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: Gary Alan Price

MOTIONS

Heard: September 9, 2010 in Toronto, Ontario
Reasons for Decision: September 30, 2010

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Gary Legault	Industry Representative
Robert Guilday	Industry Representative

Appearances:

Michelle Pong	)	For the Mutual Fund Dealers Association of Canada
Gary Alan Price	)	In writing

1. At the First Appearance in this matter, on June 1, 2010, the Respondent advised that he wished to bring a number of Pre-Hearing Motions. By Order, dated June 1, 2010, the Hearing Panel, *inter alia,* established a schedule for the serving and filing of Motion materials by both the Respondent and Staff. Both parties complied with this schedule.

2. The Respondent has brought six Pre-Hearing Motions, each dated July 26, 2010. The Motions were all made returnable on September 9, 2010. In each case, the Respondent proposed that the Motions be conducted as a written hearing. This is consistent with Rule 6.3(2) of the MFDA Rules of Procedure, which provides as follows:

> "6.3 *Motions – To Whom to be Made and Form of Motion*
>
> "(2) The Moving Party may propose that the motion be conducted as an oral hearing, a written hearing, or an electronic hearing, and the motion shall be heard in that form unless a Responding Party objects or the Panel directs otherwise;"

3. Rules 6.3(3), (4) and (5) provide the procedural framework for the hearing of the Motions, consequent upon the selection of the hearing forum by the Moving Party. They provide as follows:

> "(3) A Responding Party may object to the proposed form of a motion by advising all other parties and the Secretary in writing of the grounds for the objection no later than two days after the effective date of service of the Motion Record;
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> (4) The Panel shall determine the form of the motion and in doing so may consider any relevant factors, including:
>
> (a) convenience;
> (b) fairness;
> (c) cost, efficiency and timeliness;
> (d) public access to and participation in the hearing;
> (e) the Panel's mandate;
> (f) whether the proposed form of the motion is appropriate having regard to the evidence and the issues to be considered.
>
> (5) Where the Panel determines that the motion will be heard in a form other than the form proposed by the Moving Party, the Secretary shall notify the parties of the Panel's determination."

4. Staff did not object to a written hearing of the Motions. After a consideration of, *inter alia*, the factors set out in Rule 6.3(4), the Hearing Panel determined that these six Motions should be heard in the form requested by the Respondent.

5. On August 27, 2010, Staff delivered a Responding Record, lengthy Written Submissions and a Book of Authorities. On September 9, 2010, the Hearing Panel met, at length, to consider and determine each of the Motions. In light of the nature of the Motions and the history of this matter, the Hearing Panel concluded that it was appropriate to provide written Reasons for our various Decisions.

6. The following constitutes our Decisions and Reasons with respect to each of the Respondent's motions

A. The Respondent brought a Motion that:

1. all four Allegations against him be immediately dismissed; and
2. the MFDA be required to remove all references to him and this case from its website immediately and permanently.

The grounds for this Motion were "A Lack of Timeliness and Due Process."

7. In the Motion, the Respondent put forward his version of the relevant events by a series of 22 "Whereases". He did not provide any Affidavit evidence to support or substantiate his allegations. In contrast, the position of Staff, on all six Motions, was detailed in a lengthy Affidavit of John Gallimore, which, with Exhibits, ran to some 178 pages.

8. The essence of the position of the Respondent on this Motion is that he became aware of the MFDA investigation into his activities on May 3, 2007, some 40 months ago. He alleges that "a period of 40 months represents an acute lack of process and timeliness by the MFDA", which he describes as "pathetic, disgraceful and unconscionable." He asserts that the "lack of timeliness and due process represents an impact and a punishment far worse than anything the Respondent deserves."

9. In response, Staff has provided a detailed timetable of events starting on May 22, 2001, when the Respondent executed an Agreement of Approved Persons, pursuant to which he agreed "to be bound by, observe and comply with MFDA By-laws and Rules."

10. The Gallimore Affidavit traces the history of events from the first Compliance Examination of Select Financial Services Inc. ("Select"), conducted by MFDA Staff in April of 2003, at which time it purported to find blank investment instruction forms, in the possession of the Respondent, on which signatures of clients had been completed. It requested Select to confirm that all pre-signed forms had been destroyed.

11. According to the Gallimore Affidavit, a second Compliance Examination was conducted of Select, commencing in September of 2006. This Examination purportedly found that the Respondent was in possession of several photocopies of a blank trade order form on which the signature of a client had been completed.

12. A Report of the Second Examination was completed and forwarded to Select in January of 2007. The MFDA Enforcement Department's Case Assessment Group opened a file, with respect to the Respondent, in March of 2007.

