



**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: Robert Kenneth Phillips**

Heard: December 9, 2016 in Calgary, Alberta  
Decision and Reasons (Penalty): February 28, 2017

**DECISION AND REASONS**  
(Penalty)

Hearing Panel of the Prairie Regional Council:

Alan V. M. Beattie, Q.C.

James Samanta

Richard Sydenham

Chair

Industry Representative

Industry Representative

Appearances:

Justin Dunphy

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Counsel for the Mutual Fund Dealers  
Association of Canada

Robert Kenneth Phillips

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Respondent, did not attend and was not  
represented by Counsel

## **1. INTRODUCTION**

1. The Hearing Panel (“the Panel”) was convened pursuant to a Notice of Hearing dated June 17, 2016 to consider a disciplinary hearing proceeding against Robert Kenneth Phillips (the “Respondent”) pursuant to Sections 20 and 24 of MFDA By-law No. 1. In a first appearance by teleconference a Hearing date was agreed upon of December 9, 2016. The Respondent did not participate in the first appearance nor did anyone on his behalf.

2. A very extensive Affidavit of Allison Howse, Senior Investigator with the MFDA, sworn December 6, 2016 (herein “the Affidavit”), was admitted as Exhibit 3 at the December 9, 2016 Hearing. Two accompanying volumes of exhibits were marked as Exhibit 4. (The Notice of Hearing and the Motion Record were marked as Exhibits 1 and 2 during the First Appearance.) The Affidavit sets out nine attempts made to serve documents on the Respondent by personal service, registered mail and regular mail, and attempts to contact him by telephone and email at his last known telephone number and email address. One of the letters sent by registered mail was returned as “Refused by Recipient”, another was returned as “Unclaimed” and two others were returned marked “Returned to Sender”. It can reasonably be concluded (based on his one response, below) that the Respondent received a letter dated January 14, 2016 (setting out the essence of the allegations against him and inviting him to provide information either through counsel or on his own behalf) and in April 13, 2015 a letter by regular mail requesting dates for a MFDA interview with him further to the investigation into the matter.

3. The only communications ever received by the MFDA from the Respondent were (1) an undated “Response to MFDA questions June 9, 2014” in the course of the MFDA’s investigation (discussed below) and (2) a one page letter dated April 30, 2015 (Exhibit 4 to the Affidavit). The letter is described as follows at para. 3(c) of the Affidavit:

- c. On May 5, 2015, Staff received a written response from the Respondent dated April 30, 2015, where he addressed his involvement with BK2, one of the complainants in this matter, but failed to provide dates for Staff to conduct an investigative interview.

The letter from the Respondent includes:

I have in no way contributed to this condition, as I did not sell the investment. I only introduced my client to a person that at that time was working part-time for me to call (and) book meetings. Being an area that at that time I was unable to sell any of this project with Prism Group of companies, I had declined to sell it, and only had introduced clients to someone that had connections with it. This pertains to any investments!

4. The Affidavit contains the following paragraphs:

- d. On May 27, 2015, I provided a final letter to the Respondent via registered and regular mail demanding a response by no later than June 10, 2015, or Staff would schedule the interview for July 14, 2015 in Calgary. No response was received by Staff;
- e. On June 30, 2015, I attempted to communicate with the Respondent by telephone at the house number recorded on his NRD registration information. The recorded message indicated that the number was no longer in use;
- f. On July 14, I attended the scheduled interview for the Respondent. I waited 30 minutes after the scheduled time, but the Respondent never appeared to attend the interview.

....

4. I am advised by Mr. Dunphy that the Respondent did not attend the first appearance scheduled on August 25, 2016. I am further advised that the Hearing Panel ordered that the Respondent was deemed to have been served with the Notice of Hearing, and that the hearing on the merits would be heard on December 9, 2016. A copy of the Order of the Hearing Panel is attached as Exhibit "6" to this affidavit.

5. I am advised by Mr. Dunphy that Mr. David Babin, co-counsel for Staff of the MFDA on this matter, sent the news release of the date of the hearing on the merits of this matter to the Respondent's known e-mail address: [texstar@telus.net](mailto:texstar@telus.net), on October 27, 2016. A copy of the e-mail and attached news release is attached as Exhibit "7" to this affidavit.

6. I am advised by Mr. Dunphy that Marco Wynnyckyj, Hearings Manager for the MFDA, sent an e-mail to the Respondent's known e-mail address of [texstar@telus.net](mailto:texstar@telus.net) on December 1, 2016, enclosing the hearing panel's order of August 25, 2016, as well as a news release dated November 28, 2016 announcing the venue for the hearing on the merits. A copy of Mr. Wynnyckyj's email and its attachments is attached as Exhibit "8" to this affidavit.

5. The Affidavit states that the MFDA provided the Member, Assante Financial Management Ltd. ("Assante"), and the Alberta Securities Commission with a copy of the Notice of Hearing.

## **2. FAILURE TO ATTEND HEARING**

6. We are satisfied that the Respondent was well aware of the Notice of Hearing (which includes particulars of his alleged misconduct) and of the request that he attend the interview. We are also satisfied that he has chosen to not participate in the proceedings; if he had any intention of participating he knew how to contact the MFDA to obtain information regarding the date of the Hearing if he did not know it already through emails sent to him on October 27, 2016 and December 1, 2016 (above).

7. The Respondent was advised, in the Notice of Hearing, of the authority of the Panel to proceed with the Hearing in his absence. The Notice of Hearing states:

**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 any may impose any of the penalties described in the By-laws.

8. The Rules of the Procedure of the MFDA provide:

**7.3 Failure to Attend Hearing**

- (1) Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may;
  - (a) proceed with the hearing without further notice to and in the absence of the Respondent;

9. We were satisfied that it was in the public interest to proceed with the Hearing in the absence of the Respondent, and we so directed.

