



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: Corey William McPherson

Heard: September 17, 2012 in Victoria, British Columbia
and by written submissions
Decision and Reasons: December 11, 2012

DECISION AND REASONS (MOTION)

Hearing Panel of the Pacific Regional Council:

Jean P. Whittow, Q.C.
David Webb
Sharon Moskalyk

Chair
Industry Representative
Industry Representative

Appearances:

Shari L. Boyd)
)
Corey William McPherson)
)

For the Mutual Fund Dealers Association of
Canada
On his own behalf

A. HISTORY OF PROCEEDINGS

1. A Notice of Hearing was issued on June 29, 2012. In short, the Notice of Hearing alleged that the Respondent committed misconduct for “falsifying client RS’s signature on a client account document in order to facilitate the transfer of \$11,000 from another financial institution and the purchase of a mutual fund for the client’s account, contrary to MFDA Rule 2.1.1(b)”.

2. A Reply was filed on July 7, 2012. The Respondent did not agree with the allegation as framed and stated:

Allegation 1 of 1 re-written to my satisfaction: On or about July 9, 2011, the Respondent failed to observe high standards of ethics and conduct in the transaction of business by falsifying client RS’s signature on a client document [required by TDIS] to facilitate [client RS’s previously signed and agreed upon] transfer of \$11,000 from another financial institution and the purchase of a mutual fund for the client’s account, contrary to MFDA Rule 2.1.1(b).

3. The Respondent is self-represented.

4. A settlement hearing was scheduled for September 17, 2012. However, after regular business hours on September 14, 2012, the Respondent filed a Motion for an order that “the MFDA remove digital and online publications of notices and other related documents on the MFDA website and/or any other digital communication for which the MFDA has direct control.”

5. The Motion must be addressed before the settlement may be considered.

6. On September 17, 2012 the Panel was advised by counsel for the MFDA that the settlement agreement is treated as withdrawn while the Motion is addressed, and the Respondent indicated he understood that this is the case.

B. PROCEDURE ON MOTION

7. The Motion was originally filed electronically after business hours on September 14, 2012. On September 17, 2012, the MFDA sought an adjournment in order to properly respond to the Motion. The Panel set a schedule for receipt of further submissions from the Respondent

and MFDA counsel.

8. The submissions and evidence received are as follows:

- Respondent Notice of Motion of October 1, 2012;
- MFDA Responding Record (with Authorities) dated October 19, 2012;
- Respondent email (evidence) dated October 22, 2012;
- Respondent email (evidence) dated October 26, 2012; and
- Respondent Reply to Responding Record of October 27, 2012.

9. After the Panel received the materials described above, the Panel received a letter from MFDA counsel November 1, 2012, in which she took the position that the Respondent had expanded or altered the relief sought and made new arguments in his Reply, which either should not be considered by the Panel, or to which MFDA staff ought to be given a further opportunity to respond. In an email also dated November 1, 2012, the Respondent argued that his Reply was within the scope of the Motion.

10. The Panel is of the view that material provided in the Respondent's Reply is within the scope of the Motion. The Panel has considered this late material and does not require further submissions from MFDA counsel.

11. For the reasons that follow, the Panel has decided that the Motion shall be dismissed.

C. POSITION OF THE PARTIES ON THE MOTION

12. The Respondent seeks an order that the MFDA remove digital and online publications of notices and other related documents on the MFDA website and/or any other digital communication for which the MFDA has direct control.

13. The basis for the Motion is set out by the Respondent as follows:

I, Corey McPherson, am entirely aware of my misconduct and regret it fully. It was an error in judgement and shouldn't have happened regardless of the convenience it saved for the client given his extraordinary set of circumstances. I am fully aware of how my conduct could have had repercussions on both the institution and the client despite my good intentions. I have had time to reflect upon my actions and commit to never letting this happen again. These publications can have significant implications on my

professional image and my ability to be employed by other institutions in the future. More importantly, these publications have caused a shift in my focus in life as they can potentially impede my ability to gain acceptance into various medical and law schools. I have an excellent academic record and have strived to maintain an excellent reputation in both my City, across Canada, and internationally. I would like to keep my reputation in tact (sic) as my conduct in this circumstance is not a testament to my personal character. I believe these publications defame my character in a way that misrepresents who I am. I value integrity above all else; however, made an error in judgement with the best of intentions in mind. Every other document that was to be signed by the client was left in the pickup file, just not the Mutual Fund document as it was of a time sensitive nature. I had every intention of having client RS return to the branch to sign the document at a later date. Everything in the document was exactly what the client agreed to.