13. The file was escalated to the MFDA Enforcement Department's Investigation Group, also in March of 2007.

14. On May 3, 2007, MFDA Investigators conducted an inspection of Select and purportedly found, in the possession of the Respondent, 81 blank investment instruction forms on which the signatures of clients had been completed. May 3, 2007, is when the Respondent states that he became aware of the investigation.

15. The investigation continued during the Fall of 2007. An interview was conducted of the Respondent on January 23, 2008.

16. Upon completion of Staff's investigation, the file was forwarded to the Enforcement Department's Litigation Group in March of 2008 and, on June 23, 2008, a Notice of Hearing

was issued and subsequently served on the Respondent.

17. As detailed in paragraph 15 of Mr. Gallimore's Affidavit, all stages of the enforcement process were completed within the timeframe outlined in the MFDA Enforcement Department's published benchmarks.

18. The Respondent retained counsel, who immediately requested disclosure of the case against his client. On July 18, 2008, some disclosure was provided.

19. On August 14, 2008, the Respondent served a Reply in response to the Notice of Hearing.

20. On September 15, 2008, the first appearance was held by teleconference. The Respondent requested that the Hearing on the Merits take place in London, Ontario. Staff opposed this position. The Hearing Panel reserved its decision in respect of the venue and ordered that the Hearing be adjourned to November 2, 2008, and that the Hearing on the Merits take place on December 2 to 5, 2008.

21. On November 6, 2008, Respondent's counsel requested additional disclosure. More disclosure was provided on November 7, 2008.

22. On November 12, 2008, the second appearance was held by teleconference. The Respondent, through his counsel, requested a pre-hearing conference. Same was scheduled by the Hearing Panel for December 2, 2008.

23. The Hearing Panel further reserved its decision in respect of the venue of the Hearing on the Merits. On November 12, 2008, it ordered that the Hearing be adjourned to January 14, 2009, and the Hearing on the Merits be re-scheduled to take place on May 11 to 14, 2009.

24. A further disclosure request was made by Respondent's counsel on December 4, 2008.

25. On January 14, 2009, the third appearance was held by teleconference. Staff requested

amendments to the Notice of Hearing. This request was granted by the Hearing Panel on the basis that the Amended Notice of Hearing be served by 12:00 p.m. on January 16, 2009. The Hearing Panel continued to reserve its decision on venue. The Hearing was adjourned to February 3, 2009, with the date of the Hearing on the Merits remaining unchanged.

26. On February 3, 2009, the Respondent abandoned his request for the change in venue. The Hearing on the Merits commenced, as scheduled, on May 11, 2009, and was completed on May 12, 2009.

27. On June 12, 2009, the Hearing Panel issued its Decision and Reasons with respect to the alleged misconduct and scheduled the submissions on penalty to be heard on July 23, 2009.

28. On July 23, 2009, the Chair of the Hearing Panel advised Staff and the Respondent that one of the members of the Hearing Panel had withdrawn himself from the case.

29. Staff requested an adjournment of the Hearing with respect to penalty. After reading certain affidavit material and hearing submissions of the parties, the Hearing Panel ordered that the Hearing be adjourned to October 13, 2009, at which time it would proceed as a two-member Hearing Panel, pursuant to Section 19.9(6) of MFDA By-law No. 1.

30. On October 8, 2009, Staff brought a Motion for an Order that:

i. The Decision and Reasons with respect to misconduct in this matter, dated June 12, 2009, be declared null and void and removed from the MFDA website;
ii. The Hearing Panel be struck; and
iii. The disciplinary proceedings against the Respondent be remitted for a new hearing before a reconstituted Hearing Panel.

31. Submissions from both parties were heard by the Hearing Panel on October 13, 2009. On December 1, 2009, the Hearing Panel's Decision and Reasons, dated October 30, 2009, were released.

32. The Hearing Panel set aside its Decision and Reasons, dated June 12, 2009.

33. According to Mr. Gallimore, there was correspondence between the parties with respect to the October 30, 2009 Decision, between December 4 and 16, 2009. Settlement discussions took place between Staff and the Respondent between December 19, 2009, and January 25, 2010.

34. Again, according to the Gallimore Affidavit, on January 28, 2010, the Respondent was advised that Staff was going to submit a request to the Corporate Secretary's Office ("CSO") for a first appearance before an MFDA Hearing Panel to reschedule dates for a Hearing. This was done on January 29, 2010, and the Respondent was so advised on February 1, 2010.

35. On February 2, 2010, according to Mr. Gallimore, Staff received a request from Respondent's counsel to "stop" this request. Staff did so. Further settlement discussions occurred from February 2, 2010, to April 16, 2010.

36. On April 20, 2010, Staff asked the CSO to schedule a first appearance. This occurred on June 1, 2010, before this Hearing Panel.

37. In Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, the Supreme Court of Canada stated that:

> "There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy. It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied."
>
> Re: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, para. 102.