**3. NATURE OF THE EVIDENCE AND APPLICABLE RULE**

10. The evidence submitted by the MFDA was entirely by the Affidavit of Allison Howse. The Affidavit included two volumes comprising 25 exhibits. Ms. Howse was present at the Hearing and was prepared to testify if required by the Panel. The Affidavit and exhibits set out “the Respondent’s Registration History”, “The Exempt Security: Prism Place and Heritage Place”, “Particulars (of) Clients Referred to the Prism Group” and “No Disclosure to Assante”. The Affidavit included transcripts of interviews with clients of the Respondent, documents related to investments in the Prism Group, and “Internal Investigation Report” of the Member, Assante.

11. Rule 13.4 of the MFDA Rules of Procedure states:

*13.4 Evidence by Sworn Statement*

- (1) The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

The Panel directed that the evidence provided by the Affidavit would be allowed without Ms. Howse being required to testify.

*Tonnies*, MFDA File No. 200503, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated June 27, 2015, at paras. 10-12

#### **4. ALLEGATIONS OF MISCONDUCT**

12. In the Notice of Hearing the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:

**Allegation #1:** Between June 2010 and December 2014, the Respondent recommended, sold, referred, or facilitated the sale of an exempt security to at least 43 clients outside of the Member, thereby engaging in:

- a) securities related business that was not carried on for the account and through the facilities of the Member, contrary to MFDA Rules 1.1.1 and 2.1.1; and/or
- b) a referral arrangement which did not comply with sections 13.7 to 13.10 of National Instrument 31-103.

**Allegation #2:** Between June 2010 and December 2014, Respondent recommended, sold, referred, or facilitated the sale of an exempt security to at least 43 clients outside of the Member, thereby engaging in a dual occupation which was not disclosed to and approved by the Member, contrary to MFDA Rules 1.2.1(c) (formerly, MFDA Rule 1.2.1(d)) and 2.1.1.

**Allegation #3:** Commencing in April 2015, the Respondent failed to cooperate with an investigation conducted by MFDA Staff, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

*(Panel Note: Allegations #1 and #2 have been pled in the alternative - see para. 21 infra.)*

## **5. EVIDENCE**

13. In the “Submissions of Staff of the MFDA” the relevant facts from the Notice of Hearing and the Affidavit are summarized as follows:

- a) From November 2000 to December 2014, the Respondent was registered in Alberta as a mutual fund salesperson with Assante Financial Management Ltd. (“Assante”) (the Affidavit, para. 11 states that the Respondent resigned from Assante on December 10, 2014 and that he is not currently registered in the securities industry);
- b) Between September 2010 and March 2011, the Respondent had hired JA as a causal employee. JA, who during the relevant time was not registered as an approved person, also worked for the Prism Group of Companies (the “Prism Group”) and introduced the Respondent to the Prism Group;
- c) The Prism Group is a real estate development company based in Alberta whose president at various times was either Mr. Ricky Arshi or Mr. Ali Ghani. The Prism Group provided the following exempt market offerings via Offering Memorandum “(OM”):
  - i. Prism Place - being an exempt market offering sold by way of OM for the development and sale of a commercial building located in the Beltline Core area of Calgary, Alberta, and sold by Prism Place Development Ltd.; and
  - ii. Heritage Plaza - being an exempt market offering sold by way of OM for the purchase, development, and sale of commercial condominium units located in Cochrane, Alberta, and sold by Heritage Plaza Developments Inc.;
- d) On July 15, 2010, the Alberta Securities Commission entered into a Settlement Agreement with Mr. Ali Ghani in relation to allegations that he breached the Alberta *Securities Act* by making prohibited representations with regards to the investments offered by the Prism Group in magazine advertisements. Mr. Ghani agreed to pay a fine of \$35,000 in respect of his contravention (see para. 14 infra);

- e) Two clients serviced by the Respondent in particular: BK1 and BK2, provided testimonial evidence to Staff that the Respondent introduced the clients to the Prism Group. BK1 met with Mr. Ali Ghani in a meeting with the Respondent to discuss her mutual fund holdings. BK2 met with Mr. Ricky Arshi after the Respondent set up an appointment to discuss the Prism Group offerings. Both clients had never heard of the Prism Group prior to these meetings. Both clients invested in either the Heritage Plaza or Prism Place offerings following the introduction to the Prism Group by the Respondent (see para. 16 infra);
- f) Assante was not a party to any referral arrangement between the Respondent and the Prism Group. The Respondent did not disclose to Assante that he had entered into any form of agreement with the Prism Group or had referred or introduced clients to the Prism Group. The Prism Group offerings were not approved products by Assante;
- g) At all times, Assante has policies and procedures in place that required its Approved Persons to disclose all referral arrangements to Assante, and further required that Assante was required to be a party to any referral agreement entered into by its Approved Persons;
- h) The Respondent also did not disclose the referral arrangement to Assante as being an Outside Business Activity (“OBA”), despite Assante having policies and procedures in place during the material time that required the disclosure of OBAs by Approved Persons employed by Assante;
- i) Assante, in an internal investigation, confirmed a total of 12 clients whose accounts were serviced by the Respondent who the Respondent introduced to the Prism Group offerings;
- j) Staff confirmed that between August 2010 and September 2011, a total of 43 clients whose accounts were serviced by the Respondent were invested in either the Heritage Plaza or Prism Place offerings. The 43 clients purchased a total of \$1,701,000 worth of Class “B” Preferred Shares in these offerings;
- k) The Respondent has refused to cooperate with Staff by providing requested documents or attending a scheduled interview, despite repeated attempts of Staff to coordinate with the Respondent to arrange the same.

14. The Settlement Agreement entered into between the Alberta Securities Commission and Prism related to prohibited representations regarding investments offered by Prism. The following description is in para. 5 of the Notice of Hearing:

...In particular, between November 2009 and January 2010, Prism distributed a magazine advertisement that made the following representations about Prism Place, Heritage Plaza and two other developments by Prism:

- a) the investment in the developments was a “Fully Secure & High Return Investment”;
- b) an investment in the developments would yield a 60% return on investment over 3 years; and
- c) the investments were strictly regulated and monitored by the ASC.

