



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: Scott Reeves

Heard: March 3, 2016 in Toronto, Ontario
Decision and Reasons (Motion): March 30, 2016

**DECISION AND REASONS
(Motion)**

Hearing Panel of the Central Regional Council:

H. Michael Kelly Q.C.	Chair
Kenneth P. Mann	Industry Representative
Robert C. White	Industry Representative

Appearances:

David Halasz)	Counsel for the Mutual Fund Dealers
)	Association of Canada
)	
Karen M. McArthur)	Counsel for the Respondent
)	
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)	

1. This is a motion by Scott Reeves (“The Respondent”) brought before a Hearing Panel of the Central Regional Council (“the Panel”) of the Mutual Fund Dealers Association of Canada (the “MFDA”) seeking an adjournment of the MFDA Disciplinary Hearing (“the Hearing”), and a stay of the Hearing, until the conclusion of the criminal proceedings currently underway against the Respondent in the Ontario Superior Court of Justice, in Hamilton, Ontario. Counsel for the parties agree that the criminal proceeding, and the MFDA Hearing, are predominantly based upon the same allegations of professional misconduct. The MFDA allegations are as follows:

Allegation #1: Between 2004 and May 9, 2014, the Respondent solicited and accepted from at least three clients a total of approximately \$5,064,208, some or all of which the Respondent deposited into accounts that he controlled, which the Respondent failed to invest, return or otherwise account for, contrary to MFDA Rule 2.1.1, 1.1.1, 2.1.4.

Allegation #2: Between 2010 and 2014, on at least 34 instances, the Respondent directed the Member to deposit redemptions totalling approximately \$1,126,117 from a client's account at the Member to a bank account that did not belong to the client, by providing the Member with a void cheque that had been altered so that it appeared to the Member that the cheque corresponded to the client's bank account when the client did not hold such an account, contrary to MFDA Rule 2.1.1.

Allegation #3: Between 2009 and May 9, 2014, the Respondent made statements and provided documents to at least three clients, which he knew were false, misleading or incorrect, and misrepresented to the clients the amounts and whereabouts of their investments and monies, contrary to MFDA Rule 2.1.1.

Allegation #4: Between January 8, 2004 and May 9, 2014, the Respondent had and continued in other gainful occupations that were not disclosed to and approved by the Member by acting as an officer or a director for at least 11 corporations, contrary to MFDA Rules 1.2.1(c) and 2.1.1.

2. Counsel for the parties agree that the Panel has a discretion whether or not to adjourn the Hearing, and that the authorities referenced by both counsel consistently confirm that the exercise of that discretion is bound by the principle that a disciplinary hearing before a professional tribunal should not be adjourned pending completion of a co-temporal criminal prosecution, addressing the same or closely related allegations, in the absence of "**extraordinary and exceptional circumstances**". Both counsel agreed that the allegations advanced in the MFDA disciplinary proceeding and those advanced in the criminal proceeding bear "significant overlap". Both counsel acknowledged investment industry and court decisions supporting the application of the "extraordinary and exceptional circumstances" principle. Those authorities are listed in Appendix A on the last page of this decision.

3. The Panel was therefore required to decide whether or not there are extraordinary and exceptional circumstances that compel a decision to adjourn the Hearing.

POSITION OF THE RESPONDENT

4. On behalf of Mr. Reeves, Ms. McArthur argues that extraordinary and exceptional circumstances exist in this case for the following reasons:

- (a) Mr. Reeves, if convicted of the criminal charges pending in the criminal court, could face the possibility of a significant custodial sentence. The integrity of the criminal process is therefore of paramount importance, and should not be compromised by the MFDA process. Mr. Reeves wants to fully defend the MFDA allegations (including the filing of the requisite formal Reply). If he is forced to do so prior to the criminal trial, his right to the presumption of innocence and his right to remain silent as preserved by the *Charter*¹, with respect to the criminal proceeding, will be violated. As well he will be victimized by the exposure of any tactical strategy that he has a right to employ in the conduct of his defence in the criminal proceeding. If the Hearing is not adjourned, his participation in the Hearing may be unfairly restricted. Ms. McArthur has been

¹ *Canadian Charter of Rights and Freedoms, 1982, s.7, s.11 [particularly s. 11(a) and 11(d)] s. 13 and s.24, s. 24(1)*

retained to defend Mr. Reeves in the criminal proceeding, but has not as yet been retained to defend him in the Hearing beyond her handling of this Motion.

