



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

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

Re: Michael Labrick Harvey

Heard: January 4, 2012 in Vancouver, British Columbia
Reasons for Decision: March 14, 2012

REASONS FOR DECISION

Hearing Panel of the Pacific Regional Council:

Stephen D. Gill)	Chair
Darlene Barker)	Industry Representative
Darlene P. Thomas)	Industry Representative

Appearances:

H. C. Clement Wai)	Counsel, Mutual Fund Dealers Association of
)	Canada (“MFDA”)
Michael Labrick Harvey)	Did not appear in person or by counsel
)	

Introduction

1. This case involves circumstances where serious allegations have been raised in respect of the conduct of the Respondent, an Approved Person, with his clients, and staff of the Mutual Fund Dealers Association of Canada (“MFDA”) has commenced an investigation. However, notwithstanding requests to attend an interview from MFDA staff, over a significant period of time, which requests also indicated serious consequences for not responding, the Respondent failed to attend.

Notice of Hearing

2. These proceedings were commenced by a Notice of Hearing (Exhibit 1) dated August 31, 2011. The MFDA alleged the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Commencing May 2010 the Respondent has failed or refused to attend an interview requested by the MFDA during the course of an investigation, contrary to Section 22.1 of MFDA By-law No. 1.

Facts

3. The Notice of Hearing contained 38 paragraphs of “Particulars” which fully described the circumstances that led to the investigatory action by MFDA. We reproduce them in full:

“PARTICULARS

NOTICE is further given that the following is a summary of the facts alleged and intended to be relied upon by the MFDA at the hearing:

Registration History

1. On May 4, 2005 the Respondent was registered in British Columbia as a mutual fund salesperson with Investors Group Financial Services Inc. (“Investors Group”), a Member of the MFDA.

2. On or about September 9, 2008, the Respondent resigned from Investors Group and joined Canaccord Capital Corporation (“Canaccord”), a member of the Investment Industry Regulatory Organization of Canada (or “IIROC”). In or around February 2010, the Respondent resigned from Canaccord and is not currently registered in the securities industry in any capacity.

3. Investors Group became a Member of the MFDA on February 8, 2002.

Overview

4. Between September 2008 and June 2009, a total of twelve complaints by nineteen clients were made concerning the activities of the Respondent. The MFDA received two of the complaints directly and Investors Group received ten of the complaints. The majority of the complaints pertained to, or arose out of, a leveraging strategy that the Respondent had recommended and facilitated for the clients in their accounts. In their complaints, the clients alleged, among other things, that the Respondent had done one or more of the following:

- a) made unsuitable leveraging recommendations¹
- b) falsified client signatures and initials on account documents;
- c) falsified information recorded on account documents; and
- d) failed to disclose that mutual funds purchased for their accounts had been purchased on a deferred sales charge (“DSC”) basis, subsequently leading the clients to incur substantial DSC fees when the investments were redeemed.

5. As described in greater detail below, Investors Group reviewed all of the clients’ complaints. Based on its review, Investors Group determined that there were irregularities, inconsistencies and other concerns apparent in the clients’ account documents sufficient to warrant that Investors Group unwind several of the leveraged investments at its own expense and take other steps to address the clients’ complaints.

¹ Leveraging refers to the practice of using borrowed monies to invest.

6. Based upon the complaints, MFDA Staff conducted an investigation of the Respondent's activities. The Respondent has failed to cooperate with the MFDA's investigation by failing to respond to requests that he attend an interview with MFDA Staff to answer questions concerning the subject matter of the complaints. As a consequence, the MFDA has been unable to determine the existence, nature and extent of the allegations described in the client complaints and whether the Respondent may have engaged in the same or similar forms of misconduct with other clients.

The client complaints

Client KK

7. KK became a client of Investors Group on October 18, 2007. The Respondent was the mutual fund salesperson assigned to KK's accounts. Acting on the Respondent's recommendation, KK applied and was approved for an investment loan in the amount of \$200,000 through Solutions Banking², distributed by Investors Group, and used the proceeds to purchase mutual funds for his (KK's) account.

8. When the Respondent resigned from Investors Group, KK's accounts were transferred to another mutual fund salesperson at Investors Group. On September 12, 2008, KK met with his new mutual fund salesperson to review his accounts. At the meeting, KK was informed that if he wanted to redeem any of the DSC mutual funds in his account, the redemptions would be subject to a redemption fee (the DSC fee) which would be deducted from the proceeds of the redemption.

