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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the Act)

– AND –

IN THE MATTER OF ADRIAN SATURLEY AND ADONIS ASSET MANAGEMENT

REASONS FOR DECISION

Decision	August 23, 2022	
Panel	Valerie Seager	Commissioner
	Anne Day	Commissioner
	Michael Deturbide	Commissioner
Submissions	Christopher I. Robinson	Counsel for the Applicants
	Daniel Boyle	Counsel for the Director of the Nova Scotia Securities Commission

I. BACKGROUND

[1] Adrian Saturley ("Mr. Saturley") and Adonis Asset Management ("AAM") (collectively, the "Applicants") sought registration with the Nova Scotia Securities Commission (the "Commission") as Ultimate Designated Person, Chief Compliance Officer and sole Advising Representative, and as an advisor in the category of portfolio manager, respectively. A Notice Letter dated October 14, 2021 from Commission staff was sent to the Applicants advising them that Staff would recommend that the Director refuse to grant registration to AAM and to Mr. Saturley. The Notice Letter advised the Applicants of their right to an Opportunity to be Heard ("OTBH") before the Director, which right the Applicants exercised. Both Staff and the Applicants' provided written submissions to the Director in connection with the OTBH. Following the OTBH, the Applicants' registration request was denied by the Director in a decision dated February 14, 2022 (the "Decision"). By letter dated March 22, 2022 the Applicants requested a hearing and review of the Decision pursuant to subsection 6(2) of the Act (the "Hearing").

[2] In response to the Applicants' request, the Commission advised the Applicants that pursuant to subsection 6(2) the period to request a hearing and review of the Decision expired on March 17, 2022 (thirty days after the mailing of notice of the Decision). The Applicants applied to the Commission under section 151A of the Act for an exemption from section 6(2) of the Act with respect to the deadline for filing their request. That exemption request was granted.

[3] A pre-hearing conference (the "Pre-hearing Conference") was held on June 24, 2022. One of the matters discussed at the Pre-hearing Conference was the record of the proceeding. Section 3.2 of the General Rules of Practice and Procedure of the Commission (the "Rules") states that an applicant requesting a hearing and review of a decision of the Director shall obtain from the Director and file with the Secretary a record of the proceeding relating to the decision which shall include, unless all parties consent to the omission of any documents (i) the application; (ii) the notice of any hearing; (iii) any intermediate order made in the proceeding; (iv) any documentary evidence filed in the proceeding, subject to any applicable limitation; (v) the transcript of any oral evidence; and (vi) the decision that is the subject of the hearing and related reasons.

[4] Following the Pre-hearing Conference the parties agreed that, pursuant to Section 3.2 of the Rules, the record in this matter (the "Record") included, among other documents, the submissions of Commission staff in support of their recommendation regarding registration and the submissions of the Applicants in connection with the OTBH.

[5] Commission staff's submissions in connection with the OTBH included a compliance report prepared by the Policy and Market Regulation Branch dated July 24, 2020 relating to High Tide Wealth Management Inc. ("High Tide"). High Tide was registered as a portfolio manager with the Commission from September 9, 2009 until January 22, 2021. Mr. Saturley was the Chief Compliance Officer and

an advising representative at High Tide from February 18, 2015 to January 22, 2021, except for a period of sick leave. The Compliance Report identified substantial weaknesses in High Tide's compliance practices and internal controls, as well as significant and repeat deficiencies, many of which occurred while Mr. Saturley was Chief Compliance Officer. Staff relied on the Compliance Report for the purpose of making its recommendation regarding Mr. Saturley's and AAM's suitability for registration.

[6] The Applicants' OTBH submissions included High Tide's response to the Compliance Report dated September 3, 2020, in which High Tide disputed many of the findings and conclusions in the Compliance Report, including those related to Mr. Saturley.

[7] The Compliance Report was considered and referred to by the Director in her written decision denying registration following the OTBH.

