

# Re Lee

**IN THE MATTER OF:**

**The Mutual Fund Dealer Rules**

**and**

**Sungsoo (Steve) Lee**

2023 CIRO 42

Canadian Investment Regulatory Organization  
Hearing Panel (Pacific District)

Heard: March 20, 2023

Decision: March 20, 2023

Reasons for Decision: December 18, 2023

**Hearing Panel:**

Michael Carroll, KC, Chair

Barbara Fraser, Industry Representative

Susan E. Monk, Industry Representative

**Appearances:**

Alan Melamud, Senior Enforcement Counsel for CIRO

Doyun Elliott Kim, Counsel for the Respondent

Sungsoo (Steve) Lee, Respondent

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## REASONS FOR DECISION

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¶ 1 On December 22 2021, the Mutual Fund Dealers Association of Canada (the “MFDA”) issued a Notice of Hearing against Sungsoo (Steve) Lee (the “Respondent”) alleging that commencing in October 2020 he failed to cooperate with an investigation into his conduct by MFDA Staff contrary to section 22.1 of MFDA By-Law No. 1.

¶ 2 On January 1 2023, the Investment Industry Regulatory Organization of Canada (“IIROC”) and MFDA were consolidated into a single self-regulatory organization temporarily called the New Self-Regulatory Organization of Canada (the “New SRO”). The New SRO adopted the pre amalgamation regulatory rules and policies of IIROC and the MFDA and this matter is being heard by the Panel pursuant to the new rules. However, for purposes of clarity we will refer throughout to the MFDA Rules which governed the conduct of the Respondent at all material times hereto.

¶ 3 On March 17, 2023, staff of the New SRO (“Staff”) and the Respondent reached a Settlement Agreement containing inter alia a number of Agreed Facts. The Panel is asked to approve the Settlement Agreement.

**Agreed Facts**

*Registration History*

¶ 4 From December 2, 2002 to December 5, 2018, the Respondent was registered in British Columbia as a dealing representative with BMO Investments Inc. (the “Member”). The Respondent was an Approved Person and was bound to comply with the MFDA’s By-laws, Rules, and Policies as amended from time to time.

¶ 5 On December 5, 2018, the Member terminated the Respondent’s registration and the Respondent is no

longer employed in the securities industry in any capacity.

#### *Failure to Cooperate*

¶ 6 As a result of allegations reported to the MFDA by the Member, Staff commenced an investigation concerning:

- a) Whether the Respondent had instructed other Approved Persons to open client accounts, complete Know-Your-Client (“KYC”) information for clients, and process transactions for those clients, without the Approved Persons obtaining instructions in order to confirm the accuracy of the information received, the elements of those transactions, or that the transactions were suitable and authorized by the clients;
- b) Whether the Respondent provided pre-signed forms to the other Approved Persons for them to complete and use to process transactions; and
- c) Whether the arrangements and business dealings between the Respondent and the other Approved Persons complied with regulatory requirements and the policies and procedures of the Member.

¶ 7 Between July and August 2020 Staff corresponded with the Respondent about an interview to discuss the subject matter of the investigation. An interview was scheduled for October 28 by video conference.

¶ 8 On October 5 Staff advised counsel for the Respondent of the nature of the allegations made by the Member and requested confirmation that he would attend the video conference meeting on October 28. The letter also advised that an interpreter would be available as English was not the first language of the Respondent.

¶ 9 On October 26 counsel for the Respondent advised Staff that the Respondent would not be attending the October 28 interview for medical reasons but was prepared to cooperate in writing. Staff subsequently received a note from the Respondent’s doctor confirming that for medical reasons the Respondent would be away from work between October 26-30,2020.

¶ 10 On November 13 Staff advised counsel for the Respondent that the doctor’s note did not provide an adequate explanation of the Respondent’s medical condition preventing him from attending the interview and requested the Respondent to attend the interview on November 19, or provide a more detailed medical note.

¶ 11 In November and December 2020 the Respondent’s counsel advised Staff that they were not entitled to know the details of the Respondent’s medical condition and again repeated the offer to have the Respondent answer Staff’s questions in writing.

¶ 12 On December 24 Counsel for the Respondent provided Staff with 2 additional notes from his doctor which Staff found to be lacking adequate information. They requested further and more complete information of the Respondent’s medical condition. However, no further information was ever provided and the Respondent failed to attend the interview.