9. On September 22, 2008, KK complained to Investors Group that he was not aware that the mutual funds that he had purchased with the investment loan were purchased on a DSC basis. In the complaint, KK alleged that he had instructed the Respondent to only purchase mutual funds that did not have an initial sales charge or a DSC.

² Solutions Banking refers to an offering of products and services provided by the National Bank of Canada under a long-term distribution agreement with Investors Group.

10. Investors Group reviewed KK's client file. On October 9, 2008, Investors Group sent a letter to KK enclosing account documents from KK's client file as well as a record of "in person" meetings between the Respondent and KK. The documents included a "Borrowing to Invest Checklist", which appeared to be signed and initialed by KK, which included a section where KK acknowledged that "My Consultant has reviewed the various fee and pricing options with me, as described in the simplified prospectus." Based on its review of the account documents in KK's client file, Investors Group initially concluded that KK's purchase orders had been properly documented and that the Respondent and KK had discussed the fee options before proceeding with the transaction.

11. On October 17, 2008, KK sent a letter to Investors Group alleging that upon reviewing his file with his new mutual fund salesperson, KK discovered that the leverage documentation and client application forms contained initials that purported to be KK's initials but which had been falsified.

12. On October 20, 2008, KK sent another letter to Investors Group alleging that he had not signed or initialed two of the documents in his client file that Investors Group had sent to him on October 9, 2008, nor had he met with the Respondent on the dates and times indicated in the October 9, 2008 letter.

13. On January 5, 2009, in response to an inquiry from Staff, the Respondent stated that he had explained all fees to KK and denied that he had falsified any signatures or initials on KK's account documents.

14. Investors Group's further review of KK's account documents noted irregularities and inconsistencies in KK's signatures on the account documents and inaccuracies in KK's KYC information.

15. On September 9, 2010, KK reviewed his account documents with MFDA Staff and alleged that the following documents contained signatures and/or initials that had been falsified:

- a) Disclosure Document, British Columbia;

- b) Checklist – Borrowing To Invest;
 - c) Loan Investment Instructions;
 - d) Account Application Form;
 - e) Systematic Instructions; and
 - f) Transfer of Registered Account to IGFS.
16. In addition, KK advised MFDA Staff that:
- a) his income had been inaccurately stated as \$93,911 when it was approximately \$75,000; and
 - b) his risk tolerance had been inaccurately stated as “high” in his KYC when it should have been “medium”.

Clients CC and SC

17. CC and SC became clients of Investors Group in December 2006. The Respondent was the mutual fund salesperson assigned to their accounts.

18. CC and SC implemented a leveraged investment strategy recommended to them by the Respondent (the “Leveraging Plan”). The Leveraging Plan involved CC borrowing \$200,000 and SC borrowing \$100,000 through Solutions Banking. The proceeds of the investment loans were used to purchase mutual funds for their accounts. The mutual funds were purchased on a DSC basis.

19. When the Respondent resigned from Investors Group on September 9, 2008, CC and SC’s accounts were transferred to another mutual fund salesperson at Investors Group. At a subsequent meeting with their new mutual fund salesperson, CC and SC were advised that the value of their investments purchased under the Leveraging Plan had decreased by approximately \$105,000.

20. On June 8, 2009, CC and SC complained to the MFDA, alleging that the Respondent had misrepresented the fees associated with their investments, had made unsuitable leveraging recommendations and had not adequately explained the risks of the

Leveraging Plan. In addition, CC and SC requested copies of their account documents from Solutions Banking and upon receipt, discovered that they had never seen the documents before and that the signatures on the documents, which purported to be the signatures of CC and SC, had been falsified.

21. Investors Group reviewed CC and SC's account documents and concluded, among other things, that SC had not authorized the Leveraging Plan.

22. On September 3, 2010, CC and SC reviewed their account documents with MFDA Staff and identified 16 account documents that they alleged contained signatures and/or initials that purported to be theirs but which they advised had been falsified.

