



**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 Raymond McBurney**

Heard: November 10, 2015, in Toronto, Ontario  
Reasons for Decision: December 29, 2015.

**REASONS FOR DECISION**

Hearing Panel of the Central Regional Council:

Frederick W. Chenoweth  
Cheryl Hamilton  
Casimir Litwin

Chair  
Industry Representative  
Industry Representative

Appearances:

Shelly Feld  
Paul Blasiak

)  
)  
)

For the Mutual Fund Dealers Association of  
Canada

Michael Raymond McBurney

)  
)  
)

Not in attendance nor represented by Counsel

## **BACKGROUND**

1. On July 20, 2015, Staff issued a Notice of Hearing in respect of Michael Raymond McBurney (the “Respondent”), which alleges the following:

Allegation #1: Commencing in August 2013, the Respondent failed to cooperate with an investigation conducted by Staff of the MFDA (“Staff”) by failing to submit information requested by Staff and by failing to attend an interview to give information regarding matters under investigation, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

2. On August 7, 2015 the Respondent filed a Reply to the Notice of Hearing, which was marked as Exhibit 3. In his Reply, the Respondent asserted that he resigned as a mutual fund salesperson<sup>1</sup>/Approved Person more than 10 years ago.

3. The Respondent did not attend the first appearance on September 28, 2015, although properly served with notice of the first appearance as shown by the Affidavit of Service of Terri Spence, sworn August 6, 2015, marked as Exhibit 2. At the first appearance on September 28, 2015, the Hearing Panel ordered, among other things, that the hearing of the matter on its merits take place on November 10, 2015.

4. Rule 7.3 of the Mutual Fund Dealers Association of Canada (“MFDA”) Rules of Procedure makes it clear that where a respondent fails to attend a hearing on the date and at the time and location specified in the Notice of Hearing, the hearing panel may proceed with the hearing, without further notice to and in the absence of the respondent. In any event of this Rule, on October 13, 2015, Staff sent the following documents to the Respondent:

---

<sup>1</sup> On September 28, 2009, the mutual fund salesperson registration category was changed to “dealing representative – mutual fund dealer”.

- A letter from Staff to the Respondent dated October 13, 2015 advising of, among other things, the date and location of the hearing on the merits;
- A copy of the Order from the first appearance dated September 28, 2015; and
- A copy of a News Release dated September 28, 2015.

5. The documents referenced at paragraph 4 above, were delivered to the Respondent's U.S. address on October 14, 2015, as appears from the Affidavit of Josie Mulder, marked as Exhibit 4. The documents sent to the Respondent's Canadian address were refused. The Panel concluded that notice of the November 10, 2015 Hearing on the merits did come to the attention of the Respondent.

### **ADJOURNMENT REQUEST**

6. On November 10, 2015 at 9:35 a.m., immediately prior to the commencement of the Hearing, Shelley Feld, Senior Enforcement Counsel, received an email from the King Law Chambers. The email was authored by the assistant to a lawyer at the Chambers and was marked as Exhibit 6. The email advised that the named counsel had not yet been retained and was unable to attend the Hearing because of illness. It further advised that counsel was seeking to have the matter adjourned. The email did not advise of proposed alternate dates for the Hearing, nor did it advise as to when counsel anticipated being retained.

7. Enforcement Counsel referred the Panel to extensive case law with respect to the issue of adjournments including, *In the Matter of a Discipline Hearing Re Gabriel Richard Frank*, 2015 LNCMFDA 75 and *Law Society of Upper Canada v. Igbinosun*, a decision of the Court of Appeal of Ontario, 96 OR (3<sup>rd</sup>). The Panel regarded the principles cited in those cases as very instructive. It was, however, clear that the application of those principles must be exercised in the particular fact situation of each case.