- (b) The preliminary hearing in the criminal proceeding, lasting three days, has been completed and Mr. Reeves has been committed for trial on counts of fraud over \$5000 and theft over \$5000. He has attended the criminal proceeding a number of times, as required. On February 4, 2016, Ms. McArthur, who represents Mr. Reeves in the criminal proceeding, attended a judicial pretrial before Justice Gunn and disclosed, at that time, an estimate that the trial, and pre-trial motions will take in excess of 30 days. The potential motions will take place months before the trial, and consume approximately three days. If the MFDA Hearing is not adjourned or stayed, Mr. Reeves will incur significant legal fees in the defence of the MFDA allegations, and that may impact his ability to fund the legal fees for his defence in the criminal trial.
- (c) Mr. Reeves has sought an early trial date in the criminal court. Ms. McArthur appeared before the Superior Court again on February 19, 2016, seeking a trial date in the fall of 2016. She advised the Court, in the presence of the Assistant Crown Attorney that the criminal trial would consume approximately 30 days. The Crown did not contest that estimate. Ms. McArthur was advised that the Court would not be able to accommodate a 30-day trial in 2016, and would not have its 2017 calendar available until approximately June 2016. The Court remanded the case to the assignment court on March 18, 2016, and advised Ms. McArthur to contact the Crown Attorney and the Trial Coordinator, to attempt to secure a trial date in January or February 2017. In the circumstances, argues Ms. McArthur, there is no inordinate delay, should the Hearing be delayed pending the completion of the criminal trial. Ms. McArthur provided to the Panel a copy of the transcript of the February 19, 2016 court proceeding.
- (d) Ms. McArthur filed with the Panel a copy of the Recognizance of Bail executed by Mr. Reeves on July 17, 2015, containing, *inter alia*, the following restriction:

"Not to act in any financial capacity in any financial industry in Canada". Ms. McArthur asserts that this restriction effectively protects the financial industry, and its patrons, pending the completion of the criminal trial.

- (e) MFDA counsel in this matter attended for portions, if not all, of the preliminary hearing in the criminal prosecution, and conferred with the Crown Attorney. This demonstrates that the MFDA has not been deprived of the opportunity to achieve the expeditious and plenary exercise of its mandate to protect investors and foster public confidence in the mutual fund industry.

RESPONSE OF THE MFDA

5. Mr. Halasz, on behalf of the MFDA, emphasized that the reason underlying the "extraordinary and exceptional circumstances" principle is the recognition that, to protect the investor and to maintain public confidence in the investment industry, a self-regulatory organization such as the MFDA must have the ability, in accordance with its duty, to expeditiously investigate and address, by Hearing, alleged violations of industry rules and ethics. The MFDA has exercised this mandate appropriately in this case and seeks to have the Hearing without delay.

6. Mr. Halasz asserts that Mr. Reeves has not established extraordinary and exceptional circumstances that would warrant a decision of the Panel to adjourn, or stay, the Hearing, pending the completion of the criminal proceedings, primarily for the following reasons:

- (a) The allegations are serious, and involve a number of alleged victims. No trial date has as yet been set in the criminal proceeding, and at best would be many months away.
- (b) The co-existence of criminal and regulatory enforcement proceedings is not a rare occurrence and, almost invariably, applications for adjournment of the regulatory

proceedings pending completion of the criminal proceeding have been unsuccessful, as failing to establish exceptional and extraordinary circumstances.

- (c) Prior to the contact by Mr. Reeves' counsel with MFDA Staff in February 2016, Mr. Reeves had not co-operated with the MFDA's efforts to arrange an interview with him, nor had he filed a Reply as required, nor had he participated, either personally or by counsel, in the MFDA teleconference on November 10, 2015, when the Hearing date was set for February 25 and 26, 2016. No particulars were provided on the motion supporting Ms. McArthur's assertion that Mr. Reeves' prior counsel had answered, in part, some of Staff's questions.
- (d) No evidence was tendered by Mr. Reeves on the motion, to confirm his allegation that he may encounter financial difficulty in funding the legal fees for the criminal trial, if the regulatory Hearing proceeds first. Even were that the case, it does not amount to "extraordinary and exceptional circumstances".
- (e) The cited jurisprudence supports the proposition that the criminal court has full power to implement the protections to which Mr. Reeves is entitled pursuant to the *Charter*, and to ensure that anything flowing from Mr. Reeves' participation in the MFDA Hearing will not be accepted by the Court, in violation of *Charter* protection.
- (f) The Recognizance of Bail, signed by Mr. Reeves, does not provide the full protection of the investment public that could potentially be achieved if the Hearing is allowed to proceed.