[8] At the Pre-hearing Conference, the Applicants made an application for the Commission to make an order (i) compelling the attendance of Commission staff at the Hearing; and (ii) requiring Commission staff to answer questions posed by the Applicants' counsel, in each case regarding the Compliance Report. At the Pre-hearing Conference the Commission requested written submissions from the parties on the following issues: (i) is the Commission empowered to compel the attendance of Commission staff at the Hearing and to require them to answer questions posed by Applicants' counsel regarding the Compliance Report; and (ii) should the Commission compel the attendance of Commission staff for examination in these circumstances. (There is some question as to who the appropriate Staff person would be for purpose of compelling attendance at the Hearing – we will refer to the individual generically as "Staff" in these reasons.)

II. POSITIONS OF THE PARTIES

A. APPLICANTS

[9] The Applicants submit that section 5 of the Act, section 4 of the Rules and section 4 and section 5 of the *Public Inquiries Act* RSNS 1989, c 372 empower the Commission to compel Staff to attend at the Hearing and answer questions posed by the Applicants.

[10] Subsection 5(3) of the Act provides that:

> For the purpose of any hearing pursuant to this Act, the Commission and each member of the Commission shall have and may exercise all the powers, privileges and immunities of a commissioner appointed pursuant to the Public Inquiries Act.

[11] The *Public Inquiries Act* provides as follows:

> 4 The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing, or on solemn affirmation if they are entitled to affirm in civil matters, and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire.
>
> 5 The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court.

[12] While it is unclear what specific sections of the Rules the Applicants are relying on, they submit that section 4 of the Rules addresses the Commission's authority to issue summons.

[13] With regards to the question as to whether the Commission should compel the attendance of Staff at the Hearing, the Applicants submit that they are entitled to a fair hearing. The Compliance Report is the Staff evidence the Director used to reach her decision and fairness requires that the Applicants be entitled to test the Compliance Report in a fulsome manner, which includes cross-examination.

[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.

[16] The Applicants reject the notion that evidence provided by Mr. Saturley – including on cross examination – at the Hearing can establish the truth – or not – of the Compliance Report's contents. Only the author of those assertions can speak to their source and the manner in which the opinions and conclusions were reached.

The purpose of the cross examination will be to cast doubt on the asserted facts, opinions and conclusions in the Report.

[17] The Applicants refer to *Belteco Holdings Inc., Re* ("*Belteco*") 20 OSCB 1835, in which the Ontario Securities Commission ("OSC") considered a request by the respondents to compel staff witnesses to give *viva voce* evidence during a number of preliminary motions. The panel in that matter described the test to be applied in deciding whether such witnesses should be compelled to appear as follows:

> 13. First, the Panel must be satisfied that the evidence to be given by a proposed witness will be relevant to the issue or issues to be determined.
>
> 14. Second, it is common ground that the Commission has the power to compel the attendance of witnesses to give relevant and admissible evidence at a hearing in any proceeding before it, including these preliminary motions.
>
> 15. Thirdly, the power is a discretionary power which must be exercised in a manner to ensure that the proceeding is fair to all persons involved.

[18] The panel in *Belteco* agreed that a staff member could be compelled to testify at a prehearing motion about specific issues relevant to the prehearing; however if the evidence would be more properly elicited during the main hearing then it should be heard there.

[19] The Applicants submit that based on *Belteco*, provided the evidence sought is relevant to the issue to be determined, then it is left to the Commission to exercise its discretion in a manner to ensure that the proceeding is fair to all parties.

[20] The Applicants submit that all parties to the Hearing must be provided with a fair hearing and foundational to that fairness is permitting each party to be able to test the other's evidence in a fulsome manner which, by definition, includes cross examination.

B. THE DIRECTOR

[21] The Director agrees that the Commission has the authority to compel a witness based on section 4.1 of the Rules which provides that

> 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.

[22] The Director submits that the Commission has not considered its summons/subpoena authority in any decision to date, but that there are a number of other cases that offer guidance on when the issue of subpoenas is appropriate, including *Johnson (Re)*, 2018 NSUARB 178 ("*Johnson*"), *Ocean v Economical Mutual Insurance Company*, 2010 NSSC 20 ("*Ocean*") and *Raymond v Halifax Regional Municipality*, 2018 NSSC 149 ("*Raymond*").