¶ 13 As a result, Staff has been unable to determine the full nature of the conduct under investigation.

¶ 14 The Respondent now acknowledges that offering to answer Staff’s questions in writing did not constitute cooperation and that his medical condition did not preclude him from attending the interview.

¶ 15 The Respondent says that he received legal advice from his former counsel that did not adequately explain his obligation to cooperate with Staff and the potential consequences of not attending an interview. He has provided emails from his former counsel to corroborate his assertion. The panel notes that it was not the Respondent’s current counsel that provided that advice.

¶ 16 However, the Respondent acknowledges that notwithstanding the legal advice he received, he had an obligation to know and understand his regulatory requirements including his duty to cooperate with Staff’s investigation.

#### **Issues**

¶ 17 There are 2 issues to be determined by the Panel;

- a) Do the facts admitted constitute misconduct in contravention of the MFDA's By-laws, Rules, or Policies or provincial securities legislation?
- b) Do the sanctions agreed to in the Settlement Agreement fall within a reasonable range of appropriateness, bearing in mind the nature and extent of the misconduct and all of the circumstances?

### **Jurisdiction of Hearing Panels for Approving or Rejecting Settlement Agreements**

¶ 18 We agree with the submissions of counsel that hearing panels must not lightly interfere in a negotiated settlement, and may only accept or reject a settlement in its entirety. The role of the panel is not to determine the correct sanction, but rather it is to ascertain whether the sanction agreed to between Staff and a respondent falls within the reasonable range of appropriateness.

MFDA By-law No.1 s.24.4.3

*Professional Investments (Kingston) Inc. (Re)*, 2009 LNCMFDA 9 at para. 13

*Ho (Re)* 2018 LNCMFDA 21 at paras. 24-26

### **The facts admitted by the Respondent Constitute Misconduct**

¶ 19 As stated above the Respondent has admitted that he failed to attend the interview and answer questions as requested by Staff. This is a breach of s. 22.1 of MFDA By-law No.1 which requires Approved Persons in any investigation to "attend and answer questions under oath or otherwise...as the Corporation determines".

¶ 20 MFDA hearing panels have consistently held that an Approved Person's failure to cooperate with an investigation undermines the MFDA's regulatory obligations under s. 21 of By-law No. 1.

*Vitch (Re)*, 2011 LNCMFDA 63 at paras. 55-56

*Tonnies (Re)* 2005 LNCMFDA 7 at para. 41

*Armani (Re)* LNCMFDA 185 at paras. 8-10

¶ 21 In the present case the information provided by the Member led Staff to believe that the Respondent may have been involved in stealth advising with the assistance of other Approved Persons registered with the Member. Stealth advising is a practice whereby one individual services the accounts of clients of the Member, and provides them with advice and recommendations, while a different Approved Person effects the resulting transactions by submitting the required account forms under the Approved Person's representative code.

*Gowan (Re)*, 2022 LNCMFDA 8 at para. 11

¶ 22 Stealth advising results in the Member not having an accurate record of which Approved Persons was servicing the client's accounts and does not provide the Member with a paper trail to ensure compliance with its policies and procedures.

¶ 23 The Respondent's offer to answer questions in writing is not a defence to this misconduct. Oral questioning allows for a more effective and efficient search for the truth, makes falsehoods and fabrications more difficult, and ensures that the answers being provided are solely from the individual being questioned. Courts have considered these to be important factors when ruling on requests by parties to be examined in writing rather than orally.

*Botiuk v Campbell*, [2011] O.J. No. 1138 at paras. 44-48

*Sterling v Lower Canada Nicola Indian Band*, [2018] F.C.J. No. 1337 at paras. 11, 13, 16-17 (Prothonotary)

### **MFDA By-law No. 1 s. 22.1**

¶ 24 The underlying conduct being examined in the present case involved multiple Approved Persons and was not the sort of misconduct that could be determined by reviewing documentary evidence.

¶ 25 The panel has also considered the fact that the Respondent was relying on legal advice from his former counsel concerning his obligation to cooperate with MFDA Staff and the potential consequences for not doing so. MFDA Sanction Guidelines state that reliance on legal advice may be a mitigating factor but it is not a defence.