38. The Supreme Court went on to say that the delay must be such that it "would necessarily result in a hearing that lacks the essential elements of fairness."

Re: *Blencoe v. British Columbia (Human Rights Commission), supra*, para. 104.

39. In order to find an abuse of process, the Court held that: "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted". For there to be abuse of process, the proceedings must be "unfair to the point that they are contrary to the interests of justice. Cases of this nature will be extremely rare".

Re: *Blencoe v. British Columbia (Human Rights Commission), supra*, para. 120.

40. The Supreme Court held that: "There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings."

Re: *Blencoe v. British Columbia (Human Rights Commission), supra*, para. 121.

41. The Supreme Court further held that: "There must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected."

Re: *Blencoe v. British Columbia (Human Rights Commission), supra*, para. 133.

42. Finally, the Supreme Court held that: "The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case."

Re: *Blencoe v. British Columbia (Human Rights Commission), supra*, para. 122.

43. In the case before us, we do not find that there is either a lack of timeliness or an abuse of process.

44. With respect to the alleged lack of timeliness, until at least July 23, 2009, the case proceeded in an orderly fashion. The delay was not inordinate. The Respondent has not presented any evidence of prejudice that would come close to the principles set down by the Supreme Court of Canada in Blencoe.

45. The Hearing on the Merits was originally scheduled to take place on December 2 to 5, 2008. On November 12, 2008, the Respondent, through his counsel, requested a pre-hearing conference. This was immediately scheduled but caused an adjournment of the Hearing on the Merits for a number of months. The actual Hearing commenced and was completed on the dates scheduled. The Decision and Reasons were issued in a month's time and the Penalty Hearing was scheduled for approximately one month later.

46. It is clear that the events which transpired on July 23, 2009, which ultimately caused the Decision and Reasons of June 12, 2009 to be set aside, were unfortunate and unprecedented. They were clearly not the fault of the Respondent. On the other hand, they were not the fault of Staff.

47. Between the release of the Hearing Panel's Decision and Reasons on December 1, 2009 and April 16, 2010, the parties were, apparently, engaged in consensual discussions to ascertain if an appropriate resolution could be achieved. At the conclusion of the discussions, the matter was placed before this Hearing Panel for determination.

48. Further, according to the undisputed submissions of Staff, the Respondent has continued to work as a mutual fund salesperson with Select without any terms or conditions placed on his registration.

49. The Hearing on the Merits is currently scheduled to commence on October 18, 2010, and continue, if necessary, to October 22, 2010. These were dates agreed to by the Respondent on June 1, 2010. We are not, currently, aware of any reason why the proceedings could not be

completed within the agreed upon timeframe.

50. We, likewise, do not find any lack of due process.

51. It would appear, from the Record before us, that the Respondent has been provided with a very significant opportunity to explain and defend his actions against the allegations of misconduct.

52. The Respondent received a detailed Notice of Hearing, on or about June 23, 2008. He has received significant disclosure. There was correspondence between counsel with respect to disclosure. Any disclosure concerns could have been brought to the attention of the original Hearing Panel. We are not aware of any disclosure Orders made by the original Hearing Panel, which have not been complied with by Staff. In fact, the parties have not brought to our attention that any such Orders even exist.

53. There is a current disclosure request by the Respondent before this Hearing Panel. This request will be dealt with *infra*.

54. The Respondent has, apparently, appeared either in person or by counsel at all previous appearances. He has brought this series of Pre-Hearing Motions. He will be given the opportunity to present testimony and cross-examine Staff's witnesses at the Hearing on the Merits.

55. In conclusion, the Respondent's Motion for relief based on a lack of timeliness and due process is dismissed.

B. The Respondent has brought a Motion that:

1. all four Allegations against him be immediately dismissed; and
2. the MFDA be required to remove all references to him and this case from its website immediately and permanently.

The grounds for this Motion were "An MFDA Violation of MFDA Rules."

56. The essence of the Respondent's Motion is that the MFDA does not have the jurisdiction or authority to proceed against him a second time.

57. In a series of 28 "Whereases", the Respondent traces the history of the first proceeding culminating in the Decision and Reasons of June 12, 2009.

58. The Respondent then makes allegations with respect to John Armstrong, a member of the original Hearing Panel, who advised the Chair of the Panel, on July 22, 2009, that he found it "necessary to withdraw from the case."

59. After considering all of the relevant facts, the two remaining members of the original Hearing Panel concluded: "We accept, in light of the evidence presented, that a reasonable and well-informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, might well conclude that a reasonable apprehension exists that the member of the Panel who has since resigned may, consciously or unconsciously, have been biased. While we, the remaining two members of the Panel, do not harbour such an apprehension, that is not the test. The test is how a member of the public (and that includes the parties) may view the matter."

