of the Pre-Hearing Decision, the Panel said they would consider the application for registration "afresh" without reference to the Director's Decision.

[34] In *Re Burke*, 2020 NSSEC 2, a panel of the Commission considered the procedure for a hearing and review under s. 30(5) of the *Act.* By virtue of s. 30(5A) the process is the same as in s. 6 of the *Act*. The panel described a "hearing and review" as follows:

> [23] Subsection 6(3) of the Act provides that, upon a hearing and review, the Commission may confirm the decision under review or make such other decision as the Commission considers proper.
>
> [24] Section 2.1 of Rule 15-501 *General Rules of Practice and Procedure* (Rule 15-501) provides that these rules apply to all hearings before the Commission, including a review of an SRO decision pursuant to subsection 30(5) of the Act.
>
> [25] Rule 15-501 sets out the Commission hearing process from the commencement of a proceeding to the issuance of the decision.
>
> [26] Under Rule 15-501, the Commission exercises original jurisdiction for a hearing and review under subsection 30(5) of the Act **similar to conducting a new trial, including the admission of new evidence**.
>
> [Emphasis added]

[35] The Rules set out the practice and procedure for *de novo* hearings pursuant to s. 6(2) of the *Act*. These include provisions to ensure the matter is addressed through a full and fair hearing process. For example, with respect to compelling evidence, the Rules say:

> 4.1 The Commission may, on its own motion or on an *ex parte* application of a Party, issue a:
>
> a. summons to appear at a Hearing and give evidence on oath orally or in writing, or on solemn affirmation if the witness is entitled to affirm in civil matters; or
>
> b. a notice to produce documents and things,
>
> as the Commission deems **requisite to a full hearing** of the matters in the Hearing.
>
> [Emphasis added]

[36] The Rules provide for pre-hearing conferences which are to address a number of issues including:

> 9.1 The Commission may direct the Parties in a Hearing to participate in a pre-hearing conference at any stage of the Hearing either upon its own initiative or upon the request of a Party to consider:
>
> …
>
> f. any other matter that will promote a **fair and expeditious hearing**.
>
> [Emphasis added]

[37] The Rules also confirm the entitlement of each party to examine every witness. As observed in *Re Burke*, the hearing procedures resemble those for a new trial. Finally, the general provisions of the Rules include the following statement:

> 18.5 The Rules shall be construed to secure the most expeditious and least expensive **determination of every Hearing before the Commission on its merits, consistent, however, with the requirements of natural justice**.
>
> [Emphasis added]

[38] The proceedings contemplated by the Rules and *Act* for the hearing before the Panel resemble a judicial decision making process. As a result, the following comments by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 are applicable:

> 23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission*), 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879, at p. 896, *per* Sopinka J.

[39] The practices and procedures found in the Rules applicable to proceedings under s. 6 of the *Act* demonstrate a high level of procedural fairness, consistent with the nature of the interests at stake.

Legitimate Expectations of Mr. Saturley and Adonis

[40] The Supreme Court, in *Baker*, describes how the actions of a decision maker may give rise to legitimate expectations for a party:

> 26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. **If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness**: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 9488 (FCA), [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 1994 CanLII 18483 (FC), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. **This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights**.
>
> [Emphasis added]

[41] In assessing the legitimate expectations of Mr. Saturley and Adonis, there are two sources to be considered. The first is the procedural structure found in the Rules and described by the Commission in its jurisprudence. The other is the Pre-Hearing Decision.

[42] I have already reviewed the Commission's legislative framework and the Rules. These create an expectation of a hearing with procedures similar to what would be found in a trial or other contested proceeding.

[43] The Director opposed the appellants' request to call evidence from the authors of the Compliance Report. In the Pre-Hearing Decision, the Panel described her position as follows:

> [28] The Director argues that Staff attendance is not necessary for a full hearing of the matter in the Hearing. Staff is not a fact witness to the deficiencies described in the Compliance Report – they can only speak to certain aspects of their examination of High Tide's records and the conclusions set out in the Report. Mr. Saturley is best suited to speak directly to each of the assertions of fact and opinions of Staff in the Compliance Report and he will be given an opportunity to refute them at the Hearing.
>
> [29] The Director submits that given the Hearing will be a hearing de novo it does not matter what evidence the Director relied on in reaching her decision. The Commission is now tasked with considering the matter anew, based on the record, which includes the Compliance Report. The issue before the Hearing is not whether there were problems with the Compliance Report and its conclusions, but whether the Applicants are suitable for registration. Mr. Saturley can introduce evidence directly on this point to contradict the contents of the Compliance Report. Cross examination of the author of the Report would add nothing to this process, as any potential contradicting evidence can be obtained directly from Mr. Saturley.
>
> [30] The Director submits that requiring Staff to attend the Hearing would be inefficient where there is no prospect of useful evidence being obtained that cannot be obtained from another source.