¶ 26 This defence has been considered in a number of cases. In particular we note the following passage from a hearing of the Investment Dealers Association of Canada;

We believe that the reliance upon legal advice consideration set out in Guideline 5.1 as a mitigating factor is limited in scope. This consideration is not intended to permit a respondent to fail utterly in the requirement imposed upon that respondent to comply with By-law 19.5 merely because his or her lawyer recommends that total non-compliance is in the respondent's best interest. Rather this consideration is intended to account for the limited situation where a Respondent has refused to answer a particular question or to produce a particular document based upon competent legal advice. In such a situation, although there might be a failure to cooperate and therefore a contravention of By-law 19.5 in a strict sense, the fact that the respondent has followed competent legal advice should be taken into account in assessing an appropriate penalty.

*Bassett (Re)* [2005] I.D.A.C.D. No.26 at paras. 25-26

¶ 27 Counsel have brought to our attention the following additional cases where MFDA hearing panels have rejected the defence of reliance on legal advice as a reason for failing to cooperate.

*Legare (Re)*, 2010 LNCMFDA 45 at paras. 34-38

*Vatanchi (Re)*, 2015 LNCMFDA 78 at para. 12

*Douglas (Re)*, 2018 LNCMFDA 216 at paras. 28-30

¶ 28 In this case while the legal advice provided to the Respondent did not accurately explain his obligation to cooperate with the MFDA and the potential consequences for not doing so, it did not state that he was not required to cooperate entirely in any event.

¶ 29 The panel concludes that by failing to respond to Staff's letters and attend the interview the Respondent contravened s. 22.1 of MFDA By-law No.1.

#### **The Sanctions Proposed under the Settlement Agreement**

¶ 30 If the Settlement Agreement is approved by the Panel the following sanctions will be imposed on the Respondent;

- a) He shall be permanently prohibited from conducting securities related business while in the employ of or in association with any Dealer Member that is registered as a mutual fund dealer, pursuant to s. 24.1.1 (e) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1 (e));
- b) He shall pay a fine of \$35,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(b));
- c) He shall pay costs of \$5,000 pursuant to s. 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.2); and
- d) The fine and costs shall be payable in installments as follows:
  - (i) \$10,000 (fine) and \$5,000 (costs) payable in certified funds upon acceptance of the Settlement Agreement; and
  - (ii) \$25,000 (fine) payable on or before September 20, 2023.

#### **Factors to Consider in Determining whether to Approve a Settlement Agreement**

¶ 31 Included as factors to be considered in determining whether to accept or reject a settlement agreement are :

- a) Whether acceptance would be in the public interest and whether the sanction imposed will protect investors;
- b) Whether it is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the settlement agreement;
- c) Whether it addresses the issue of specific and general deterrence;
- d) Whether it will prevent the type of conduct described from occurring again; and
- e) Whether it will foster confidence in the integrity of the Canadian capital markets, the MFDA, and the regulatory process itself.

**Factors to be considered when evaluating whether the penalties proposed should be accepted**

¶ 32 Hearing panels have also taken into account the following factors when evaluating whether the penalties proposed should be accepted:

- a) the seriousness of the contraventions admitted to by the Respondent or 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) the 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 activity;
- j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- k) previous decisions made in similar circumstances.

*Sterling Mutuals Inc. (Re)*, *supra* at para. 14, SBA, Tab 9.

*Seriousness of Misconduct*

¶ 33 The Respondent failed to attend at an interview when requested by Staff as explicitly required by section 22.1(b) of MFDA By-law No. 1. Hearing Panels have repeatedly held that the failure to cooperate with MFDA Staff is very serious misconduct. As recognized by the IDA Hearing Panel in *Bassett (Re)*, the interview is a critical tool for regulatory investigations like those conducted by the MFDA. MFDA Hearing Panels have repeatedly noted that the failure by an Approved Person to cooperate with a MFDA investigation subverts the ability of the MFDA to perform its regulatory function:

The Panel considered that the failure of an Approved Person to cooperate with an MFDA investigation by among other things, not complying with a request by an MFDA investigator made pursuant to s. 22.1 of the By-law is serious misconduct. It subverts the ability of the MFDA to perform its regulatory function by fully investigating a matter and determining all of the facts. Further, the failure to provide information requested in an investigation undermines the integrity of the industry's self-regulatory system and the effectiveness of its operations, including the MFDA's mandate to protect the public.

*Dixon (Re)*, 2017 LNCMFDA 247 at para. 12, SBA, Tab 31.

*Vitch (Re)*, *supra* at paras. 55-56, SBA, Tab 11.