15. The MFDA interviewed two clients of Assante/Respondent, “BK1” who had made a complaint to the Alberta Securities Commission through her husband, and BK2 the person who had made the complaint to Assante. (*They had the same initials but were not related.*) The information from the interviews (transcripts: Exhibits 13 and 18 of the Affidavit) was summarized in the Notice of Hearing:

#### **Client BK1**

16. In early January 2011, the Respondent presented Prism Place as an investment opportunity to Client BK1 and her husband, DK. The Respondent indicated to BK1 and DK that they could earn a better rate of return on the preferred shares of Prism Place than they were presently earning on some of their mutual fund holdings.

17. In late January 2011, BK1 attended a follow-up meeting with the Respondent and Ghani. During the follow up meeting, the Respondent presented the details of the investment and provided client BK1 with a copy of the OM and the Subscription Agreement. The Respondent represented to client BK1 that the investment was low risk in nature. The Respondent further represented that the investment would yield a guaranteed return of capital plus 20 percent per year in interest upon the completion of the project. At the conclusion of the meeting, the Respondent informed client BK1 that

she would only be able to communicate with Ghani about the investment from that point on, and that the Respondent, would not have any further involvement. (*Panel Note: The 20% figure appears to be a typo as BK1 said several times in the interview that the represented rate of interest was 12%.*)

18. On January 31, 2011, client BK1 executed a Subscription Agreement and purchased \$80,000 worth of preferred shares in Prism Place. Funds were transferred from client BK1's mutual fund account held at Assante, to the Olympia Trust Company ("Olympia") to complete the sale. (*Panel Note: BK1 said the \$80,000 was the amount the Respondent recommended she put into the investment.*)

19. Prism Place was originally expected to be completed in the spring of 2013. Beginning in the spring of 2014, client BK1 and DK made a number of inquiries to the Respondent and Ghani about the status of Prism Place. The Respondent did not respond to client BK1.

20. To date, client BK1 has not received any payments from her investment in Prism Place.

## **Client BK2**

21. In or about January 2011, the Respondent presented Heritage Plaza to client BK2 as an investment opportunity. The Respondent described Heritage Plaza as a retail development project in Cochrane, Alberta, that was actively seeking investors. The Respondent advised client BK2 that any investment made in Heritage Plaza would be locked-in for three years and that, at the conclusion of the three years, client BK2's principal plus any accrued interest would be returned to his RRSP portfolio. The Respondent further advised client BK2 that the rate of return on the Heritage Plaza investment would be 20 percent.

22. In or around July 2011, the Respondent set up an appointment at his office between client BK2, the Respondent, and Ricky Arshi ("Arshi"), a representative of Prism. During the meeting, Arshi presented the details of the Heritage Plaza investment to client BK2. Client BK2 asked the Respondent his opinion of Heritage Plaza as an investment opportunity, and the Respondent recommended that client BK2 invest in the project, as he believed it to be a good opportunity.

23. On or about July 19, 2011 client BK2 met with Arshi to complete the Subscription Agreement for the purchase of \$40,000 worth of preferred shares in Heritage Plaza. The Respondent was not present for this meeting. To facilitate the purchase, funds were

transferred from client BK2's RRSP account at Assante to a self-directed RSP account at Olympia. Client BK2 has not received any payment from his investment in Heritage Plaza.

16. There was the following question and answer in the interview of BK2 (transcript pp. 21, 22, Exhibit 16 of Affidavit):

Q: Were you aware whether or not Mr. Phillips was receiving a commission or any type of fee for your investment in Prism?

A: Again, he glossed over the answers, he wouldn't elaborate on my questions regarding his relationship with Prism. All he said was that there was a few thousand dollars - what did I say in my statement here - outstanding between the two. I specifically asked Phillips if he had invested in this company, he would not answer yes or no, other than to say that there were, quote, a few thousand dollars outstanding between him and Prism and Ghani. And I left the meeting confused, I didn't know what that meant. But there was something going on between Robert Phillips and - was it Ali Ghani or was it Prism, I don't know.

17. The Respondent cooperated with Assante in its thorough investigation conducted between March 6, 2014 and June 13, 2014 ("Internal Investigation Report", Exhibit 19 of the Affidavit). The investigation was initiated because of a complaint by a client, BK2 (supra, para. 15) that the Respondent had "recommended an unapproved exempt product of a real estate company called the Prism Group of Companies". The Respondent advised Assante that the only involvement he had with the clients and Prism was to refer the clients to Prism.

18. In its investigation Assante concluded there was no evidence that there was a referral arrangement between the Respondent and Prism and no evidence that the Respondent received any referral fees or compensation. However, in the course of its investigation, Assante discovered a draft copy of an agent agreement between Prism and the Respondent which had been "edited" by a lawyer. It outlined the compensation the Respondent would receive for the sale of subscriptions which was a "base commission of 7% of total dollar amount of any Subscription Funds that are introduced by the Agent to the Corporation...". Assante's Report states that "we have no conclusive evidence that this agreement became a binding contract". The

Respondent advised Assante that he had no recollection of the document and stated that he was not interested in being an agent of Prism.

19. The Assante investigator(s) concluded that the Respondent had breached certain MFDA rules, had engaged in security related activity without disclosing it to Assante and had violated the standard of conduct. The Assante investigator(s) recommendation was to “escalate the matter to senior management for a review”. The Respondent “resigned from Assante on December 10, 2014 and is not currently registered in the securities industry in any capacity” (Affidavit, para. 11).