23. In addition, SC advised MFDA Staff that the following information had been incorrectly recorded on her account documents:

- a) SC's personal income was recorded as "\$50,000-\$74,999" when it should have stated "\$25,000-\$49,999";
- b) SC's personal net worth had been inflated;
- c) SC's investment knowledge was recorded as "Good", when the Respondent knew, or ought to have known, that SC's investment knowledge was minimal;
- d) the "Investments Held" by SC included "bonds" and "stocks" when SC had not previously owned those types of investments;
- e) SC's investment time horizon was recorded as "more than 10 years" when the Respondent knew or ought to have known that SC's investment time horizon was 6 to 10 years;
- f) SC's investment risk tolerance was recorded as "High" when the Respondent knew or ought to have known that it was lower; and
- g) SC's KYC Investment Portfolio Profile was recorded as "Mod Aggressive to Aggressive", when the Respondent knew or ought to have known that SC was "Moderate".

Clients SS and DS

24. SS and DS were clients of Investors Group. The Respondent was the mutual fund salesperson assigned to their accounts. On June 28, 2007, SS and DS had applied and were approved for a \$40,000 investment loan. They used the investment proceeds to implement a leveraging strategy in their accounts that was recommended to them and facilitated by the Respondent.

25. On October 30, 2008, SS and DS complained to Investors Group alleging, among other things, that the Respondent had falsified account documents and that the leveraging strategy was unsuitable for them.

26. Investors Group reviewed the client file for SS and DS and identified the following concerns:

- a) irregularities and inconsistencies in client signatures and initials on account documents;
- b) a falsified Notice of Assessment for DS, which had been submitted with the loan application in support of DS's income, which appeared to have been created by cutting and pasting DS's name and SIN number onto a copy of a Notice of Assessment for client SC;
- c) The possibility that the Respondent had used a blank signed form to process a trade in the account; and
- d) inaccurate KYC information recorded on their KYC form.

27. MFDA Staff's own review of SS and DS's account documents identified the following concerns, among others:

- a) Irregularities in client signatures and initials on account documents which suggested that the clients had not been properly informed of the leveraging strategy and had not properly authorized the leveraging strategy;
- b) DS's income had been recorded as \$58,545 when her Notice of Assessment stated that her income was -\$1,890;
- c) A supporting document for DS's stated income that appeared to have been falsified;

- d) Errors and inconsistencies in DS and SS's KYC information with respect to their length of employment, employment positions, and ownership of vehicles;
- e) SS and DS's risk profile had been inaccurately recorded as "moderate aggressive" when the Respondent knew or ought to have known their risk profile was "moderate";
- f) A leveraging suitability analysis which had been conducted based on incorrect and falsified KYC information; and
- g) The leveraging strategy implemented by the Respondent for DS and SS appeared to be unsuitable for them, based on their true KYC information.

28. In addition to the three above described complaints by KK, CC and SC, and SS and DS, 9 additional complaints (involving 14 clients) were made concerning the Respondent. The complaints included but were not limited to allegations that the Respondent had:

- a) falsified signatures and/or initials on account documents;
- b) inflated the income information stated for three clients;
- c) recorded incorrect risk tolerances for three clients;
- d) recorded incorrect investment knowledge for one client;
- e) inflated the net worth of two clients;
- f) stated incorrect banking information for two clients;
- g) proceeded with a leverage investment recommendation which the client had not authorized;
- h) facilitated unsuitable leveraging strategies for five clients; and
- i) failed to advise three clients with respect to the DSC fees applicable to their investments.

Investors Group's response

29. Based on its review of the clients' complaints, Investors Group determined that there was sufficient evidence that several of the clients had not properly authorized the leveraging strategy and/or that the leveraging strategy that had been recommended and facilitated by the Respondent in their accounts was not suitable for the clients. As a

result, Investors Group unwound the leverage loans and investments of those clients at its own expense, among other measures.

MFDA Staff Investigation

30. Based upon the client complaints, MFDA Staff commenced an investigation of the Respondent's activities. During the course of the investigation, MFDA Staff spoke with clients KK, CC and SC (as described above) and with EL to review their account documents with them. The clients advised MFDA Staff that the following number of documents in their respective client files contained client signatures or initials that had been falsified:

- a) KK: 6 account documents;
- b) CC: 7 account documents;
- c) SC: 9 account documents; and
- d) EL: 9 account documents.

31. In addition, MFDA Staff conducted its own review of the account documents for clients CU, SS and DS (as described above), CR, PD, BD, KS, JM and EM and identified the following number of documents in their respective client files that appeared to contain client signatures or initials that had been falsified, based on a comparison between the clients' signatures and initials on their account documents and their signatures and initials on their complaint letters and other documents:

- a) CU: 11 account documents;
- b) SS and DS: 5 account documents;
- c) CR: 4 account documents;
- d) PD and BD: 10 account documents;
- e) KS: 2 account documents; and
- f) JM and EM: 4 account documents.