60. The Hearing Panel then went on to consider whether the presence of the third member "infected" the other members of the Panel. They concluded that "a reasonable and well-informed person might have a legitimate apprehension that the process was tainted, and that the results offended the principles of natural justice."

61. The two-member Hearing Panel then sent through an exhaustive analysis as to whether it had the jurisdiction to rescind the Decision which it had rendered as a three-member Panel on June 12, 2009. It concluded that it did and the Decision was set aside. The Respondent did not appeal this latter Decision.

62. The Respondent states that "there is absolutely nothing in the MFDA Rules which speaks to, considers or contemplates in any way these unique, unprecedented circumstances."

63. The Respondent concludes that "given that the Rules do not speak to, consider or contemplate these circumstances in any way, the MFDA is acting beyond the very clear provisions and limitations of its own rules . . . and . . . to do so is not only unethical and unbecoming, but also illegal."

64. In its submissions, Staff conceded that "the circumstances of this case may be unique and unprecedented in respect of MFDA cases."

65. However, Staff goes back to February 16, 2001, when the Ontario Securities Commission ("OSC") issued a Recognition Order under Section 21.1 of the *Securities Act (Ontario)* R.S.O. 1990 c. S.5. By making this Order, the OSC approved the MFDA's mandate to regulate the securities-related business and conduct of its members and Approved Persons.

66. Section 8(A) of the Recognition Order states as follows:

> "The MFDA shall, as a matter of contract, have the right to and shall appropriately discipline its members and their Approved Persons for violations of the rules of the MFDA and shall cooperate with the Commission in the enforcement of applicable securities legislation relating to the operations, standards of practice and business conduct of the members and Approved Persons…[.]"

67. Section 8(C) of the Recognition Order states:

> "[t]he MFDA shall require its members and their Approved Persons to be subject to the MFDA's review, enforcement and disciplinary procedures."

68. The Respondent confirmed his membership in the MFDA on May 22, 2001, and agreed to submit to the jurisdiction of the MFDA and conduct himself according to its Rules, Regulations and By-laws. It is according to those Rules, Regulations and By-laws which Staff is seeking to have the conduct of the Respondent adjudged.

69. The former Decision has been set aside by the Hearing Panel which made it, including the Allegation which it found to have been proven.

70. The matter is to be heard afresh. It is to be heard according to well established MFDA Rules, Regulations and By-laws.

71. We do not find the procedure to be a violation of the MFDA Rules.

72. The Motion is dismissed.

C. The Respondent brought a Motion that:

1. all four Allegations against him be immediately dismissed; and
2. the MFDA be required to remove all references to him and this case from its website immediately and permanently.

The grounds for this Motion were "A Lack of Fairness".

73. In a series of 116 "Whereases", the Respondent outlines a number of events and arguments which he believes culminates in the "unfairness" of the process. Many of the factual assertions are matters which should be brought before the Hearing Panel on the Hearing on the Merits.

74. Some, such as those dealing with the alleged conduct of Mr. Armstrong, as well as the other Approved Persons of Select, and the alleged responses or lack thereof, of the MFDA, are of more dubious relevance but could be brought before the Hearing Panel at the Hearing on the Merits where Staff could present arguments as to admissibility and relevance and the Hearing Panel could make a ruling with respect to same.

75. The arguments dealing with the alleged legal status of pre-signed forms, during the material time period, are central to the Hearing on the Merits and should be presented by the Respondent at that time. Similarly, the considerations and arguments concerning the Respondent's alleged use of pre-signed forms, the lack of client harm and the Respondent's record in the industry, are matters of importance and relevance at the Hearing on the Merits and should be presented at that time.

76. The assertions and arguments concerning the actions of the two-member Hearing Panel, subsequent to July 23, 2009, have been dealt with previously in these Reasons.

77. The alleged lack of disclosure by the MFDA of documentation and information relating to Mr. Armstrong and Mr. Davis are dealt with in the following Motion dealing with several other matters of disclosure.

78. The events surrounding the alleged actions of Mr. Armstrong are, indeed, unfortunate. As indicated, these events were caused neither by the actions of the Respondent nor Staff.

79. The events resulted in a careful consideration by the remaining Hearing Panel Members as to the appropriate course of action. They determined that the appropriate and the fairest approach was to set aside their Decision and Reasons of June 12, 2009.

80. Consequently, this Hearing Panel, at the moment, has heard no evidence whatsoever against the Respondent. The hearing of evidence commences on October 18, 2010. At that time, the Respondent will have a full opportunity to object to, test and respond to any admissible evidence presented against him with respect to all four Allegations. This Hearing Panel will then make a determination, based on the evidence, both testamentary and documentary, which it receives.