20. The MFDA calculated that if the Respondent had received referral fees at 7% and/or 10% he would have received \$166,900 regarding Prism securities purchased by “at least 43 clients” who had been identified in the MFDA investigation. (*Panel Note: Discussed in Decision, infra.*)

## **6. SUBMISSIONS OF STAFF**

21. At the Hearing, Enforcement Counsel for the MFDA summarized the MFDA’s position which is set forth in written “submissions of Staff of the MFDA” and “Book of Authorities”. Staff states that Allegations #1 and #2 have been pled in the alternative and if the Panel finds that the Respondent has engaged in the misconduct detailed in Allegation #1(a) and/or #1(b) it is unnecessary to also make a finding under Allegation #2. [*Panel Note: In view of our decision (below), in which we find that Allegations #1(a) and (b) have been proven, we will not include the Submissions of Staff with respect to Allegation #2.*]

### **Allegation #1: Securities Related Business and/or Entering into a Referral Arrangement in Breach of NI 31-103**

14. Staff submits that the hearing panel must consider the following issues to determine whether the Respondent engaged in Securities Related Business that was not carried on for the account and through the facilities of the Member, contrary to MFDA Rules 1.1.1, and/or entered into a referral arrangement with the Prism Group, in breach of ss. 13.7 and

13.8 of National Instrument 31-103 “Registration Requirements and Exemptions” (“NI 31-103”):

- a) With respect to MFDA Rule 1.1.1:
  - i) Whether a signed written agreement is necessary for the Respondent to have engaged in “Securities Related Business”;
  - ii) Whether the act of introducing clients to an exempt market dealer is sufficient to determine whether the Respondent has engaged in “Securities Related Business”; and
  - iii) Whether it is necessary for the Respondent to have made some form of profit in connection with the introductions to the exempt market dealer to determine whether the Respondent has engaged in “Securities Related Business”.
  
- b) With respect to Referral Agreements as defined by s. 13.7 of NI 31-103:
  - i) whether the Respondent met the three requirements of a referral arrangement as listed in s. 13.8 or NI 31-103.

**(a) Securities Related Business**

15. MFDA Rule 1.1.1(a) states as follows:

**1.1.1 Members.** No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities related business (as defined in By-law 1.1) except in accordance with the following:

- (a) all such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules, other than....

16. MFDA By-law No. 1 defines “securities related business” as follows (emphasis added):

“securities related business” means any business or **activity, (whether or not carried on for gain) engaged in, directly or indirectly**, which constitutes trading or advising in securities for the purposes of applicable securities legislation in any jurisdiction in Canada, including for greater certainty, **securities sold pursuant to exemptions under applicable securities legislation**;

17. “Securities Related Business” is given a broad definition under MFDA By-law No. 1. It specifically encompasses “activity” that is not carried on for gain, encompasses “indirect” activity, and specifically includes exempt market securities. Under the MFDA definition, the business or activity must constitute “trading or advising in securities” as defined under applicable securities legislation in Canada.

18. The Alberta *Securities Act*, provides a broad definition for what constitutes a trade. It includes the following:

1 In this Act,

(jjj) “trade” includes

(i) any sale or disposition of a security for valuable consideration, whether the terms of payment are in margin, instalment or otherwise, but does not include....

19. There is no dispute in the present matter that the exempt market offerings of the Prism Group would be considered the “sale or disposition of a security for valuable consideration.” 43 clients serviced by the Respondent paid consideration of \$1,701,000 for the purchase of Class “B” Preferred Shares in either the Prism Place offering or the Heritage Plaza offering.

20. The interview testimony of clients BK1 and BK2 confirm that they were introduced to the Prism Group through the Respondent.

21. Assante’s Investigative Report discovered a total of 12 clients who were introduced to the Prism Group by the Respondent.

22. Staff's review of the Respondent's client list and the Prism Group's exempt market distribution reports filed with the Alberta Securities Commission show a total of 43 clients who invested in one of the Prism Group offerings.

23. Finally, as summarized in the Assante's Investigative Report, there is no dispute that the Prism Group offerings were not approved products by the Member, and the Member was unaware that clients were being introduced to the Prism Group through the Respondent.

24. It is Staff's position that the wording of Rule 1.1.1, when viewed in conjunction with the definition of "Securities Related Business" in MFDA By-law No. 1 and the definition of "trade" in the Alberta *Securities Act*, encompasses a wide range of actions that do not require a signed referral fee agreement or proof of monetary gain for a violation of the rule to occur. In the present case, Staff has confirmed that 12 clients were introduced to the Prism Group through the Respondent. A total of 43 clients of the Respondent were confirmed to have invested in Prism Group offerings. However, Staff can only infer that the remaining clients were introduced to the Prism Group through the Respondent due to the Respondent's failure to cooperate in Staff's investigation.

25. Previous hearing panels of the MFDA have held, in adopting a decision from the Ontario Securities Commission, that "acts in furtherance" of a trade are to be interpreted in a very wide and all-encompassing manner.

*Brown*, MFDA File No. 200808, Hearing Panel of the Central Regional Council, Reasons and Decision dated December 8, 2010 at para. 110

26. Staff submits that the Respondent's act of introducing clients to the Prism Group's two exempt market offerings, without any inquiry by the clients, and which clients then proceeded to invest in either the Prism Place or Heritage Plaza offerings, is sufficient conduct to be captured by Rule 1.1.1.

27. Previous decisions from Hearing Panels of the MFDA have stressed the importance of Rule 1.1.1 to ensure that Approved Persons do not go “off book” so that Members can properly supervise the Approved Person. In the decision of *Caicco*, the Hearing Panel, citing an earlier MFDA decision, commented on some of the principles underlying the rule:

“MFDA Rule 1.1.1(a) is fundamental to the regulatory mandate of the MFDA. An approved Person must not trade in securities other than through the firm employing him/her, and the firm must have knowledge and consent to those business dealings. The Rule enhances investor protection and strengthens public confidence in the Canadian Mutual Fund Industry, as it creates a regime whereby an approved person is only permitted to sell investment products that have first been approved for sale by the Member, and which are sold through the facilities of the Member, thus ensuring the trading activity is subject to appropriate review and supervision.

*Caicco*, MFDA File No. 201503, Hearing Panel of the Central Regional Council, Decision and Reasons dated August 4, 2015 at para. 23

28. In the decision of *Andrews*, the Hearing Panel, in discussing Rule 1.1.1 and the seriousness of the misconduct at issue, confirmed that the sale or referral of unapproved exempt market products was very serious, due to the fact that clients were exposed to significant risk of loss given the nature of the investments and the absence of Member due diligence and regulatory oversight of the investments. As the investments were not processed through the Member in that decision, the Member was unable to properly supervise the approved person and ensure the clients were properly qualified as accredited and eligible investors.

*Andrews*, MFDA File No. 201324, Hearing Panel of the Central Regional Council, Decision and Reasons dated May 6, 2014

**(b) Referral Arrangement: National Instrument 31-103**

29. Staff also submits that the same conduct as described above constitutes a violation of National Instrument 31-103

31. Sections 13.7 and 13.8 of the NI 31-103 (“Registration Requirements and Exemptions”) are fundamental to the regulatory mandate of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry.