14. The Respondent states that the damaging impact of publication on the internet is disproportionate to the wrong committed. He states that publication is in itself a penalty, and it is unfair that he should be “constantly punished” for a “one-time mistake.”

15. The Respondent relies upon Rule 1.8(2) of the MFDA Rules of Procedure, which permits a Panel to close a hearing if the public interest in refraining from disclosure outweighs the desirability of an open hearing.

16. The Respondent states that he is not seeking to exclude the public from the hearing. He is not seeking a publication ban and does not oppose provision of information concerning this case to persons who request it. He is simply seeking to avoid the wider and longer-term impact of on-line publication.

17. The Respondent also relies upon the BC *Privacy Act* and publications made by the Office of the Information and Privacy Commissioner of BC.

18. The MFDA takes the position that the Motion must or should fail.

19. Counsel for the MFDA argues that the order issued by the BC Securities Commission on February 15, 2001 pursuant to s. 24 of the *Securities Act* (the “Recognition Order”) and the MFDA By-laws “mandate” publication. She argues that the MFDA’s publication on its website is consistent with the Recognition Order and By-laws.

20. Secondly, counsel for the MFDA argues that openness of the discipline process is of paramount importance in allowing the MFDA to fulfill its mandate to regulate mutual fund salespersons, ensure investors are protected and ensure public confidence. She relies upon *Hudbay Minerals Inc., Re*, 2009 CarswellOnt 2899, O.S.C.B. 4427 and refers to *Pezim v. BC (Superintendent of Brokers)*, [1994] 2 SCR 557, 1994 CanLII 103.

21. Counsel for the MFDA likens the Respondent's Motion to an application for a publication ban or sealing order, and refers to the authorities that set out the limited circumstances in which the courts will make such an order. She argues that the openness of the discipline system should only be limited in exceptional circumstances and that the protection of the Respondent's reputation is not such a circumstance.

22. Counsel for the MFDA argues that the *Privacy Act* and the *Freedom of Information and Protection of Privacy Act* ("FIPPA") do not apply, but, if they did, would not support the Respondent's Motion.

23. In response to counsel for the MFDA's submissions, the Respondent reiterates that he is not seeking a publication ban or to exclude the public from a hearing. He acknowledges that publication has already been made. He reiterates that he is seeking to avoid the impact of permanent on-line publication.

D. APPLICABLE MFDA RULES AND POLICY

24. The Recognition Order provides for publication:

(E) Any notification required under paragraph 8(D) shall include, in addition to any other information specified in paragraph 8(D), the names of the member and the relevant Approved Persons together with a summary of circumstances that gave rise to the proceedings.

(F) the MFDA shall maintain a register to be made available to the public, summarizing the information which is required to be disclosed to the Commission under paragraphs 8(D) and (E).

(G) the information given to the Commission under paragraphs 8(D) and (E) will be published by the Commission unless the Commission determines otherwise.

25. The MFDA By-laws contain provisions regarding publication of the notice of hearing and notice of penalties:

20.1.4 Publication of Notices

A Notice of Hearing shall be published in the same manner as a notice of penalty pursuant to Section 24.5.

...

24.5 Publication of Notice and Penalties

24.5.1 Notice Requirements

If and whenever a Member, Approved Person or other person is penalized by a Hearing Panel, notice of the penalty and notice of the disposition of any review from the imposition thereof shall be given forthwith by the Corporation. If such penalty is subject to review the notice shall so indicate.