[23] In *Johnson*, a matter involving the Nova Scotia Utility and Review Board ("UARB"), the appellant appealed the assessed value of his property and sought to subpoena the Property Valuation Services Corporation ("PVSC") employee who had conducted most of the assessments of the affected property over several preceding years. The respondents objected to the issuance of the subpoena. The UARB confirmed that disclosure and subpoenas are aspects of procedural fairness but as noted by the Supreme Court of Canada in *May v Ferndale Institution*, 2005 SCC 82 ("*May*"), "[t]he requirements of procedural fairness must be assessed contextually in every circumstance" (at para 90). A number of contextual factors were identified in *Johnson*:

a. It was important for the appellant to question the person who did the assessment and was making the decisions;

b. The PVSC employee's attendance was required to hold her accountable for the decisions she was making;

c. The appellant had difficult encounters with the PVSC employee he intended to call as a witness and he believed she was not properly trained or certified to undertake assessment work;

d. Any assessment done by the witness PVSC intended to call was based on incorrect information.

[24] The UARB denied the subpoena request largely on the basis of relevance and in doing so noted that "..the employee's performance is not at issue in this proceeding, nor is it the purpose of an appeal under the Assessment Act to make PVSC employees personally accountable for their conduct" (para 21).

[25] The Director submits that the contextual analysis as applied in Johnson closely mirrors that of the Applicants, although the facts are distinguishable in that a different PVSC staff member from the one the appellant sought to subpoena was to be called by the respondent at the hearing to introduce evidence. There was no reliance by the respondent in *Johnson* on any opinion of the employee sought to be subpoenaed and the respondent's intended witness could provide the evidence needed for the appeal. The Director submits that in the present case the Director intends to rely upon the record that was before the Director at the OTBH, which has been admitted by consent. This record is submitted simply as the record for

the decision on the Applicants' OTBH. The Director intends to establish the truth of its contents as they apply to the issue now before the Commission through the cross examination of Mr. Saturley.

[26] The Director submits that even if the evidence in the Compliance Report is relevant, it is already in the public record. In *Raymond*, Halifax Regional Municipality ("HRM") sought an order quashing subpoenas of the Nova Scotia Information and Privacy Commissioner ("Tully"), a former investigator of the Office of the Information and Privacy Commission of Nova Scotia ("OIPC"), two HRM staff members and HRM's solicitor. The appellant was concerned about a development in her area and its impact on her property rights and she had sought information relating to the development via two applications for access to records. Tully had prepared a report in connection with the request for access to records. That report made recommendations but no decision. After consideration of the recommendations made by Tully in her report, the HRM Access and Privacy Officer rendered a decision regarding the requested records. The appellant appealed the decision of the HRM Access and Privacy Officer and subpoenaed certain individuals, including Tully, seeking additional information for introduction at the appeal *de novo* of that decision.

[27] Justice Brothers quashed the subpoenas for a variety of reasons. In the case of Tully, Justice Brothers found that a subpoena was not necessary because even if the evidence she could offer was relevant, it was already in the record. Tully had authored a report that made recommendations but made no decision. The report itself was not the subject of the appeal. Justice Brothers found it was "background information and speaks for itself" (para 30). In the case of Tully and the former OIPC investigator, Justice Brothers also found that the principles of deliberative secrecy applied:

> "To seek evidence from Tully and Burchill is to go behind the OPIC report, which is not permitted. The information, and what the OIPC considered in reaching its recommendations, is not appropriate subject matter for a subpoena. Deliberative secrecy applies here. The process undertaken to come to the recommendations should not be disclosed; such an order for disclosure could potentially have a chilling effect". (para 32)

The Director submits that the facts in *Raymond* are analogous to those before the Commission now and the reasoning in *Johnson* applies *mutatis mutandis*.

[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.

III. LAW AND ANALYSIS

[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.

[32] There is a statutory presumption in favour of registration. Subection 32(1) of the Act provides that, where an applicant is seeking registration under the Act, then

> 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.

[33] Pursuant to Part 4 of the Rules, the Commission has the authority to issue a summons to compel staff to appear at a hearing, give evidence on oath orally or in writing and produce documents "as the Commission deems requisite for a full hearing of the matters in the Hearing".