81. In our view, at the present time, there is no unfairness in the process. The Motion is dismissed.

D. The Respondent has brought a Motion that:

1. all four Allegations against him be immediately dismissed; and
2. the MFDA be required to remove all references to him and this case from its website immediately and permanently.

The grounds for this Motion were “A Lack of Full, Fair and Timely Disclosure”.

82. In a series of 110 "Whereases" and 7 Exhibits, the Respondent complains about the lack of disclosure to the date hereof of certain defined documentation and the lack of timely disclosure by Staff with respect to the specified documents.

83. In response, Staff states that it adheres to the disclosure standards first enunciated in R. v. Stinchcombe [1991] 3 S.C.R. 326. This disclosure obligation is referenced in the MFDA Enforcement Department's Litigation Manual under the heading "Disclosure Guidelines", as follows:

> "In determining what should be disclosed, Enforcement Counsel should apply the following guidelines:
>
> (a) Staff is under a general duty to disclose all "relevant" material gathered in the course of Staff's investigation – the "fruits of the investigation";
> (b) Information is "relevant" if it could reasonably be used by the Respondent for one or more of three purposes: (i) to respond to the allegations; (ii) to advance a defence; or (iii) to make a decision concerning the conduct of the defence, such as whether to call evidence;
> (c) When assessing relevance, Staff is required to err on the side of inclusion and should only exclude material which is "clearly irrelevant" or which is subject to a valid claim of privilege;
> (d) The obligation to disclose applies to all material, whether inculpatory or exculpatory;
> (e) The obligation to disclose applies to all material, regardless of whether Staff intends to adduce the material as evidence at the hearing;
> (f) The obligation to disclose extends beyond the substance of allegations to include all information which might reasonably reflect upon the credibility of Staff's evidence;
> (g) All statements from persons who have provided relevant information to Staff should be disclosed, notwithstanding that those persons may not be put forward by Staff as witnesses; and
> (h) In the ordinary course, the obligation to disclose is triggered by a request made by or on behalf of the Respondent.
>
> The obligation to disclose does not extend to Staff's internal work product, such as, for example, the Investigation Plan or Report, the Proceedings Authorization Memo, research materials, notes or memos of internal discussions or meetings concerning aspects of the investigation or prosecution, or charts and summaries of materials gathered during the course of the investigation prepared by Staff – unless and to the extent Staff proposes to introduce any such materials at the hearing, in which case they must be disclosed."

84. The pre-hearing disclosure obligations of Staff are also set out in Rules 10 and 11 of the MFDA Rules of Procedure, as follows:

> "RULE 10: DISCLOSURE OF DOCUMENTS
>
> 10.1 *Obligation to Disclose Documents and Items - Corporation*
>
> (1) The Corporation shall, as soon as reasonably practicable after service of the Notice of Hearing, and in any case at least 14 days prior to the commencement of the hearing of the proceeding on its merits, provide the Respondent with copies of all documents, and a list of items other than documents, that the Corporation intends to rely on at the hearing.
>
> (2) The Corporation shall make available for inspection by the Respondent any item referred to in sub-Rule (1).
>
> 10.3 *Failure to Disclose Documents or Items*
>
> (1) If a party fails to provide a document, or make an item available for inspection, in accordance with Rules 10.1 and 10.2, then the party may not rely on the document or item at the hearing without permission of the Hearing Panel and on such terms as the Hearing Panel considers appropriate.
>
> 10.4 *Corporation's Duty to Disclose*
>
> (1) Nothing in this Rule 10 derogates from the Corporation's obligation to make disclosure as required by common law, as soon as reasonably practicable after service of the Notice of Hearing.
>
> RULE 11: WITNESS LISTS AND STATEMENTS
>
> 11.1 *Provision of Witness Lists and Statements*
>
> (1) Subject to Rule 12, a party to a proceeding shall provide every other party with:
>
> (a) a list of the witnesses the party intends to call at the hearing of the proceeding on its merits; and
>
> (b) in respect of each witness named on the list, other than a Respondent who has already provided a statement recorded by the Corporation, either:
>
> (i) a witness statement signed by the witness; or

(ii) a transcript of a recorded statement made by the witness; or

(iii) if no signed witness statement or transcript referred to in sub-Rules (i) and (ii) is available, a summary of the evidence that the witness is expected to give at the hearing.

(3) The parties shall comply with the requirements of sub-Rules (1) and (2) at least 14 days prior to the commencement of the hearing.

11.2 *Contents of Witness Statements*

(1) A witness statement, transcript of a recorded statement or summary of the expected evidence of a witness required by Rule 11.1 shall contain:

(a) the substance of the evidence the witness is expected to give at the hearing; and

(b) the name and address of the witness or, in the alternative, the name and address of a person through whom the witness can be contacted."