24.5.2 Content of Notice

A notice of penalty given pursuant to Section 24.5.1 shall include a summary of the facts, shall specify the By-law, Rules or Policies violated and the penalty assessed, and shall include the name of the Member or person upon which the penalty is imposed and, in the case of a penalty imposed upon an Approved Person or other person, shall include the name of the Member employing or retaining such person at the relevant time.

24.5.3 Method of Giving Notice

A notice of penalty given pursuant to Section 24.5.1 shall be given:

- (a) by publication in a Corporation bulletin;
- (b) by delivery of the notice to a news service or newspaper having national distribution;
- (c) by delivery of the notice to any securities commission, stock exchange, self-regulatory organization or other securities regulatory authority having jurisdiction over the Member or individual concerned, and
- (d) to such other persons, organizations or corporations, and in such other manner as the Hearing Panel imposing the penalty, and/or as the Corporation from time to time, deems advisable.

26. The By-laws also provide that hearings are open to the public unless ordered otherwise on a specified test:

20.5 Open to the Public

A hearing pursuant to Section 20 shall be open to the public except where the Hearing Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, in which case the Hearing Panel may hold the hearing *in camera*.

27. Rule 1.8(2) of the MFDA Rules of Procedure provides:

A Panel may order that all or part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

E. THE “FACTS” ASSUMED FOR PURPOSES OF MOTION

28. We understand that the Respondent was prepared to admit the allegations against him, that is, that he falsified a client’s signature on a client account document. The Settlement Agreement is treated as withdrawn at this time. As a result, the Panel does not have before it an Agreed Statement of Facts.

29. It is not necessary for the Panel to make any findings of fact on the allegations against the Respondent for the purposes of this Motion. This Panel is not called upon to determine whether the Respondent’s conduct amounts to misconduct.

30. However, it does appear to be material to this Motion that the alleged misconduct can be described generally as relatively modest in nature. Based on the Notice of Hearing and Reply, we understand that the client had already signed the other required documents (and presumably that the failure to sign this particular document was an oversight). Only a single incident is alleged.

31. In the Motion, the Respondent asserts he signed the client’s name “with the best of intentions”, because of the “time-sensitive nature” of the document and the fact that the client was “travelling to and from the hospital to see his wife, and children who were under incubation”. No opposition was made by counsel for the MFDA as to the factual assertions made by the Respondent in his submissions on the Motion.

32. Perhaps most importantly, it appears to be common ground that there was no personal gain by the Respondent.

33. Based upon the admissions that the Respondent is prepared to make and the surrounding circumstances as described by the Respondent, for the purposes of this Motion, the Panel assumes the above facts are correct and that the Respondent admits that these facts amount to misconduct.

F. DECISION

34. The MFDA is the national self-regulatory organization for the mutual fund industry. The BC Securities Commission has recognized the MFDA pursuant to s. 24 of the *Securities Act* as a self-regulatory body under the Recognition Order.

35. The Recognition Order includes a requirement that the MFDA publish notice of disciplinary or settlement hearings and the disposition of such matters (Cl. 8 (D)). The Recognition Order requires that the MFDA require its members and Approved Persons to be subject to the MFDA's review enforcement and disciplinary procedures.

36. The Respondent was at all material times registered as a mutual fund salesperson, and an Approved Person and therefore subject to regulation by the MFDA.

37. In order to become an Approved Person, the Respondent was required to enter into an agreement that he will comply with the MFDA's By-laws and Rules.

38. As set out above, the MFDA has adopted By-laws concerning publication regarding its discipline proceedings. By-law 24.5 deals with publication of the outcome of a hearing. That By-law dictates the content of the notice of penalty and to whom notice must be given.

39. The Respondent is then bound by these By-laws and cannot successfully oppose publication as specified in the By-laws.

40. However, the Recognition Order and the MFDA By-laws do not mandate publication on the internet. Therefore, the regulatory regime does not dispose of the Motion.

41. The MFDA's policy is to publish on the internet.

42. There is no evidence before the Panel as to the origin of the policy, but it is apparent that publication of the notice of the outcome of discipline hearings on the internet has been the policy at all times material to this case.