32. In summary, based upon the review conducted by Investors Group and MFDA Staff's own investigation of the complaints, there are reasonable grounds to believe,

absent any additional information provided by the Respondent, that between December 2006 and September 2008, the Respondent falsified information recorded on the account documents of at least 13 clients and falsified client signatures or initials on at least 67 client account documents, without the knowledge or approval of the clients, in order to ensure (or increase the likelihood) that leveraging strategies recommended and facilitated by the Respondent in the clients' accounts complied with Investors Group's internal leveraging policy and therefore would be approved by Investors Group.

Allegation #1: Failure to Cooperate

33. Between January 5 and July 14, 2009, the Respondent provided Staff, through Canaccord, written responses to questions concerning the subject matter of the client complaints. The Respondent denied any wrongdoing in his responses to those inquiries and characterized the complaints as a "calculated and malicious attack on my professional reputation and a manipulation of my clients by Investors Group in response to my decision to move to Canaccord".

34. By letter dated May 3, 2010, sent by registered and regular mail, Staff requested that the Respondent contact the MFDA to arrange and attend an interview concerning the subject matter of the complaints. The registered letter was returned "unclaimed."

35. On July 16, 2010, Staff contacted the Respondent by telephone and left a message in a voicemail box identified as belonging to the Respondent requesting that he contact Staff with respect to the May 3, 2010 letter.

36. By letter dated July 26, 2010, sent by registered and regular mail, Staff requested that the Respondent contact the MFDA to arrange a date for an interview. In the letter, Staff advised the Respondent that his failure to respond to Staff's requests may result in the matter being referred for disciplinary action. The registered letter was returned "unclaimed".

37. Despite MFDA Staff's requests, the Respondent has failed to attend for an interview with MFDA Staff during the course of the investigation. As a consequence,

the MFDA has been unable to determine the existence, nature and extent of the allegations contained in the client complaints described above and whether the Respondent may have engaged in the same or similar forms of misconduct with other clients.

38. Commencing May 2010, the Respondent has failed or refused to attend an interview requested by the MFDA during the course of an investigation, contrary to s. 22.1 of MFDA By-law No. 1.

NOTICE is further given that the Hearing Panel may, in its discretion, require that the Respondent pay the whole or any portion of the costs of the proceedings before the Hearing Panel and any investigation relating thereto.

NOTICE is further given that the Respondent must **serve** a **Reply** on Enforcement Counsel and **file** a **Reply** with the Corporate Secretary within twenty (20) days from the date of service of this Notice of Hearing.

A **Reply** shall be **served** upon Enforcement Counsel at:

Mutual Fund Dealers Association of Canada
121 King Street West, Suite 1000
Toronto, Ontario
M5H 3T9
Attention: H. C. Clement Wai, Enforcement Counsel
Facsimile: 416-361- 9073
Email: cwai@mfd.ca

A **Reply** shall be **filed** by:

- a) providing 4 copies of the **Reply** to the Corporate Secretary by personal delivery, mail or courier to:

Mutual Fund Dealers Association of Canada
121 King Street West, Suite 1000
Toronto, Ontario
M5H 3T9
Attention: Office of the Corporate Secretary; or

- b) transmitting 1 copy of the **Reply** to the Corporate Secretary by fax to fax number 416-361-9781, provided that the Reply does not exceed 16 pages, inclusive of the covering page, unless the Corporate Secretary permits otherwise; or

- c) transmitting 1 electronic copy of the **Reply** to the Corporate Secretary by e-mail at CorporateSecretary@mfd.ca.

A **Reply** may either:

- i.) specifically deny (with a summary of the facts alleged and intended to be relied upon by the Respondent, and the conclusions drawn by the Respondent based on the alleged facts) any or all of the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing; or
- ii.) admit the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing and plead circumstances in mitigation of any penalty to be assessed.

NOTICE is further given that the Hearing Panel may accept as having been proven any facts alleged or conclusions drawn by the MFDA in the Notice of Hearing that are not specifically denied in the **Reply**.

