



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: George William Popovich

Heard: March 22, 2013 in Toronto, Ontario
Decision and Reasons: April 16, 2013

DECISION AND REASONS (MOTION)

Hearing Panel of the Central Regional Council:

Mark J. Sandler
Guenther Kleberg
Glenda Towle

Chair
Industry Representative
Industry Representative

Appearances:

Shelly Feld)
Rohit Kumar)
)

Counsel for the Mutual Fund Dealers
Association of Canada (“MFDA”)

Bob Baksi)
)

Counsel for the Respondent

Introduction

1. On November 30, 2012, the MFDA issued a Notice of Hearing pursuant to sections 20 and 24 of By-law No. 1 in respect of a disciplinary proceeding commenced against George William Popovich. The first appearance was held by teleconference on January 28, 2013.
2. On March 22, 2012, the hearing panel heard, by further teleconference, a motion brought on behalf of Mr. Popovich to change the venue of his disciplinary proceeding from Toronto to Windsor, Ontario. That motion was ultimately granted. Pursuant to an ancillary motion, we also ruled that part of the affidavit filed in support of the change of venue be received in the absence of the public.
3. Our written reasons follow.

The ancillary motion pursuant to Rule 1.8

4. An affidavit sworn by Mr. Popovich was filed in support of his motion for a change of venue. Enforcement Counsel chose not to cross-examine on the affidavit. It reflects, amongst other things, that:
 - (a) Mr. Popovich is the primary caregiver for his wife who suffers from primary progressive Multiple Sclerosis. It describes the progression of the disease, and that she is fully reliant on him for daily care.
 - (b) Mr. Popovich would be unable to attend Toronto for any length of time given her medical condition, and the role he performs. He explains the limitations on where and under what circumstances they can travel.
 - (c) Mr. Popovich suffers from certain medical challenges himself.
 - (d) To the extent to which he is able, Mr. Popovich wishes to attend the hearing in person and participate in it.

(e) The anticipated witnesses are overwhelmingly located in Windsor. Holding a hearing outside of Windsor will negatively impact on Mr. Popovich's ability to encourage the attendance of defence witnesses.

(f) Attendance in Toronto for any length of time would be beyond Mr. Popovich's financial ability.

(g) Mr. Popovich is currently without legal counsel for the hearing itself (Mr. Baksi has agreed to act only on the motions filed). Mr. Popovich believes that a Toronto hearing would effectively destroy any opportunity for him to retain counsel.

5. As reflected above, counsel for Mr. Popovich, Mr. Baksi, asked that all or part of the change of venue motion be heard in the absence of the public. To enable the parties to make meaningful submissions on this issue, we temporarily excluded the public from the hearing. Once submissions on this issue had been completed and we had made a decision, the hearing was reopened to the public¹, our decision on this issue was repeated for the attending member(s) of the public, and we proceeded to hear the change of venue motion in public.

6. The key submission made by Mr. Baksi on the ancillary motion was that the affidavit of Mr. Popovich contains intimate personal and financial information about Mr. Popovich and his wife that should not be disclosed in public. He relied upon Rule 1.8 of the MFDA Rules of Procedure which reads:

1.8 Hearings Open to the Public

(1) Subject to sub-Rules (2) and (3), all hearings shall be open to the public unless the Panel orders otherwise.

(2) 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.

¹ Members of the public who attended by teleconference "signed off" from the teleconference during the *in camera* submissions. Their contact information was preserved and they were notified when the hearing was about to resume in public.

7. Counsel for the MFDA opposed the ancillary motion. He contended that the information was not so intimate as to overcome the presumption of an open hearing. He also submitted that the information explained to the public why the change of venue was being sought and potentially why it would or would not be granted.

8. We carefully reviewed the affidavit. In our view, it does contain some intimate personal information about the daily regimen of Mr. Popovich's wife and the disabling effects of her medical condition, disclosure of which could adversely impact on her personal privacy and dignity. The desirability of avoiding disclosure significantly outweighed the desirability of adhering to the principle that hearings be entirely open to the public. Accordingly, we ruled that specific portions of the affidavit would not be received in public. Instead, an edited version of the affidavit would be accessible to the public.