8. In coming to its conclusion with respect to the "request for adjournment", in this case, the Panel was mindful of the fact that:

- As a result of the operation of Rule 7.3 of the MFDA Rules of Procedure, and as a result of the Respondent's failure to attend the first appearance on September 28, 2015, the Panel was at liberty to proceed with the Hearing without notice and in the absence of the Respondent;
- The Respondent was not in attendance either at the first hearing of September 28, 2015 nor at the November 10, 2015 Hearing on the merits;
- The MFDA Rules of Procedure require that a motion for adjournment be brought. None had been brought in this matter.
- Counsel allegedly acting for the Respondent had not yet been retained, nor was there any indication as to when he would be.
- The email of November 10<sup>th</sup> did not suggest alternate dates for a Hearing of the matter.
- Counsel allegedly acting on behalf of the Respondent did not attend the hearing.
- The Respondent had received ample notice of both the September 28, 2015 and November 10, 2015 Hearing dates.
- No reasons were given, in the correspondence, for the failure of the Respondent to attend.
- The allegations in the case were that the Respondent had failed to attend at least two days for arranged interviews.
- There was inadequate evidence before the Panel to demonstrate a real interest, on the part of the Respondent, to respond to the allegations.
- There had been no request for an adjournment until 25 minutes before the commencement of the Hearing.
- The email of November 10, 2015 was not the email of counsel, but rather the email of his assistant.

9. Although there was limited evidence of prejudice to the prosecution, there was evidence of inconvenience to counsel and witnesses, which when balanced with the limited interest expressed by the Respondent in the process and the casual request for an adjournment, led the Panel to conclude that the hearing process would be brought into disrepute should the

adjournment request be granted. For all the reasons set out above, the Panel concluded that the Hearing should proceed as scheduled on November 10, 2015, in the absence of the Respondent.

## **JURISDICTION**

10. The Panel raised with Enforcement Counsel the issue of the MFDA's jurisdiction over the Respondent. The issue was raised given the Respondent's assertion that he had resigned as a mutual fund salesperson/dealing representative/Approved Person more than 10 years ago. In concluding this issue, the Panel reviewed in detail the Affidavit of John James Gallimore, marked as Exhibit 7. Attached to the Affidavit were the records of both the Canadian Securities Administrators ("CSA") and the National Registration Database ("NRD"). The database shows evidence that the Respondent had been registered as a mutual fund sales person/dealing representative with other dealers from July 29, 1992 to October 9, 1992 and from March 5, 1997 to September 29, 1997, and with W.H. Stuart Mutuals Ltd. ("W.H. Stuart") from October 20, 1987 to May 8, 1992 and from February 3, 1998 to May 17, 2013.

11. Exhibit 7 also disclosed that on May 23, 2013, a Hearing Panel of the MFDA made an order pursuant to s. 24.3 of the MFDA By-law No. 1, suspending W.H. Stuart from membership in the MFDA. Presumably, because of this suspension on May 17, 2013, the Respondent registered as an Approved Person with Keybase Financial Group Inc. ("Keybase") where he remained until July 3, 2013, when he resigned. Exhibit 7 also evidenced that the Respondent was Senior V.P. of Sales and Marketing at W.H. Stuart, as of November 2012. The Board concluded that the Respondent's assertions of resignation 10 years ago were not credible in the face of the above evidence, and accordingly, concluded that the Respondent was continuously registered as a mutual fund sales person/dealing representative/Approved Person from February 3, 1998 to July 3, 2013, when he resigned.

12. Enforcement Counsel also drew the Panel's attention to MFDA By-law 24.1.4, which confirmed that Approved Persons remain subject to the jurisdiction of the MFDA, notwithstanding that such persons cease to be members. The By-law further confirmed that a proceeding shall not be commenced against a former Approved Person unless a Notice of

Hearing had been served upon such Approved Person no later than five years from the date upon which such persons ceases to be a member. The evidence, before the Panel, was clear that the Respondent had ceased to be an Approved Person on July 3<sup>rd</sup>, 2013 and that the Notice of Hearing in this matter had been served on July 24, 2015. Accordingly, for all the above reasons, the Panel concluded that the MFDA had jurisdiction to commence this disciplinary proceeding against the Respondent.