NOTICE is further given that if the Respondent fails:

- a. to **serve** and **file** a **Reply**; or
- b. attend at the hearing specified in the Notice of Hearing, notwithstanding that a **Reply** may have been served,

the Hearing Panel may proceed with the hearing of the matter on the date and the time and place set out in the Notice of Hearing (or on any subsequent date, at any time and place), without any further notice to and in the absence of the Respondent, and the Hearing Panel may accept the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing as having been proven and may impose any of the penalties described in the By-Laws.”

4. This Panel, at the Hearing, made a determination pursuant to MFDA Rule 8.4(1)(a) to (c), and we accepted as proven the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing. We will deal with penalties and costs later in this decision.

5. The MFDA called one witness at the Hearing, namely Ms. Patricia West, an experienced senior investigator who did the bulk of the investigation on the case of the Respondent. Ms. West

impressed us as an experienced investigator who carried out the Harvey investigation in a careful and thorough manner. We found her to be a credible witness and accept her testimony.

6. In the early stages of the investigation (2009), Mr. Harvey responded by email to various MFDA inquiries. We have the five 2009 Responses of Mr. Harvey (Exhibit 5) to the enquiries from MFDA staff. He responded on January 5/09 with a 5 page email; February 23/09, 7 pages; March 13/09, 3 pages; March 16/09, 3 pages; July 13/09, 4 pages; and on July 14/09, 3 pages. It appears that at least in 2009, Mr. Harvey disputed the allegations made against him.

7. However, Ms. West testified that her later investigation entailed reviewing all of the documents that were provided to the MFDA by the Investors Group, as well as reviewing the various complaints, analyzing the documents, interviewing some of the complainants, and attempting to interview Mr. Harvey. Unfortunately, despite requests, Mr. Harvey never presented himself for the interview. Further, he filed no Reply to the Notice of Hearing.

8. Ms. West also testified as to the response by Investors Group to the complaints by their clients as a result of Mr. Harvey's alleged conduct. Apparently Investors Group effected settlements with various former clients of Mr. Harvey to make them whole in respect of losses that were said to have occurred due to misrepresentations by Mr. Harvey or certain transactions which were disputed or brought into question. Ms. West testified that for all the client complaints, the loss to Investors Group to unwind the leverage strategy and reimburse the clients where they found inconsistencies with the signatures, was approximately \$630,000.

9. As is set out in the Particulars in the Notice of Hearing, supra., attempts were made to contact Mr. Harvey by letter dated May 3, 2010; by telephone on July 16, 2010; and by letter dated July 26, 2010. All the registered letters were returned "unclaimed"; however the letters by ordinary post were not.

10. We are satisfied that the Respondent had notice of MFDA staff's requests, and that he failed to attend for an interview with MFDA staff during the course of the investigation, contrary to Section 22.1 of MFDA By-law No. 1. (The determination was initially made at the Hearing.)

11. Further, MFDA staff has extended every opportunity for the Respondent to participate in this Hearing. The Respondent received ample notice of the initial hearing date: see the Affidavit of Service of Dean Price (Exhibit 2) and the Affidavit of Service of Sofi Vasiliadis (Exhibit 3). The Notice of Hearing set the initial hearing for October 3, 2011 at 9:00 a.m. That hearing took place but the Respondent did not attend. The Panel then directed that the Hearing of the matter on its merits would take place on January 4, 2012 commencing at 10:00 a.m. That Order was published in a News Release issued by the MFDA on October 3, 2011. On December 14, 2011 the MFDA published a further News Release confirming the Hearing on the Merits would take place on January 4, 2012 commencing at 10:00 a.m., and gave the location. The Hearing did take place on January 4, 2012 and this Panel, having heard the evidence, and the submissions of counsel for the MFDA, found the offence alleged had been proven, and made an Order that:

- (a) The Respondent is permanently prohibited from conducting securities related business while in the employ of or associated with any Member of the MFDA pursuant to s. 24.1.1(e) of the MFDA By-law No. 1;
- (b) The Respondent shall pay a fine in the amount of \$75,000, pursuant to s. 24.1.1(b) of the MFDA By-law No. 1; and
- (c) The Respondent shall pay costs in the amount of \$10,000, pursuant to s. 24.2 of the MFDA By-law No. 1.