32. These provisions create a regime whereby an Approved Person is only permitted to refer clients to purchase investment products through referral arrangements that are subject to appropriate review and supervision by the Member, and require referral fees to be processed through the books and records of the Member.

33. These provisions are structured to drive regulated activity through the Member so that the Member is able to exercise supervision and control over the activity in question. It allows the Member to consider the appropriateness of any given referral arrangement between a third party and the Approved Person.

34. By prohibiting Approved Persons from entering into their own referral arrangements, the Member has the opportunity to exercise a degree of control over the types of referral arrangements that its Approved Persons may offer to clients in a manner that protects clients’ interests and reduces the likelihood of regulatory and commercial liability for the Member.

35. In the present case, Staff does not have evidence of a formal, signed referral fee agreement between the Respondent and the Prism Group.

36. *[Panel Note: The transcript of the interview by the MFDA of BK2 on April 15, 2015 (Exhibit 16 of the Affidavit) shows that in two answers (pp. 11 and 21) BK2 said there were “a few thousand dollars outstanding between him and Prism and Ghani (see para. 16 supra).]*

37. Staff has confirmed, based on the available evidence, that the Respondent introduced 12 clients to the Prism Group. Staff can also confirm that 43 clients of the Respondent invested a total, when combined with the first 12 clients, of \$1,701,000 in either the Heritage Plaza or Prism Place offerings. However, for 31 clients Staff is unable to definitely prove that the Respondent signed a written referral agreement or received compensation from the Prism Group due to the Respondent's failure to cooperate in Staff's investigation into his conduct.

38. Staff has determined, based on the fees set out in the Prism Place and Heritage Plaza subscription agreements, that an individual receiving a commission for these projects would receive a 10% and 7% commission, respectively. This would equate to total commission of \$166,920. Staff's position is that the Respondent did have a referral fee agreement due to the number of clients serviced by him that ended up investing in one of the Prism Group offerings.

39. Any referral agreement between the Respondent and the Prism Group was not permitted under Sections 13.7 and 13.8 of the National Instrument due to the following reasons:

- (a) Assante was not a party to the Referral Agreement, contrary to s. 13.8 of 31-103; and
- (b) the Respondent, if he received referral fees from the Prism Group, were not recorded on the books and records of Assante, contrary to s. 13.8 of 31-103.

40. Numerous MFDA Hearing Panels have found that an Approved Person had engaged in misconduct contrary to the NI 31-103 by entering into or participating in referral arrangements that did not meet the requirements for permitted arrangements, as articulated by s. 13.8 of NI 31-103.

*Oosterveld*, MFDA File No. 201514, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated October 11, 2016

*Caicco*, supra

**The Respondent's involvement with the Prism Group was a 'gainful occupation'**

47. The definition of 'gainful occupation' under Rule 1.2.1(c) is not limited to an occupation where an Approved Person is earning an income at the time of disclosure. MFDA hearing panels have held that at its very least, the meaning which must be given to 'gainful occupation' is that the Approved Person expects or at least hopes to derive some compensation, profit or other benefit from it.

*Mawer*, MFDA File No. 201331, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated April 3, 2014 at para. 35

48. While Staff does not have documentary evidence of any fees received by the Respondent, Staff notes that the evidence of client BK2 establishes that, as of February 28, 2014, the Respondent's interest in the Prism Group was that there was "\$2,000 between him and Prism". [*Panel Note: As above, at para. 36, more correctly "a few thousand dollars".*]

49. As stated previously, a total of 43 clients of the Respondent had invested in one of the two Prism Group offerings, investing a total of \$1,701,000 with the Prism Group. Staff takes the position that, given the number of clients of the Respondent, there must have been some expectation of compensation, profit, or some other benefit.

50. Assante was not aware of, nor provided approval for, the Respondent's involvement with the Prism Group.

51. Having not made Assante aware of his involvement with the Prism Group, it follows that Assante could not have given the Respondent formal approval to continue his involvement with the Prism Group. Staff submits that there was an expectation of

compensation given the number of clients introduced to the Prism Group, and that such expectation constitutes a “gainful occupation” as set out under Rule 1.2.1(c).

### **The Respondent fell short of the standard of conduct expected of Approved Persons**

52. Staff submits that, as a result of the Respondent not disclosing his involvement with the Prism Group to Assante, he fell short of the standard of conduct expected of an Approved Person.

53. MFDA Rule 2.1.1 states:

#### Standard of Conduct

Each Member and each Approved Person of a Member shall:

- a) deal fairly, honestly and in good faith with its clients;
- b) observe high standards of ethics and conduct in the transaction of business;
- c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
- d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

54. At all material times, Assante’s policies and procedures required their Approved Persons to disclose their involvement with any OBAs, or to sell exempt market products without approval from the Member.

55. Hearing panels have previously held that a Respondent’s failure to comply with the policies and procedures of the Member constitutes a breach of an Approved Person’s standard of conduct and of MFDA Rule 2.1.1.

*Franco*, MFDA File No. 201016, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated May 6, 2011 at para. 43

56. It is therefore submitted that, in the present case, the Respondent’s failure to comply with the Assante’s policies and procedures also contravened MFDA Rule 2.1.1.

### **Allegation #3: Failure to Cooperate**

57. Staff alleges that the Respondent contravened s. 22.1 of MFDA By-law No. 1 by failing to cooperate with Staff's investigation of his conduct.

58. Pursuant to s. 21 of MFDA By-law No. 1, the MFDA has a duty to conduct examinations and investigations of a Member, an Approved Person, and 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.

59. In carrying out its s. 21 duty, the MFDA is authorized to request and oblige a Member, Approved Person or any other person under its jurisdiction to:

- a) submit a report in writing with regard to any matter involved in any investigation;
- b) produce for investigation and provide copies of the books, records and accounts of such person relevant to the matters being investigated;
- c) attend and give information respecting such matters; and
- d) make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the MFDA.