## **FAILURE TO COOPERATE**

13. Staff submitted that the Respondent had had a reasonable opportunity to participate in this proceeding and that given the Respondent's failure to attend at the hearing on the merits, that the hearing should proceed in the absence of the Respondent. As stated above, the Panel agreed.

14. Enforcement Counsel referred the Panel to s. 21 of MFDA By-law No. 1, pursuant to which the MFDA has a duty to conduct examinations and investigations of an Approved Person under its jurisdiction in connection with any matter related to that person's compliance with the By-laws, rules and policies of the MFDA; the Panel was further made aware that s. 21 obliges an Approved Person under its jurisdiction to, among other things, attend and give information respecting matters under investigation. Correspondingly, s. 22.1 of the MFDA By-law No. 1, also obliges an Approved Person to cooperate with the s. 21 investigative requirements. Finally, the Panel was made aware of extensive case law which confirmed the MFDA's investigative powers and the obligation of an Approved Person to provide Staff with information and documentation, and to attend for interviews with Staff.

15. Additionally, the Panel was made aware of a series of cases, including the case of *British Columbia Securities Commission v. Branch* [1995] 2 S.C.R., being a decision of the Supreme Court of Canada, which confirmed the reasonableness of the obligation to cooperate with an investigation to which an Approved Person is subject.

16. The undisputed Affidavit of John James Gallimore, Exhibit 7, disclosed that:

- a) at various times until July 3, 2013, the respondent was registered as a mutual fund sales person/dealing representative with several mutual fund dealers in Ontario, including W.H. Stuart a former Member of the MFDA and Keybase a current Member of the MFDA;
- b) During the course of the investigation that resulted in the issuance of a Notice of Hearing commencing a disciplinary proceeding against W.H. Stuart and its principles, Staff obtained information indicating that the respondent may have knowledge of and may have participated in conduct that had the given rise to that proceeding;
- c) In June 2013, Staff commenced an investigation of the Respondent's activities as an Approved Person of W.H. Stuart; and
- d) The Respondent had refused to respond in writing to inquiries from Staff and had disregarded requests that he attend an interview with Staff to give information regarding matters under investigation by Staff, details of which are set out hereafter.

17. The Affidavit of John James Gallimore, being Exhibit 7, sets out in substantial detail the efforts of MFDA Staff to have the Respondent submit information and/or attend an interview. Full details of Staff's effort are set out in paragraphs 17 to 29 of Exhibit 7 and are summarized in the chart below:

DATE	FROM	TO	RESPONSE
June 25, 2013	Staff (D. Liptrott)	The Respondent (through Keybase)	<ul style="list-style-type: none"> <li>• Requested signed written statement.</li> <li>• On July 24, 2013, Keybase provided Staff with an undated signed statement from the Respondent in which he denied knowledge of the matter under investigation by Staff and claimed that he had “not renewed” his “mutual fund license for over 4-5 years”.</li> </ul>
August 14, 2013	Staff (D. Liptrott)	The Respondent	<ul style="list-style-type: none"> <li>• Detailed request for information.</li> <li>• No response.</li> </ul>
September 5, 2013	Staff (D. Liptrott)	The Respondent	<ul style="list-style-type: none"> <li>• Request for additional information.</li> <li>• On September 12, 2013, Staff</li> </ul>

DATE	FROM	TO	RESPONSE
			received a fax from the Respondent. The Respondent repeated his claim that all had not been registered in the securities industry in Canada for several years. He did not respond to the inquiries that Staff had sent to him.
November 20, 2013	Staff (J. Gallimore)	The Respondent (sent to the Respondent's U.S. address)	<ul style="list-style-type: none"> <li>• Requested his attendance for an interview.</li> <li>• No response.</li> </ul>
November 21, 2013	Staff (J. Gallimore)	The Respondent (sent to the Respondent's Canadian address)	<ul style="list-style-type: none"> <li>• Further interview request.</li> <li>• No response.</li> </ul>
December 11, 2013	Staff (J. Gallimore)	The Respondent (sent to the Respondent's Canadian and U.S. addresses)	<ul style="list-style-type: none"> <li>• Further request for information.</li> <li>• No response.</li> </ul>

18. In light of Staff's substantial effort to obtain information from the Respondent or have him attend an interview, and in light of the Respondent's ongoing failure to cooperate, the Panel concluded that the Respondent's failure to comply constituted a contravention of s. 22.1 of MFDA By-law No. 1.