85. As indicted above, we are not aware as to whether any Motions were brought by the Respondent before the original Hearing Panel with respect to requests for disclosure, and, if so, whether any rulings were made by this Panel. Consequently, we will deal with the disclosure requests according to the above-outlined principles and, where necessary, subsequent case law.

86. According to the Gallimore Affidavit, on July 18, 2008, Staff provided the Respondent's counsel with two volumes of material in satisfaction of what it viewed as its pre-hearing disclosure obligations in this matter.

87. Counsel for the Respondent made additional disclosure requests in November and December of 2008 and January of 2009. Except for Staff's Investigation Report, it is the position of Staff that it had produced everything that had been requested of it, prior to the commencement of the Hearing on the Merits in May of 2009.

88. Dealing with the specific requests and submissions in the Notice of Motion:

(a) The first 45 "Whereases" deal with Compliance Examinations apparently

conducted on Select in April of 2003 and September of 2006, which resulted in Compliance Examination Reports of Select, dated December 20, 2003, and January 5, 2007. The Respondent received copies of these Reports on July 18, 2008.

89. The arguments and assertions which the Respondent makes in the Motion material, both as to the contents of the Reports and what he might have done if he had received the Reports at or about the dates of their respective release, are arguments and assertions which are open for the Respondent to make at the Hearing on the Merits.

90. What is clear is that the Respondent has had copies of these Reports in his possession for a period in excess of two years and, thus, will have had ample opportunity to decide what steps, if any, to take if Staff seeks to introduce these Reports at the Hearing on the Merits.

(b) In "Whereases" 46 to 50, the Respondent seeks to provide evidence relating to three of his clients with respect to whom the MFDA auditors allegedly found pre-signed forms. Should Staff seek to introduce these forms at the Hearing on the Merits, the Respondent is at liberty to both make representations as to their respective admissibility or lead evidence with respect to same.

(c) In "Whereases" 51 to 70, the Respondent seeks to lead evidence and make observations with respect to the attendance of MFDA investigators on his office on May 3, 2007, what material they reviewed and what documentation they removed from the premises. This evidence and these observations are more properly the subject matter of the Hearing on the Merits. They do not seek to relate to the issue of disclosure and the timeliness thereof.

(d) "Whereases" 71 to 79, deal with the alleged conduct of the MFDA investigators leading up to a request that the Respondent appear in Toronto on January 23, 2008, to provide a statement. If, in fact, the Respondent did provide such a statement and if, at the Hearing on the Merits, Staff seeks to introduce that statement, in whole or in part, the Respondent will be at liberty to make any appropriate arguments with respect to the admissibility of the statement because of the alleged conduct of the investigators.

(e) "Whereases" 80 to 89 contain representations with respect to the utility and legitimacy of pre-signed forms. They do not deal with disclosure issues but contain material germane to the Hearing on the Merits.

(f) "Whereases" 90 to 92 contain a request for disclosure of the Investigator's Report. This request is also the partial subject matter of the next Motion. The Respondent also requests disclosure of "who made the decision to litigate against him and on what basis they made that decision."

91. Staff's submission is that the Staff's Investigation Report contains only Staff's analysis and is therefore irrelevant to the proceedings. Likewise, Staff submits that information concerning who made the decision to litigate is irrelevant.

92. Following the Stinchcombe principles, Staff submits that the "fruits of the investigation", i.e. the basis for Staff's decision to litigate, were disclosed in the material delivered to the Respondent's counsel on July 18, 2008.

93. The only reason given by the Respondent as to why the Investigation Report should be disclosed is the assertion that "based at least partially on that Report", the MFDA made a decision to proceed against the Respondent.

94. The MFDA Enforcement Department's Litigation Manual (quoted *supra*) states that the obligation to disclose does not extend to Staff's internal work product, such as the Investigation Report, "unless and to the extent Staff proposes to introduce any such materials at the hearing, in which case they must be disclosed." With this proposition, we agree.

95. We, likewise, agree that information as to who made the decision to litigate against the Respondent and on what basis they made that decision is irrelevant.

96. We are only interested in receiving admissible evidence showing why or why not the four Allegations against the Respondent can be sustained.

(g) "Whereases" 93 to 98 request disclosure of information relating to a Mr. Terry Davis, whom the Respondent describes as a co-owner of Select. The allegation is that Mr. Davis was under investigation at the same time as was the Respondent and that the MFDA proceeded against the Respondent and not Mr. Davis.

97. We agree with Staff that this information is irrelevant and, unless and until a proceeding is commenced against Mr. Davis, this information should remain confidential.

(h) "Whereases" 99 to 105 request disclosure of information concerning Mr. John Armstrong, who was a member of the original Hearing Panel.

98. We, again, agree with Staff that this information is irrelevant and, unless and until a proceeding is commenced against Mr. Armstrong, this information should remain confidential.