9. We were fortified in that view by the following:

(a) Much of the affidavit, including the most significant information about the condition of Mr. Popovich's wife and Mr. Popovich's role as caregiver remains public. The public is capable of fully appreciating the basis for the change of venue motion;

(b) Staff did not seek to cross-examine Mr. Popovich on his affidavit;

(c) The portions of the affidavit that are not public are extremely limited.

10. We respectfully did not agree with all of the edits proposed by Mr. Baksi. It was our view that several of the items he sought to edit out of the public version of the affidavit were not so intimate as to outweigh the public interest in an open hearing. In one instance, faced with our ruling to that effect, Mr. Baksi sought and was granted leave to withdraw a sentence contained in the affidavit which, in his view, was unnecessary to advance the change of venue motion.

11. We also did not find it necessary to exclude the public for the change of venue submissions despite the fact that certain portions of the affidavit were not received in public.

Both parties were easily able to make their submissions without reference to those portions of the affidavit, particularly given the fact that Enforcement Counsel did not oppose the change of venue motion.

12. For these reasons, the affidavit is public with the exception of those portions which we identified (without reference to their content).

The change of venue motion pursuant to Rule 1.5

13. Disciplinary hearings that are conducted by hearing panels of the Central Regional Council are almost invariably held in Toronto. The one exception that was brought to our attention was the removal of a hearing commenced in Toronto to London to avoid the logistics difficulties posed by the presence of the G20 Summit in Toronto.

14. It is hardly surprising that these hearings are conducted in Toronto. Toronto is the location of the MFDA's hearing room, the Corporate Secretary's offices and the offices of Enforcement Counsel and investigators. Many of the Central Regional Council adjudicators are also based in Toronto or in close proximity to Toronto.

15. That being said, a hearing panel has the jurisdiction, on its own initiative or pursuant to a request or motion by a party, to change the venue of a hearing. This jurisdiction is found in Rule 1.5 of the Rules of Procedure:

1.5 General Powers of a Panel

(1) A Panel may:

(a) exercise any of its powers under these Rules on its own initiative or at the request of a party;

(b) waive or vary any of these Rules at any time, on such terms as it considers appropriate;

(c) issue directions or make interim orders concerning the practice or procedure to be followed during a proceeding, on such terms as it considers appropriate.

16. Either party may move for a change of venue. The moving party bears the burden of demonstrating that a change of venue is necessary. Here are some factors that are relevant to that determination. They are not intended to be exhaustive. Some overlap:

- (a) the location of the anticipated witnesses;
- (b) cost, efficiency and timeliness;
- (c) special circumstances that prevent a party from participating in a hearing conducted at a particular location;
- (d) prejudice to a party;
- (e) the anticipated length of a hearing;
- (f) the availability of appropriate resources to conduct a hearing in another venue;
- (g) the position of the non-moving party;
- (h) public accessibility to the location of the hearing;
- (i) the availability of alternatives to a change of venue, such as an electronic hearing.

17. In these very particular circumstances, Mr. Popovich has demonstrated that a change of venue is necessary. His role as sole caregiver for his wife, who is seriously ill and incapacitated, prevents him from participating in a hearing of some anticipated duration in Toronto. All but a few of the anticipated witnesses are based in the Windsor area. Windsor has available reporting services and physical premises to accommodate a hearing. The costs associated with a change of venue are offset, at least to some extent, by the presence of most witnesses in the Windsor area. Enforcement Counsel does not oppose the motion (though he does not consent to it either). The public can fully access proceedings conducted in Windsor. An electronic hearing is not appropriate for the hearing proper, given the issues that have been raised.

18. For these reasons, the motion for a change of venue to the City of Windsor is allowed.

Next steps

19. The parties agreed upon a timetable, which we approved, for the exchange of further materials relating to Mr. Popovich's motion for a stay. The motion for a stay will be heard in Windsor on Friday, May 31, 2013 and, if necessary, on Saturday, June 1, 2013.

20. We are grateful to counsel for their assistance to date.

DATED this 16th day of April, 2013.

“Mark J. Sandler”

Mark J. Sandler,
Chair

“Guenther Kleberg”

Guenther Kleberg,
Industry Representative

“Glenda Towle”

Glenda Towle,
Industry Representative

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