[44] In dismissing the request for an order compelling staff to testify, the Panel relied on s. 14.1 of the Rules which provides:

> 14.1 The Commission shall not be bound by rules of evidence. The primary test for the admission of evidence is its relevance to the allegations in the Statement of Allegations.

[45] The Panel ultimately concluded that any evidence which the authors of the Compliance Report might provide was not relevant or necessary for a full hearing on the merits.

[46] Since the hearing would be *de novo*, the Panel said it would consider the appellants' application for registration "afresh", and conduct an independent examination of the evidence. They would reach their own conclusions without

reference to the Director's Decision. According to the Panel, the extent to which the Director relied on the Compliance Report in reaching her decision was immaterial. The Panel described its approach to the hearing and why the potential staff testimony was unnecessary:

> [45] Even if Staff were to change their conclusions and opinion on cross examination, that would not determine the outcome of the Hearing with respect to the central issue – whether the Applicants are not suitable for registration. The decision as to registration is to be made by the Commission, not Staff. It is the Commission's responsibility to assess all the facts before it – the Record, including the Compliance Report and the Response, Mr. Saturley's evidence, assuming he elects to testify, and any other evidence deemed relevant and admitted – to determine whether it establishes that Mr. Saturley is not suitable for registration. Staff's conclusions and opinions in a Compliance Report prepared in an entirely different context do not pre-determine the conclusions and opinions of the Commission in the context of the suitability for registration hearing.

[47] In light of the submissions of the Director and the comments of the Panel in the Pre-Hearing Decision, it was reasonable for Mr. Saturley and Adonis to expect a process which would have the following features:

- The hearing would be *de novo* with the issue of their suitability for registration considered "afresh".
- There would be an evidentiary burden on staff to rebut the statutory presumption of suitability for registration.
- The Director's Decision was not under review, and it did not matter what evidence she considered.
- Whether there were deficiencies with the Compliance Report, and its conclusions would not determine the outcome because the Panel would carry out its own independent assessment of suitability for registration.

Conclusion on the Content of the Duty of Fairness

[48] The proceeding before the Panel was adversarial in nature with the Director and the applicants represented by counsel. They were each entitled to present evidence and examine any witnesses who testified. The formal rules of evidence did not apply; however, admissibility would be determined based upon relevance.

The overriding principle was a hearing which was expeditious, fair and determined on the merits.

[49] The Panel said the Director's Decision and what evidence she relied on, were irrelevant since it was considering the matter afresh in the hearing *de novo*.

*Application of the Duty of Fairness to the Panel Hearing and Decision*

[50] It is a fundamental aspect of procedural fairness that, in a hearing of an adversarial nature, parties whose interests are at stake are able to challenge evidence presented against them. This could take the form of adducing independent evidence or questioning the source of the challenged evidence. With factual assertions, this would permit a decision-maker to understand the reliability of the source. In matters of opinion, it could demonstrate the witness' qualifications (or lack thereof), establish the facts relied on and explore any potential biases.

[51] The Compliance Report was prepared in relation to HTWM under the authority of s. 29E(1) of the *Act*, which provides:

> 29E (1) The Commission may, in writing, appoint any person to examine at any time
>
> > (a) the financial and business affairs including, without limitation, the books, records, accounts, communications and other documents, whether in paper, electronic or other form, of a registrant or reporting issuer; and
> >
> > (b) the books and records of a custodian of assets of a mutual fund or of a custodian of shares or units of a mutual fund under a custodial agreement or other agreement with a person or company engaged in the distribution of shares or units of the mutual fund, and prepare such financial or other statements and reports that may be required by the Commission for the purpose of determining whether Nova Scotia securities laws are being complied with.

[52] The Compliance Report is replete with factual assertions concerning the operations of HTWM, apparently gleaned from interviews and documentary reviews. It also contains statements of opinion on matters of securities law, regulatory requirements and investment suitability. The persons involved in the investigation leading to the Compliance Report are not named in it nor are their qualifications set out.

[53] At the time the Compliance Report was prepared, HTWM objected to its contents, both factual and opinion. Through the registration process for Mr. Saturley and Adonis, they also disputed the accuracy of the Compliance Report. This was the reason for their request to call evidence from the authors.

[54] At the *de novo* hearing, Mr. Saturley testified about a number of matters including the opinions and conclusions in the Compliance Report. He explained what he considered to be mistakes and deficiencies in the document. He was cross-examined on some but not all of those issues.