(i) "Whereases" 106 to 110 requests disclosure of "basic professional C.V. information" with respect to the members of this Hearing Panel.

99. On the basis of the material presented, we fail to see how this information is relevant or could be of assistance to the Respondent. Should, during the course of the Hearing on the Merits, we become of the view that information of this nature would be of assistance to the Respondent, it will be provided.

100. For the reasons set out above, this Motion is dismissed.

E. The Respondent has brought a Motion that:

1. The January 2004 memorandum from Deryl Drysdale of Select Financial Services Inc. to all of Select Financial Services Inc.'s Approved Persons be declared inadmissible as part of the MFDA's case against the Respondent;

2. The MFDA be ordered to provide a true copy of the 2008 Investigators Report to the Respondent well before October 18, 2010;

3. The MFDA be ordered to provide a true copy of the 2008 Investigators Report to the Rehearing Panel, and that the Rehearing Panel then make a subsequent decision on the appropriateness and fairness of providing that report to the Respondent.

The grounds for the Motion were "Fairness".

101. The Respondent argues that a January 2004 memorandum from Deryl Drysdale of Select to all of Select's Approved Persons "be declared inadmissible as part of the MFDA's case against the Respondent." The argument is based on the assertion by the Respondent that the "memorandum is confidential internal communication between the Member and the Approved Persons and, as such, the MFDA has no right to it."

102. In response, Staff refers to sections 21 and 22 of MFDA By-law No. 1 and Rule 1.6 of the MFDA Rules of Procedure. These provide as follows:

Section 21 and 22 of MFDA By-law No. 1

"21. POWER TO CONDUCT EXAMINATIONS AND INVESTIGATIONS

The Corporation shall make such examinations of and investigations into the conduct, business or affairs of any Member, Approved Person of a Member or any other person under the jurisdiction of the Corporation pursuant to the By-laws and/or the Rules as it considers necessary or desirable in connection with any matter relating to compliance by such person with:

21.1 the By-laws, Rules or Policies of the Corporation;

21.2 any securities legislation applicable to such person including any rulings, policies, regulations or directives of any securities commission; or

21.3 the by-laws, rules, regulations and policies of any self-regulatory organization.

22. INVESTIGATORY POWERS

22.1 For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

(a) to submit a report in writing with regard to any matter involved in any such investigation;

(b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and

(c) to attend and give information respecting any such matters;

(d) to 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 Corporation;

and the Member or person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion, require that any statement given by any Member or person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath.

22.2 For the purpose of any examination or investigation pursuant to this By-law, the Corporation shall be entitled to free access to, and to make and retain copies of, all books of account, securities, cash, documents, bank accounts, vouchers, correspondence and records of every description of the Member or person concerned, and no such Member or person shall withhold, destroy or conceal any information, documents or thing reasonably required for the purpose of such examination or investigation.

22.3 The Corporation, may, with respect to any information received:

(a) refer a matter to the applicable Regional Council for consideration in accordance with the provisions of Section 24; or

(b) refer a matter to the appropriate securities regulatory authority, self-regulatory organization or law enforcement agency; or

(c) take such other action under the By-laws or Rules which it considers appropriate in the circumstances.

Rule 1.6 of the MFDA Rules of Procedure

"1.6 *Admissibility of Evidence*

(1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to

the matters before it and is not bound by the technical or legal rules of evidence.

(2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.

(3) Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege."

103. These provisions, *prima facie*, provide justification for Staff to be in possession of the memorandum in question and, if thought appropriate, to seek to introduce it at the Hearing on the Merits. Consequently, at this time, we are not prepared to declare this memorandum inadmissible.

104. That being said, should Staff, at the Hearing on the Merits, seek to introduce this memorandum into evidence as part of its case against the Respondent, the Respondent is entitled to make further submissions on the issues of its inadmissibility and the Panel will make a further ruling based on the arguments presented at that time.

105. In the alternative, in this Motion, the Respondent makes a further request for a copy of the 2008 Investigator's Report or that the Hearing Panel be provided, at this time, with a copy of the Report and then make a decision on the "appropriateness and fairness" of providing a copy of this Report to the Respondent.

106. The Respondent makes, essentially, two submissions as to why he should be given the requested relief:

(a) Stephen Glanville, a purported co-author of this Report, testified under oath as to the contents of the Report during the Hearing on the Merits on May 11 – 12, 2009. Unless Mr. Glanville perjured himself, the essential elements of the Report are already known and, thus, there is no compelling reason for Staff not to provide the Respondent with a copy.

(b) The Respondent has reason to believe that Mr. Glanville "may have perjured himself" during his testimony and, thus, the Respondent should be provided with a copy of the Report.