12. The Panel stated that the reasons for the decision would follow: these are the Reasons.

Analysis

13. It is well settled that the MFDA has a duty to conduct examinations of, and investigations into the conduct, business or affairs of any Member, Approved Person, or any other person under its jurisdiction as it considers necessary or desirable in connection with any matter related to that Member's or person's compliance with, among other things, the By-laws, Rules and Policies of the MFDA: Section 21 of MFDA By-law No. 1.

14. In carrying out this duty, the MFDA is authorized to require a Member, Approved Person or any other person under its jurisdiction to:

- (a) Submit a report in writing with regard to any matter that involves any such investigation;
- (b) To produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and
- (c) **Attend and give information respecting any such matters:** Section 22.1 of MFDA By-law No. 1 (emphasis added).

15. It is now well accepted that there is a general duty on all members of self-governing professions to co-operate with their governing bodies: *Kaburda v. College of Dental Surgeons of British Columbia* (2001) B.C.J. No. 2161; *Artinian v. College of Physicians and Surgeons of Ontario* (1990) O.J. No. 116 (Divisional Court); *In the Matter of Arnold Tonnies* (June 27, 2005) MFDA File No. 200503.

16. Counsel for the MFDA submitted, and we agree, that the failure of an Approved Person to comply with a request made by Staff pursuant to Section 22.1 of By-law No. 1 is serious misconduct. To a very significant degree, it subverts the ability of the MFDA to perform its regulatory functions. As was said in *Re: Tonnies*, supra.:

“Failure to co-operate is serious misconduct in that it subverts the ability of the MFDA to perform regulatory functions. The Responsibility to regulate mutual fund sales has been granted to the MFDA, as similar regulatory powers fall upon other professional bodies, and that responsibility can only be carried out if the MFDA has the authority to investigate, which includes the ability to obtain relevant documentation from Members and Approved Persons.” (Page 20).

17. The failure of an Approved Person to provide information requested in an investigation clearly undermines the integrity of the self-regulatory system, and the effectiveness of its operation. In many cases, as here, it completely frustrates the investigation. In our view, and from the cases referred to us, it is also clear that this conduct cannot and will not be tolerated. It is a very serious offence.

18. The Rules provide another avenue for the MFDA to proceed, which was the course chosen in this case. This Panel had the benefit of the evidence of Ms. Patricia West at the Hearing, but also we noted that the Respondent failed to serve and file a Reply, and as such, at the Hearing on January 4, 2012, this Panel proceeded pursuant to Rule 8.4 of MFDA Rules of

Procedure. Pursuant to Rule 8.4 (1)(a), (b) and (c), this Panel accepted the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing as proven, and imposed the penalties and costs ordered on January 4, 2012.

Penalty

19. The Panel had the benefit of the submissions of counsel for the MFDA with respect to the penalty to be imposed, and costs. In summary the MFDA sought:

- (a) a permanent prohibition;
- (b) a fine in the range of \$50,000 to \$100,000;
- (c) costs in the amount of \$10,000.

20. The Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers)* (1994) S.C.J. 58 has indicated the importance of the regulatory function of organizations like the MFDA:

“59. It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. **Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system:** David L. Johnston, *Canadian Securities Regulation* (1977), at p. 1.” (emph. added)

21. In *Pezim* the Court continued its analysis and cited *Brosseau v. Alberta Securities Commission*, [1961] S.C.R. 584, a 1961 decision of the Supreme Court of Canada:

“The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.”

22. MFDA counsel submitted, and we agree, that several previous decisions found the following factors should be taken into account in determining the appropriate sanctions to impose:

- (a) The protection of the investing public;

- (b) The integrity of the securities markets;
 - (c) Specific and general deterrents;
 - (d) The protection of MFDA's membership; and
 - (e) The protection of the integrity of the MFDA's enforcement processes.
- (*Re Tonnies*, supra, page 22).

23. MFDA counsel submitted, and we agree, that additional factors to be considered when determining the appropriate penalty include the following:

- (a) The seriousness of the allegations proved against the Respondent;
- (b) The Respondent's past conduct, including prior sanctions;
- (c) The Respondent's experience and level of activity in the capital markets;
- (d) Whether the Respondent recognizes the seriousness of the improper activity;
- (e) The harm suffered by investors as a result of the Respondent's activities;
- (f) Benefits received by the Respondent as a result of the improper activity;
- (g) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- (h) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities
- (i) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activities;
- (j) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital market; and
- (k) Previous decisions made in similar circumstances

Re: Lamoureux, [2002] A.S.C.D. No. 125 at para. 11;

Re: Tonnies, supra. at p.23.