60. Correspondingly, the Member, Approved Person or other person under investigation is obliged to cooperate with the s. 21 requirements.

61. This obligation is consistent with the duties owed by all members of self-governing professions. In *Artinian v College of Physicians and Surgeons of Ontario*, the

Ontario Divisional Court stated that “fundamentally, every professional has an obligation to cooperate with his self-governing body”.

*Artinian v College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704 (Div. Ct.) at para. 9

62. There is ample authority for the proposition that an Approved Person must provide Staff with information and documentation, and attend an interview with Staff when requested to do so. To hold otherwise would hinder the MFDA’s ability to investigate the conduct of registrants in the mutual fund industry and prevent the MFDA from fulfilling its regulatory mandate to protect the public.

*Lipovetsky*, MFDA File No. 201252, Hearing Panel of the Central Regional Council, Decision and Reasons dated July 25, 2013

*Ogalino*, MFDA File No. 201248, Hearing Panel of the Central Regional Council, Decision and Reasons dated January 31, 2014

63. In the present case, the evidence establishes that the Respondent has refused to submit information and documents requested by Staff and has disregarded requests that he attend an interview with Staff.

64. The chart below summarizes Staff’s requests to the Respondent to submit information and documents and/or to attend an interview, as is set out in more detail at para. 3 of the Howse Affidavit. (*Panel Note: Chart omitted in view of ample evidence above of the efforts by Staff to reach the Respondent.*)

65. In addition to the above, the Respondent has failed to respond to the “Wells Letter” sent by Staff in January 2016, failed to file a Reply to the Notice of Hearing, and has not communicated to Staff in any way since his last correspondence of April 30, 2015.

66. The above demonstrates that the Respondent, despite repeated attempts to Staff to contact him, has failed to cooperate with Staff and as a result has hindered Staff's ability from fulfilling its mandate of protecting investors. Staff further notes that as the Respondent had replied to the April 13, 2015 letter sent by Ms. Howse, there is no dispute that the Respondent received Staff's messages.

### **Finding of Misconduct**

67. Staff submits that the misconduct as set out in the Notice of Hearing has been proven, and respectfully requests that the Hearing Panel make a finding that Allegations #1 and #3 have been established.

### **E) Penalties**

69. Pursuant to s. 24.1.1(h) of MFDA By-law No. 1, if in the opinion of a Hearing Panel, an Approved Person has failed to comply with or carry out the provisions of any federal or provincial statute relating to the business of the Member or of any regulation or policy made pursuant thereto, a Hearing Panel can impose any of the penalties set out in s. 24.1.1(a)-(f)

70. In the present case, Staff seeks the following penalties against the Respondent:

- a) A permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
- b) A fine of \$220,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; broken down as follows:
  - i. A fine of \$170,000 in respect of the violation of Rule 1.1.1, NI 31-103, and/or Rule 1.2.1(c);
  - ii. A fine of \$50,000 for the Respondent's failure to cooperate;

- c) Costs of \$7,500 pursuant to s. 24.2 of MFDA By-law No. 1.

### **Factors concerning the Appropriateness of the Proposed Penalty**

71. Primary goal of securities regulation is the protection of the investor.

*Pezim v British Columbia (Superintendent of Brokers)*, (1994) 2 SCR 557 at paras. 59, 68

*Breckenridge*, MFDA File No. 200708, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 at para. 74

72. In addition to protection of the public, the goals of securities regulation also includes fostering public confidence in the capital markets and the securities industry.

*Pezim*, supra, at paras. 59, 68

73. The Hearing Panel in *Tonnies* (described the) role of a Hearing Panel, when imposing sanctions in furtherance of the above goals.

*Tonnies*, supra, at para. 45

74. Sanctions imposed by a Hearing Panel should therefore be protective, preventative, and intended to be exercised to prevent likely future harm to the markets.

75. To determine whether a penalty is appropriate, the Hearing Panel should consider:

- a) The protection of the investing public;
- b) the integrity of the securities markets;
- c) specific and general deterrence;
- d) the protection of the MFDA's membership; and
- e) the protection of the integrity of the MFDA's enforcement processes.

*Tonnies*, supra, at para. 46.

76. Hearing Panels also frequently consider the following factors when determining whether a penalty is appropriate:

- 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) 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.

*Breckenridge*, supra, at para. 77 and the decisions cited therein.

## **MFDA Penalty Guidelines**

77. The MFDA Penalty Guidelines are an additional resource that a Hearing Panel may consult when determining the appropriateness of the penalty to be imposed pursuant to a settlement agreement. The Penalty Guidelines are intended to provide a basis upon which a Hearing Panel’s discretion can be exercised consistently in like circumstances. As stated in the introduction to the Penalty Guidelines under the heading “Purpose Of The MFDA Penalty Guidelines”:

**Range Is Guideline Only**

The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. 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 a Hearing Panel.

78. In cases involving the type of misconduct in the present case, the Penalty Guidelines recommend consideration of the following penalties and factors:

<b>BREACH</b>	<b>PENALTY TYPE &amp; RANGE</b>	<b>SPECIFIC FACTORS TO CONSIDER</b>
<p><b>Referral Arrangements</b> (NI 31-103)  (Guidelines, p. 18)</p>	<ul style="list-style-type: none"> <li>• Fine: Minimum of \$10,000.</li> <li>• Write or rewrite an appropriate industry course (e.g. IFIC Officers’, Partners’ and Directors’ Course or Canadian Investment Funds Course).</li> <li>• Suspension.</li> <li>• Permanent prohibition in egregious cases.</li> </ul>	<ol style="list-style-type: none"> <li>1) Magnitude (in size and value) of referrals.</li> <li>2) Number of clients affected.</li> <li>3) Magnitude of client losses (if any).</li> <li>4) Suitability of referrals if involving securities.</li> <li>5) Compensation received by the Respondent.</li> <li>6) Any personal interest of the Respondent in referral.</li> <li>7) Existence of client complaints.</li> <li>8) Legality of Referral</li> </ol>
<p><b>Failure to Cooperate</b> (Section 22.1 of MFDA By-law No. 1)</p>	<ul style="list-style-type: none"> <li>• Fine Minimum of \$50,000.</li> <li>• Termination of Member or permanent prohibition of an Approved Person.</li> <li>• Interim order pursuant to s. 24.3 of MFDA By-law No. 1.</li> </ul>	<ol style="list-style-type: none"> <li>1) Whether the contravention was intentional or inadvertent.</li> <li>2) Whether there was complete or only partial non-compliance.</li> <li>3) The impact that the non-compliance had on the investigation.</li> <li>4) Whether the Respondent can</li> </ol>