43. The rationale for such broad publication is rooted in the public interest mandate of the MFDA.

44. The purpose of the securities regulation in general and the MFDA in particular is to protect the investor, promote capital market efficiency and ensure public confidence in the system of regulation (*Pezim v. BC (Superintendent of Brokers)*).

45. Openness and transparency are critical components to this mandate. As set out by the Ontario Securities Commission in *Hudbay Minerals Inc.*:

The principle of openness is a fundamental legal principle that promotes public confidence in the integrity of the judicial process (citations omitted). This principle applies to administrative tribunals. The Commission has considered the importance of openness of its proceedings and has stated:

“Openness” is important for the Securities Commission which is charged with the responsibility of helping to ensure the integrity of the capital markets in Ontario. Disclosure is particularly important for a body which itself uses disclosure as one of its principal techniques for ensuring compliance with the law by others. Investors, those being regulated, and the general public all have a strong interest in knowing what the Commission is doing and why it is doing it. (citation omitted)

(*para. 22*).

46. This is consistent with the very many authorities which describe the fundamental importance of the openness of the courts. The curtailment of public accessibility can only be justified to protect societal values of “superordinate importance” (*MacIntyre v. Nova Scotia (Attorney General)*, (1982) 132 D.L.R. (3d) 385 (S.C.C.); and see *W.(C.) v. M.(L.G.)* 2004

BCSC 1499)).

47. In *Steinhoff, Re*, 2012 CarswellNat 5227[2010], [2010] I.I.R.O.C., the applicant sought an order from an IIROC hearing panel to prevent any publication (a broader prohibition than that sought by the Respondent) on the basis that publication would harm her professional reputation. Relying upon *MacIntyre* and *W.(C.) v. M.(L.G.)*, the Panel held that the applicant's concerns for her reputation were a private interest that did not displace the public interest in an open process.

48. In another IIROC case referred to by counsel for the MFDA, *Re Deeb*, 2012 IIROC 8, a panel dismissed an application to remove a Notice of Hearing from the IIROC website. The panel held that it was in the public's interest to know what allegations are made by IIROC against those it regulates. It concluded that "the public interest in a fair and transparent process overrides the Respondent's personal interest" (para. 15).

49. The Panel finds the principles set out in these authorities to be compelling. We are of the view that the Respondent's desire to limit internet publication to protect his reputation and what he believes to be his future prospects is a personal interest. This personal interest does not outweigh the public interest in publication by the MFDA.

50. We pause to note that publication on the internet must properly reflect the facts found or admitted in order that any reader may fairly assess the case. For example, in this case, an admission of misconduct for "falsifying" a client's signature must be coupled with the essential facts about the circumstances in which this occurred, including, for example, that the Respondent did not receive personal gain.

51. It is the Panel's view that the *Privacy Act* does not preclude publication by the MFDA. The *Privacy Act* creates a tort for violation of privacy rights. An action under the *Privacy Act* must be brought in BC Supreme Court.

52. It is the Panel's view that the FIPPA does not apply to these proceedings. FIPPA applies to provincial "public bodies" as therein defined. The MFDA is not included in the list of public bodies contained in Schedule 1 to FIPPA.

53. It is for these reasons that the Panel rejects the Motion.

54. The Panel notes that, once posted on the internet, information is widely available. Further, information posted on the internet remains available forever, unless the posting is removed.

55. The Panel is of the view that after some reasonable period of time, there is little benefit to maintaining full publication on the internet. The precedent value of decisions diminishes. At some point in time, the benefit to full publication may be outweighed by the privacy interest of a registrant.

56. We are of the view that an application to remove material from the MFDA website after the passage of time might be viewed differently by this or another Panel.

57. The Panel therefore recommends that the MFDA consider adopting a publication regime which removes publications, particularly in minor matters, after a stipulated period, or relocates material to an archived portion of the website. It is our view that such a regime may effectively serve the public interest.

DATED this 11th day of December, 2012.

“Jean P. Whittow”

Jean P. Whittow, Q.C.,
Chair

“David Webb”

David Webb,
Industry Representative

“Sharon Moskalyk”

Sharon Moskalyk,
Industry Representative