*Armani (Re)*, *supra* at paras. 8-10, SBA, Tab 13.

*Cudmore (Re)*, 2018 LNCMFDA 177 at para. 7, SBA, Tab 32.

MFDA By-law No. 1, s. 22.1, SBA, Tab 1.

¶ 34 Indeed, the Respondent's misconduct is aggravated by the fact that his failure to cooperate also affected MFDA Staff's ability to investigate fully the conduct of the other Approved Persons who allegedly facilitated the stealth advising by the Respondent.

¶ 35 Finally, neither the Respondent's chronic medical condition nor the legal advice he received significantly ameliorate the seriousness of the misconduct. The medical condition did not prevent the Respondent from cooperating with MFDA Staff's investigation, but was instead used as a way for the Respondent to avoid his regulatory obligation. Indeed, the Respondent refused to disclose the nature of his medical condition, therefore preventing MFDA Staff from making any assessment of his ability to participate and determining what accommodation could be offered. With respect to the legal advice, as found in *Bassett (Re)*, reliance on legal advice, as a mitigating factor, is not intended to permit an Approved Person to utterly fail to cooperate with MFDA Staff's investigation.

#### *Respondents Past Conduct*

¶ 36 The Respondent has not previously been the subject of MFDA disciplinary proceedings.

#### *Respondent's Recognition of the Seriousness of the Misconduct*

¶ 37 By entering into the Settlement Agreement the Respondent has accepted responsibility for his actions and avoided the time and expense of a contested disciplinary hearing.

#### *The Harm Suffered by Clients and the Benefits Received from the Misconduct*

¶ 38 As a result of the Respondent's failure to cooperate, Staff cannot determine the full extent of his potential misconduct, including the full scope of clients that may have been affected by stealth advising. Similarly, Staff also cannot determine whether the Respondent may have received some benefit from the alleged misconduct.

#### *Deterrence*

¶ 39 Deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets in order to protect investors.

*Cartaway Resources Corp. (Re)*, 2004 SCC 26 at para. 61. For a more general discussion, see paragraphs 52-62.

¶ 40 The Respondent has agreed to a permanent prohibition which is a significant sanction despite the fact that he is 68 years old. Furthermore, the Respondent has agreed to pay a \$35,000 fine. While this amount is lower than the typical fine of \$50,000 in cases of a failure to cooperate where there is no settlement, it is important to recognize that the Respondent has taken responsibility for his misconduct and entered into a settlement with Staff. The Panel has taken notice of the fact that the Respondent states that he has exhausted his RRSP savings, has minimal cash in his bank account, and supports himself with government pension income and modest rental income. He has provided corroborating documents to Staff in this regard. He states that he is in the process of selling his rental property to pay the fine to be imposed upon him should the Panel accept the Settlement Agreement. Under these circumstances, the fine is a significant sum, which, coupled with the permanent prohibition, will serve to send a message to others in the mutual fund industry about the seriousness of the misconduct at issue.

#### *Previous Decisions Made in Similar Cases*

¶ 41 Counsel have referred us to the following decisions of MFDA and IDA hearing panels in situations where respondents have failed to cooperate with investigations into their conduct and where permanent prohibitions have been imposed. The fines in these cases range from \$40,000 to \$125,000 and costs from \$5,000 to \$20,000.

*Armani (Re), supra*  
*Bassett (Re), supra*  
*Chow (Re), supra,*  
*Cudmore (Re), supra*  
*Dixon (Re), supra*  
*Gizzo (Re), 2011 LNCMFDA 49*  
*McBurney (Re), 2015 LNCMFDA 153*  
*Robb (Re), supra, SBA*  
*Taylor (Re), 2019 LNCMFDA 134*  
*Tuitakalai (Re), 2021 LNCMFDA 21*  
*Vitch (Re), supra, SBA*

¶ 42 We have reviewed these decisions and the factors outlined in paragraphs 31 and 32 above, and taken into consideration the current financial circumstances of the Respondent and his age. In the result we find that the proposed sanctions are reasonable and proportionate and we accept the Settlement Agreement.

Dated at Vancouver this 18 day of December 2023.

“Michael Carroll” \_\_\_\_\_

Michael Carroll, K.C., Chair

“Barbara Fraser” \_\_\_\_\_

Barbara Fraser, Industry Representative

“Susan E. Monk” \_\_\_\_\_

Susan E. Monk, Industry Representative

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