BREACH	PENALTY TYPE & RANGE	SPECIFIC FACTORS TO CONSIDER
		demonstrate that the refusal to cooperate was based on reasonable reliance on competent legal advice.
<b>Standard of Conduct</b> (Rule 2.1.1)  (Guidelines, p. 27)	<ul style="list-style-type: none"> <li>• Fine: Minimum of \$5,000.</li> <li>• Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course).</li> <li>• Suspension.</li> <li>• Permanent prohibition in egregious cases.</li> </ul>	<ol style="list-style-type: none"> <li>1) Nature of the circumstances and conduct .</li> <li>2) Number of individuals affected.</li> <li>3) Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute.</li> </ol>

**APPLICATION IN THE PRESENT CASE**

**Seriousness of the Misconduct**

79. Staff submits that the proven misconduct in the present case is among the most serious type of misconduct that an Approved Person can engage in. The Respondent circumvented a key pillar of securities regulation, and consequently exposed his clients to potential undue risk.

80. As previously noted, MFDA Rule 1.1.1, NI 31-103, and Rule 1.2.1(c) were designed to ensure that Members can implement effective oversight of any securities business, products, or outside business activities that their Approved Persons may be introducing or referring clients to, or involved in. By directing all securities related business and referral agreements through the Member, and approving outside business activities, clients are protected by constant oversight, due diligence and thorough risk appraisals by Members.

81. In the present matter, while there is no evidence of client loss at this time, the Member was unable to ensure that the Prism Place and Heritage Plaza offerings were suitable for clients, thus exposing the Respondent's clients to undue and unnecessary risk.

82. In addition, Staff submits that by failing to cooperate with Staff during the course of its investigation into the Respondent's conduct, the Respondent has hindered Staff's ability to provide effective oversight of the mutual fund industry.

83. Staff submits that, in light of the Respondent having contravened a centrally important Rule and the National Instrument, and having failed to cooperate, significant penalty is warranted in the present case.

### **Respondent's Past Conduct and Experience in the Capital Markets**

84. The Respondent was registered as a mutual fund salesperson (now a mutual fund dealing representative) with Assante from November 2000 to December 2014. During that time, the Respondent was not subject to any discipline by the MFDA.

### **Remorse or Recognition by the Respondent of the Seriousness of the Misconduct**

85. The Respondent has not demonstrated that he recognizes the seriousness of his misconduct, and has not expressed remorse for his actions. Rather, the Respondent has consistently taken the position that he had minimal to no involvement with the Prism Group, as he only "introduced" clients to the Prism Group. The Respondent's position ignores the fact that "but for" his involvement, his clients would likely have not invested in any of the Prism Group offerings.

86. Moreover, the Respondent has refused to participate in the investigative or hearing process, and to take seriously his obligations as an Approved Person.

## **Harm Suffered by Investors and Benefits Received by the Respondent**

87. As previously noted, 43 clients of the Respondent invested a total of \$1,701,000, which they invested in Class “B” Preferred Shares in either the Prism Place or Heritage Plaza offerings.

88. Staff does not have any evidence that the Investors have suffered a loss of their investment in the Prism Group offerings.

89. Because of the Respondent’s failure to cooperate, Staff has inferred that the Respondent received compensation of \$166,920 based on the Heritage Plaza and Prism Place subscription agreements and number of clients of the Respondent identified to have invested with the Prism Group. It is well settled by MFDA Hearing Panels that, when an Approved Person receives compensation outside the Member, that disgorgement of those profits is the appropriate remedy.

*Oosterveld*, supra, at para. 33 and the decisions cited therein.

## **Risk to Investors and Markets if the Respondent Continues Operating in Industry**

90. Staff submits that the Respondent poses a significant risk to other investors and the market at large if he is allowed to return to the industry. The misconduct he engaged in was serious, and in failing to cooperate with Staff of the MFDA, he has demonstrated disregard for the mutual fund industry and the protections put in place to ensure investor protection.

## **Deterrence**

91. The Supreme Court of Canada in *Cartaway Resources Corp.* and MFDA hearing panels have held that it is appropriate for deterrence to be among the factors taken into account when determining penalty.

*Cartaway Resources Corp.* (2004) 1 SCR 672 at paras. 52-62

*Tonnies*, supra, at para. 47

92. The effect of general deterrence should advance the goal of protecting investors. As a result, the penalty levied should be sufficient so as to affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry. As the Supreme Court of Canada stated in *Cartaway Resources*:

A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction...The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged...

*Cartaway Resources*, supra, at para. 61

93. Staff submits that the proposed penalties are necessary, in order to communicate to other Approved Persons that engaging in Securities Related Business outside the Member, entering into unapproved referral arrangements in violation of NI 31-103, and engaging in unapproved business activities, puts clients at risk, and is serious misconduct that has no place in the mutual fund industry. A strong penalty for a failure to cooperate is also necessary to send a message to Members and Approved Persons of their obligation to participate fully in the investigative process.

94. Staff further submits that the proposed penalties are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members and Approved Persons. Furthermore, the proposed sanctions will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry.

## **Penalty Guidelines**

95. Staff submits, on the basis of the foregoing factors, that a penalty higher than those recommended by the MFDA Penalty Guidelines is warranted in the present case.

96. The specific aggravating factors are at issue in the present case, and justify a fine higher than the recommended minimum:

- a) The Respondent's failure to cooperate and therefore recognize the seriousness of the misconduct at issues;
- b) The magnitude of the referrals, in terms of the number of clients referred and the amount invested, was substantial;
- c) Two clients, complainants BK1 and BK2, came forward and made complaints regarding the Respondent's conduct; and
- d) The Respondent concealed his involvement with the Prism Group from Assante and prevented Assante from exercising effective oversight.