### **BREACH OF STANDARD OF CONDUCT**

19. The Panel was referred to MFDA Rule 2.1.1, which prescribes the standard of conduct applicable to Approved Persons. It is clear that the Rule was designed to protect the public interest by requiring Approved Persons to adhere to a high standard of ethical conduct. Enforcement Counsel submitted that by disregarding his obligations to comply with his regulatory body and s. 22.1 of MFDA By-law No. 1, the Respondent had violated the standard of conduct required of industry participants. On the evidence, the Panel agreed and found that the Respondent's conduct was contrary to MFDA Rule 2.1.1.

## RESULT

20. For all the above reasons, the Panel concluded that the misconduct set out in Allegation #1 in the Notice of Hearing dated July 20, 2015 in respect of Michael Raymond McBurney, had been established.

## PENALTY

21. The Panel reviewed the factors to be considered when determining whether a penalty is appropriate. The factors are set out in detail in the case of *Re Headley* 2006, a decision of a hearing panel of the Ontario Regional Council in MFDA File No. 200509, dated February 21, 2006.

22. The Panel noted that the penalty guidelines of the MFDA, recommend the following:

- a) Failure to cooperate: minimum fine of \$50,000; and permanent prohibition; and
- b) Standard of conduct: a minimum fine of \$5,000; writing or re-writing an appropriate industry course; suspension; a permanent prohibition in egregious cases.

23. Enforcement Counsel submitted that the Respondent had engaged in serious misconduct. It was submitted that failure to cooperate with his self-governing body demonstrates a fundamental breach of the Respondent's obligations. It was further submitted that due to the Respondent's failure to cooperate with Staff's investigation, Staff had been unable to investigate the full nature and extent of the involvement of the Respondent in conduct that had given rise to the disciplinary proceeding commenced against W.H. Stuart and its principals. That disciplinary proceeding includes allegations that are very serious, including allegations concerning the misappropriation of over \$6 million from more than 180 investors. On the evidence, the Panel agreed and found that the Respondent's conduct was, indeed, serious.

24. The Panel was also mindful of the fact that the Respondent has no past disciplinary history with the MFDA. It was submitted that this factor should be given very little weight in

light of the serious misconduct associated with subverting the ability of the regulator to fully investigate the Respondent's conduct and to determine in an expeditious manner all of the relevant facts. The Panel concurred with this view. The panel also concluded that the Respondent's failure to cooperate with Staff's investigation demonstrated that he was ungovernable and would therefore pose a risk to investors and the capital markets were he to continue to operate in the capital markets.

25. Staff requested that an order for costs be made against the Respondent in the amount of \$7,500. This amount would permit the MFDA to recover from the Respondent a portion of the costs attributable to conducting the investigation and prosecution of this matter. This amount is consistent with the amounts awarded by MFDA Hearing Panels in the past.

26. Accordingly, for all the above reasons, the Panel made the following Order:

- a) If at any time a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of, this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the *MFDA Rules of Procedures*;
- b) From the date of this Order, the Respondent is permanently prohibited from conducting securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- c) The Respondent shall pay a fine in the amount of \$75,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- d) The Respondent shall pay costs of this proceeding in the amount of \$7,500 pursuant to s. 24.2 of MFDA By-law No. 1.

**DATED** this 29<sup>th</sup> day of December, 2015.

“Frederick W. Chenoweth”

Frederick W. Chenoweth  
Chair

“Cheryl Hamilton”

Cheryl Hamilton  
Industry Representative

“Casimir Litwin”

Casimir Litwin  
Industry Representative

DM 456650 v1