[34] Section 14.1 of the Rules provide that the Commission shall not be bound by rules of evidence. The primary test for the admission of evidence is relevance.

[35] The Supreme Court of Canada ("SCC") has established that every public authority making administrative decisions affecting the rights, privileges or interest of an individual is subject to procedural fairness (*May*, para. 94). As set out in J*ohnson*, disclosure and subpoenas are aspects of procedural fairness in administrative hearings. The SCC noted in *May* that requirements of procedural fairness must be assessed contextually in every circumstance.

[36] The Applicants contend that it would be unfair not to allow cross examination of the author of a report that was foundational to the Director's decision and that cross examination is necessary for a full hearing. The Director contends that it would not be unfair, and that any such cross examination would not provide relevant evidence for the purpose of the Hearing that cannot otherwise best be provided directly by the Applicants.

[37] The Compliance Report forms part of the Record that was agreed to by consent of all parties to the Hearing at the Pre-Hearing Conference. As such, it does not need to be admitted into evidence by *viva voce* or affidavit evidence of Staff. However, the question remains whether cross examination of its author can provide relevant evidence and is necessary for a full hearing.

[38] In *Johnson*, the UARB declined to issue a subpoena where much of the ground the appellant intended to cover in questioning the PVSC employee would not be relevant. The facts in *Johnson* are distinguishable in that a different PVSC staff member from the one the appellant sought to subpoena was to be called by the respondents at the hearing to introduce evidence. The appellant argued that that person did not have information relevant to all of the matters the appellant wished to address with the employee he wished to cross examine. The UARB found that the appellant would not be prejudiced in his ability to provide evidence relevant to the issues in question because he was personally familiar with many of the relevant matters.

[39] In *Ocean,* a defendant to a civil action sought to quash two subpoenas against its legal counsel. *Ocean* is distinguishable from the current situation since, as Justice Smith noted in that case "the considerations before the court are different when a party seeks to subpoena the opposing party's counsel to testify at trial" (para 7).

[40] In *Raymond*, Justice Brothers relied in part on the principles of deliberative secrecy, which prevents disclosure of how and why adjudicative decision-makers make their decisions. In the current matter, Staff was not acting as an adjudicative decision maker in preparing the Compliance Report and the process Staff used to make their recommendations in that report is clearly disclosed therein. To the extent the principle applies to the Director's decision and her consideration of the contents of the Compliance Report it is not relevant in this matter because the Hearing is a hearing *de novo* – the how and why of the Director's decision is not the subject matter of the Hearing. But also relevant to Justice Brothers' decision to quash the Tully subpoena was the fact that (i) the relevant report that the Nova Scotia Privacy and Information Commissioner authored was before the court not as the subject of the appeal but as background information; and (ii) even if the evidence that could be offered was relevant it was already arguably in the record.

[41] The author of the Compliance Report is not a party to the Hearing nor was the Compliance Report prepared for or in anticipation of the Applicants' registration application or the Hearing. It was prepared pursuant to the Commission's authority under subsection 29E(1) of the Act to examine the financial and business affairs

of a registrant, including the books and records of High Tide. As such, the Compliance Report was work product prepared in the normal course of the Commission's Policy and Market Regulation Branch. The Compliance Report was prepared before the Applicants submitted their application and related to the examination of an entirely separate entity from the Applicants, albeit one which employed Mr. Saturley at the time.

[42] After the Compliance Report was issued, High Tide responded to its contents via a 90-page written response addressed to the Policy and Market Regulation Branch (the "Response"), which included detailed responses to the observations made by Staff in the Report. The Response covered those aspects of the Compliance Report relevant to Mr. Saturley. The Response forms part of the Record.

[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.

[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.

[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.

DATED at Halifax, Nova Scotia, this 23rd day of August, 2022.

NOVA SCOTIA SECURITIES COMMISSION

(signed) "*Valerie Seager*"
Valerie Seager
Commissioner

(signed) "*Anne Day*"
Anne Day
Commissioner

(signed) "*Michael Deturbide*"
Michael Deturbide
Commissioner