107. As indicated above, the position of Staff is that it has adhered to the Stinchcombe

principles in providing disclosure and has disclosed all of the relevant facts, which underpin the Report. The Report contains only Staff's analysis and is therefore irrelevant to the proceedings.

108. We agree with the approach taken by the OSC in the Taylor Shambleau case and are not prepared to infer that the Report may contain undisclosed facts. As the OSC stated: "Should an issue arise at the hearing which results in some specific aspect of the "report" becoming relevant to a fact in issue, the panel may very well determine that it is relevant and therefore that it should be produced in part"

Re: *Ontario (Securities Commission) v. Shambleau* [2003] O.J. No. 4089, para. 4.

109. This approach by the OSC was found by the Ontario Divisional Court not to be "unreasonable".

110. With respect to the prior testimony of Mr. Glanville, it is not before us. We have not, as yet, heard any testimony. Should Staff seek to call Mr. Glanville at the Hearing on the Merits, the Respondent will be given an opportunity to cross-examine him and/or object to any or all of his evidence.

111. This Motion is dismissed.

E. The Respondent has brought a Motion that:

1. the Rehearing on the Merits, currently set for October 18-22, 2010 in Toronto, Ontario, be relocated to London, Ontario;

2. the MFDA be mandated to pay the Respondent five thousand ($5,000) dollars in costs.

The grounds for the Motion were "Fairness, Accountability and the Accepting of Responsibility".

112. In this Motion, the Respondent traces the history of the first Hearing on the Merits from May 11 – 12, 2009, to the October 30, 2009 Decision and Reasons of the two remaining Members of the Hearing Panel setting aside its June 12, 2009 Decision on the basis that "a reasonable and well-informed person might have a legitimate apprehension that the process was tainted, and that the result offended the principles of natural justice."

> Re: Decision and Reasons (of first Hearing Panel) – October 30, 2009, para. 23.

113. We agree with the Respondent that the circumstances surrounding this case "are anything but normal" and are "unique and unprecedented." We agree that these circumstances were not caused by the Respondent. Nor, as indicated earlier, were they caused by Staff.

114. With respect to the request for costs, we agree with the previous Hearing Panel, when, in its Decision and Reasons, dated October 30, 2009, it stated:

> "The second matter concerns costs. The Respondent asks that costs be assessed against the MFDA. It is not an unreasonable request because, through no fault of his own, he found himself involved in proceedings which put in question the Decision made in the case against him. Regrettably, we are unable to do so. Section 24.2 of By-law No. 1 (as amended) permits a Hearing Panel to order that a Member or Approved Person "pay the whole or part of the costs of the proceedings." But it is silent about costs against the MFDA, and this precludes us from considering the request."

115. With respect to the request for a change of venue, the Respondent has not provided any evidence that his ability to make full answer and defence to the Allegations would be hindered or affected if the Hearing on the Merits remained in Toronto.

116. There is no indication before us of how many witnesses he intends to call or where they are located in relation to either Toronto or London. The sole basis for his change of venue Motion is that "the Respondent cannot possibly be further penalized by issues, developments and circumstances which are beyond his control, not his fault or not his responsibility."

117. We have great sympathy with the Respondent in the circumstances in which he has found himself because of events beyond his control.

118. We also have sympathy with the position of Staff that it does not wish to create a precedent for future cases. One hopes and expects that the circumstances leading to the setting aside of the Hearing Panel's Decision are unique and will not be repeated.

119. On the basis of the material before us, we have no alternative but to dismiss the Motion for a change of venue and we do so.

120. However, we note Rules 1.3(1) and (2), as well as Rule 1.5(1)(c) of the Rules of Procedure, which provide as follows:

> "1.3 *General Principles*
>
> (1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.
>
> (2) Where matters are not provided for in these Rules, the practice may be determined by analogy to them.
>
> 1.5 *General Powers of a Panel*
>
> (1) A Panel may:
>
> (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."

121. Under these Rules, and under the unique and unprecedented circumstances of this case, it might be possible to infer that it would not be unreasonable for the MFDA to provide appropriate travel expenses for the Respondent and his witnesses from London, Ontario to the Hearing on the Merits in Toronto.

122. At this time, we do not make such a finding as we have not provided Staff with an opportunity to make submissions. Also, as indicated, we are not aware of how many witnesses the Respondent intends to call or where they normally reside.

123. If the parties cannot agree on appropriate arrangements and, if the Respondent sees fit

to do so, he may review this issue with the Hearing Panel at the conclusion of the Hearing on the Merits.

DATED this 30th day of September, 2010.

"Thomas J. Lockwood"
Thomas J. Lockwood, Q.C.,
Chair

"Gary Legault"
Gary Legault,
Industry Representative

"Robert Guilday"
Robert Guilday,
Industry Representative

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