## **Previous Decisions Made in Similar Circumstances**

97. [Counsel reviewed the pertinent circumstances in penalties assessed in each of the following cases, which are addressed in the Decision, below.]

*Lipovetsky*, supra

*Ogalino*, supra

*Westgard*, MFDA File No. 200937, Hearing Panel of the Central Regional Council, Decision and Reasons dated July 15, 2010

*Jones*, MFDA File No. 201008, Hearing Panel of the Central Regional Council, Decision and Reasons dated February 7, 2011

*Oosterveld*, supra

**Bulloch**, MFDA File No. 201417, Reasons and Decision of the Central Regional Council dated January 15, 2015

**Chin**, MFDA File No. 201361, Hearing Panel of the Central Regional Council, Decision and Reasons dated October 10, 2014

**Cormylo**, MFDA File No. 200927, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated August 12, 2014

**Cavalli**, MFDA File No. 201259, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated November 6, 2013

**Piett**, MFDA File No. 201206, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated September 25, 2012

98. It is therefore submitted that the proposed penalties are reasonable and proportionate, having regard to the conduct of the Respondent and the circumstances of this case.

## **7. DECISION**

22. We confirm our decision declared at the conclusion of the hearing on misconduct that we are satisfied Allegations #1(a) and (b) and #3 against the Respondent have been proven. We reserved our decision on penalties. Our decision on penalties and our reasons for the decisions on both misconduct and penalties follow.

23. With one exception, we accept and adopt the submissions (sub para. 70, p. 21 supra) by Enforcement Counsel including the factors which a hearing panel should consider in exercising its discretion to impose penalties. The one exception is the proposed amount of the fine which we address below.

24. In each of *Lipovetsky*, *Ogalino*, *Westgard* and *Jones* (all supra) the panel imposed a fine of \$50,000 for failure to cooperate. The fine of \$50,000 proposed in the present case for failure to cooperate is therefore strongly supported by the precedents.

25. With respect to Allegation #1 (“Securities Related to Business” and “Referral Arrangement”), in *Westgard* the respondent was engaged in security related business outside the member. He recommended to several clients an investment which he said would yield a high rate of return. He deposited money from two clients in his own bank account and there was no reasonable prospect the monies would be returned to the clients. The decision of the panel included a permanent prohibition. The conversion of the funds made that case more serious than the present case but the conduct of the Respondent in the present case, involving many clients, warrants a permanent prohibition.

26. In *Oosterveld* the respondent referred 56 clients and three other individuals to a company selling an exempt market product and received at least \$33,158.67 in referral fees, thereby entering into a referral arrangement in which the member was not a party. The clients suffered a significant loss of their investments. The panel imposed penalties including a permanent prohibition and a fine of \$50,000 for securities related business and for a dual occupation. Although there is no evidence in the present case of whether the clients have or will suffer losses, the circumstances are sufficiently serious to warrant a permanent prohibition. Their retirement funds, which were in mutual funds, were transferred to investments which were clearly speculative and risky and which the clients said they would not have agreed to if they had known the circumstances and particularly the censure of the Alberta Securities Commission. They proceeded with the investments in reliance on the Respondent’s recommendation and representations regarding the rate of return they could expect to earn.

27. In similar circumstances in *Bulloch, Chin, Cormylo, Cavalli* and *Piett*, the panels imposed permanent prohibitions together with fines and costs. A permanent prohibition is clearly called for in the present case.

28. In cases of misconduct involving commissions or compensation received by respondents, the MFDA has often applied the principle of disgorgement in assessing fines with the result that fines bear a relationship to the amount of commissions or compensation received. In *Oosterveld* the respondent received at least \$33,158.67 in referral fees and a fine of \$50,000 was imposed. In *Bulloch* the respondent received fees of approximately \$50,000. The panel agreed to the

proposed fine of \$25,000 because it was reluctant to overturn a settlement agreement between the parties.

29. The present case presents a challenge because, as a result of the Respondent's failure to cooperate and provide information, it cannot be determined how much compensation, if any, the Respondent received in referral fees. The only evidence from which it can be inferred that he did receive referral fees is (1) there was a draft copy of an agent agreement between the Respondent and the Prism Group, which the Respondent claims to have no recollection of, (2) he told BK2 that there were "a few thousand dollars outstanding between him and Prism and Ghani", (3) the number of clients he referred to the Prism Group and the amount of time he spent in doing so, and (4) the reasonable adverse inference that can be drawn from his unwillingness to cooperate with the MFDA and to provide information about his relationship with the Prism Group. Staff of the MFDA have proposed a fine of \$170,000 which is based on 10% of the \$1,701,000 invested by clients with the Prism Group. This is obviously high because the referral fees in the Prism Place investment were "up to 7%" compared to the "up to 10%" in the Heritage Plaza investment and we know that there were investments in the Prism Place security. In all the circumstances we have concluded that a fine is definitely required for reasons including deterrence in future cases of similar unknown circumstances, and we have concluded that the fine should be \$100,000.

30. A serious disciplinary response is required in this case having regard to all the factors set out in the Submissions of Staff. We consider the penalties as proposed, with a variation in the fine (as above), to be reasonable. We recognize that the Respondent did not have a disciplinary record but that cannot mitigate against the imposition of very significant penalties for his egregious misconduct.

31. **IT IS HEREBY ORDERED** that the following penalties are imposed:

- a) a permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(c) of MFDA By-law No. 1;

- b) a fine of \$150,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1, being comprised of a fine of \$100,000 in respect of the violation of Rule 1.1.1, and NI 31-103 and \$50,000 for the Respondent's failure to cooperate;
- c) costs of \$7,500 pursuant to s. 24.2 MFDA By-law No. 1.

**DATED** this 28<sup>th</sup> day of February, 2017.

“Alan V. M. Beattie”

Alan V. M. Beattie, Q.C.  
Chair

“James Samanta”

James Samanta  
Industry Representative

“Richard Sydenham”

Richard Sydenham  
Industry Representative

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