[55] It is clear from the Pre-Hearing Decision and the Merits Decision, the Panel accepted the Compliance Report as proof of the inadequate performance of Mr. Saturley while he was with HTWM. It was the only document in the record which was referred to in the Merits Decision.

[56] The Panel expected Mr. Saturley to call evidence to rebut the Compliance Report findings in order to obtain registration for himself and Adonis. This is demonstrated in the following passage from the Pre-Hearing Decision:

> [44] … **The party best placed to provide relevant information as to why the Compliance Report is inaccurate**, why its conclusions are in error and what the underlying narrative should be **is Mr. Saturley himself**. Mr. Saturley has personal knowledge of those aspects of the Compliance Report relevant to him and is thus in the **ideal position to provide exculpatory evidence**. …
>
> [Emphasis added]

[57] The Merits Decision also describes the onus which the Panel placed on the applicants:

> [31] The Compliance Report is **important** because it forms the **bulk of the evidence behind Staff's recommendations and the Directors decision** not to approve the Application…
>
> [32] The Compliance Report identified **numerous deficiencies**, many of which were **deemed significant**…
>
> …
>
> [57] Appendix B to the Compliance Report provides a summary of 128 client accounts, all of which included options as part of the investment strategy, and Staff's conclusions as to the unsuitability of uncovered options for many of the client's listed in that summary. While the detail behind the summary was not available to the Hearing Panel, what is apparent is a general lack of individualization in determining whether options, which included uncovered puts

> and which in any event required the opening of a margin account, were suitable investments…**The evidence in Appendix B leads us to conclude that the conflict between a desire for lower risk tolerance and the higher rate of return was not adequately addressed with HTW's clients.**
>
> …
>
> [73] …The mechanics of the margin arrangements and the extent to which an investment in options may enhance the risk associated with margin arrangements are fundamental elements to be considered in assessing a client's risk tolerance, determining suitability and ensuring that the client's IPS reflects the totality of the KYC information. **An adequate compliance program will have policies, procedures and documentation that reflects this. The Compliance Report concluded that HTW did not have this. Notwithstanding Mr. Saturley's evidence we've reached the same conclusion.**
>
> …
>
> [80] Our **decision is based on the totality of the evidence** including (i) the **deficiencies noted in the Compliance Report**…most of which involve compliance related matters for which Mr. Saturley was responsible; (ii) **Mr. Saturley's testimony and exhibits which did not alter our view that the material conclusions in the Compliance Report are borne out by the evidence** and demonstrate his unsuitability for registration, and which in many cases served to highlight Mr. Saturley's lack of awareness of his responsibilities as CCO and AR.
>
> [Emphasis added]

[58] In addition, this was a *de novo* hearing where the Panel said the suitability of the applicants for registration was to be decided without reference to the Director's Decision. Despite this, the Panel, at paragraph 81 of the Merits Decision (quoted at para. 13 above), adopted her reasoning as the basis for refusing the registrations.

[59] The Panel was entitled to determine the weight they would give to the conclusions set out in the Compliance Report, but they were required to provide Mr. Saturley and Adonis with a fair opportunity to respond. In the Pre-Hearing Decision, they concluded the persons who carried out the investigation of the affairs of HTWM and formed the opinions about the performance of Mr. Saturley had nothing relevant to offer. He was free to challenge the opinions in the Compliance Report but not by questioning those who formulated them. This is fundamentally unfair given the importance attached to the report in the Merits Decision.

[60] It is also unfair for the Panel to adopt the reasoning in the Director's Decision after advising it was immaterial because the hearing would be *de novo*.

[61] For the above reasons, I have concluded that there was a breach of the duty of procedural fairness owed to the appellants, and as a result the Merits Decision ought to be set aside.

**Disposition**

[62] The parties made diametrically opposed submissions with respect to the remedy to be granted for breach of the duty of procedural fairness. The appellants, relying on s. 26(5) of the *Act*, seek the order that they say the Panel should have made which is the issuance of the requested registrations.

[63] The respondent argues that the appeal should be dismissed, despite the breach of procedural fairness. They say no purpose would be served in remitting the matter for a further hearing since rejection of the registrations would be the inevitable result based on the evidence before the Panel and their findings.

[64] Although the Panel made findings with respect to the suitability of Mr. Saturley and Adonis for registration, it is not possible to say they would have reached the same conclusions if appropriate procedural fairness had been afforded them.

[65] As an alternative position, both parties submit that if the matter is to be remitted for a new hearing it should be before a different panel of the Commission. I conclude this would be the appropriate remedy and so order.

[66] Since this is a tribunal appeal, no costs shall be payable by either party.

Wood, C.J.N.S.

Concurred in:

Fichaud, J.A.

Bryson, J.A.