24. We were also referred to the MFDA Penalty Guidelines which are intended to assist Hearing Panels, Staff and Respondents in considering the appropriate penalties in MFDA disciplinary proceedings. However, the Penalty Guidelines are not mandatory, and the Guidelines suggest the types and ranges of penalties that would be appropriate in particular

cases. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances, but are not binding on the Hearing Panel.

25. The MFDA Penalty Guidelines recommend the following for the misconduct found in this case:

“SPECIFIC FACTORS TO CONSIDER

1. Whether the contravention was intentional or inadvertent.
2. Whether there was complete or only partial non-compliance.
3. The impact that the non-compliance had on the investigation.
4. Whether the Respondent can demonstrate that the refusal to cooperate was based on reasonable reliance on competent legal advice.

PENALTY TYPES AND RANGES

1. Fine: Minimum of \$50,000.
2. Termination of Member or permanent prohibition of an Approved Person.
3. Interim Order pursuant to s. 24.3 of MFDA By-law No. 1.”

26. In this case, as the facts set forth in the Notice of Hearing demonstrate, the investigation disclosed very serious matters involving the investing public. The MFDA investigation into those serious allegations was frustrated by the deliberate conscious refusal of the Respondent to fulfill his obligations to the MFDA and attend the interview. The refusal of the Respondent to attend and be interviewed is egregious in the extreme. In our view, as other Panels before us have stated, it is important for the investing public, and the MFDA membership to know that such conduct will attract severe penalties. It is also important, in the matter of specific deterrence, that the Respondent appreciate the seriousness of his default, and that there will be grave consequences.

27. With respect to the Penalty Guidelines and factors to consider, in our view the Respondent’s contravention was intentional; it was complete; and it had a very significant and serious impact on the investigation.

28. In this case the Respondent had sufficient experience to know that as an Approved Person under the jurisdiction of the MFDA, he was bound by the Policies and Rules, and he was obliged to attend in response to the MFDA's request for an interview. Because the Respondent has not filed a Reply, or attended the Hearing, we can only assume that he has not accepted responsibility, nor has he shown any remorse. Further, due to the Respondent's refusal to cooperate with the investigation, Staff has been unable to determine the extent of any benefits the Respondent received. However, it is obvious to us that he viewed a non-appearance was more beneficial than attending and facing the allegations.

29. The MFDA has not alleged any past disciplinary history on the part of the Respondent. However, given the effect of his refusal to be interviewed, we give very little weight to this consideration.

30. Counsel for the MFDA referred us to previous decisions in similar circumstances, which we have reviewed: *Re: Westguard*, [2010] MFDA File No. 200937; *Re: Desbois*, [2009] MFDA File No. 200822; *Re: Brick*, [2007] MFDA File No. 200705; *Re: Tonnies*, [2005] MFDA File No. 200503. In summary, in those decisions the Panels imposed penalties of permanent prohibition, and a \$50,000 fine.

31. It is our view that given the allegations that arose as a result of the MFDA's limited investigation, the Respondent by his non-appearance is guilty of very serious misconduct. It is our view, that given the seriousness of this misconduct, the usual fine of \$50,000 is not sufficient. Considering all of the evidence in this case, the appropriate fine is \$75,000. We also find that a permanent prohibition is clearly warranted.

32. The Panel also has the ability to order costs against the Respondent in respect of the MFDA investigation. We have the benefit of the evidence of Ms. West in the matter of costs. We have determined that costs sought by the MFDA, namely \$10,000, are appropriate.

33. In the result, on January 4, 2012 this Panel made the following order:

1. The Respondent is permanently prohibited from conducting securities related business while in the employ of or associated with any Member of the MFDA

- pursuant to s. 24.1.1(e) of the MFDA By-law No. 1;
2. The Respondent shall pay a fine in the amount of \$75,000, pursuant to s. 24.1.1(b) of the MFDA By-law No. 1; and
 3. The Respondent shall pay costs in the amount of \$10,000, pursuant to s. 24.2 of the MFDA By-law No. 1.
34. These Reasons may be signed in counterpart.

DATED this 14th day of March, 2012.

“Stephen Gill”

Stephen D. Gill,
Chair

“Darlene Barker”

Darlene Barker,
Industry Representative

“Darlene Thomas”

Darlene P. Thomas,
Industry Representative