7. The MFDA seeks an Order dismissing the motion, with costs.

ANALYSIS AND DECISION

8. Mr. Reeves faces serious criminal charges, and if convicted could be subject to significant custodial sentence. He also faces serious allegations of improper conduct contrary to industry regulation, and if found guilty, he is exposed to significant non-custodial penalty. He is entitled to the presumption of innocence in both matters. The standard of proof in the criminal process is proof beyond reasonable doubt. In the MFDA process, the standard is proof on a balance of probabilities. Both proceedings involve significant exposure to penalty. Both proceedings are permitted by law to co-exist. Clearly one will proceed first. If the trial proceeds first and results in acquittal, the Hearing will likely proceed, as the standard of proof in the Hearing is different from that in the criminal proceeding. Mr. Reeves contends that if the MFDA Hearing proceeds first, his ability to make full answer and defence in the Hearing will be compromised by the risk that testimony he might give at the Hearing, could be used by the Crown in its quest to obtain conviction on the criminal charges. As well, exposure of his defence strategies employed at the Hearing will "tip off" the prosecution (including the witnesses adverse to him) in the criminal trial, as to his intended approach, and thereby enable unfair adjustment. He is not compelled to give evidence in the Hearing, but if he does so, he exposes himself to the said risk. The majority decision of the Supreme Court of Canada ("S.C.C.") in *R. v Nedelcu*, 2012 SCC 59, (overturning the decision of the Ontario Court of Appeal) held that the civil action discovery testimony of Mr. Nedelcu, was admissible in the criminal charges against him arising from the same event, but only for the limited purpose of challenging Mr. Nedelcu's credibility in the criminal proceeding. If limited to that parameter, the S.C.C stated that the admissibility of the discovery testimony did not violate s. 13 of the *Charter*². If the criminal trial proceeds first, then s. 13 does not apply, as Mr. Reeves would not be subject to "incrimination" (i.e. exposed to custodial penalty) in the MFDA Hearing. The decision of the Ontario Securities Commission ("O.S.C.") in *Terence Peter Robinson et. al.* 1993 LNONOSC 362, referred to, but distinguished, the decision of the Nova Scotia Supreme Court 100 D.L.R. (4th) 79 in the case of *Phillips v. Nova Scotia Commission of Inquiry into the Westray Mine Tragedy*. In that case the Nova Scotia Supreme Court stayed the Commission's Hearing, pending related criminal prosecution, on the ground that the Respondents were, by the Public Enquiries Act of Nova Scotia, **compelled** to testify in the Commission's Hearing. Consequently, the Nova Scotia Supreme Court stated that

² *S. 13 of the Charter: "13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury for the giving of contradictory evidence."*

the Respondents' right to silence under *s. 7* of the *Charter*³, would be violated, if the Hearing proceeded before the anticipated criminal charges. In *Robinson*, the O.S.C. distinguished *Phillips* on the basis that, in *Robinson*, the Respondents were not compelled by law to testify, if they did not so wish. The O.S.C. found that Mr. *Robinson's* assertion of procedural vulnerability, did not constitute "exceptional and extraordinary circumstances", and therefore would not support his quest for an adjournment of the Hearing. That decision was appealed to the Ontario Divisional Court. The Divisional Court dismissed the appeal, confirming that the OSC analysis was correct.

9. The Panel has carefully reviewed the authorities (court and industry regulatory decisions) presented by the parties, addressing the issue of "extraordinary and exceptional circumstances". Those decisions, citing prior authorities, have consistently maintained that the concerns, related to the application of the *Charter* and Charter-compliant procedural fairness, when regulatory and criminal proceedings co-exist, do not constitute extraordinary and exceptional circumstances, and can be adequately addressed by the Court that will hear the criminal charges. In each of the decisions the request for adjournment, or stay, of the Hearing was refused. The decisions consistently emphasized the importance of the duty, desire, and right of the regulatory bodies like the MFDA to address allegations of misconduct in conscientious and **expeditious** fashion, so as to protect investors and to maintain public confidence in the investment industry. In each of the authorities cited, the date for commencement of the criminal trial had not as yet been set, and was predicted to be months, if not years, away. In the *Reeves* case, it appears reasonably possible that a trial date can be obtained for early 2017.

10. The second ground for relief asserted by Mr. *Reeves* on this Motion, is the allegation that he may have insufficient funds to retain legal counsel for the criminal proceedings, if the Hearing proceeds first. He asserts that this financial dilemma will either unfairly restrict his ability to fully address and participate in the Hearing, or otherwise will leave him with insufficient funds to fully retain counsel for the requisite plenary representation in the criminal proceedings. Procedural fairness is the issue before this Panel. Mr. *Reeves* did not place before the panel any

³ *Section 7 of the Canadian Charter of Rights and Freedom: " 7. Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"*

evidence supporting this assertion of financial inadequacy. The Panel received no direct submissions as to the anticipated length of the Hearing, beyond the estimate by Staff at the November 10, 2015 Pre-Hearing that, in view of Mr. Reeves' lack of participation to that point, Staff could produce its evidence at the Hearing, in two days. Ms. McArthur advised the Panel, on March 3, 2016, that Mr. Reeves intended to participate in the Hearing, if the Hearing were adjourned, but might not be able to do so, if the Hearing were not adjourned.

11. The Panel is of the view that this assertion of lack of financial capacity does not constitute "extraordinary and exceptional circumstances". None of the authorities placed before the Panel addressed that issue, specifically. However the Panel is satisfied that this conclusion is consistent with the reasoning set out in the authorities.

12. For the reasons set out above, the Panel is not prepared to adjourn or stay the MFDA Hearing. The Motion is hereby dismissed. Costs of the motion may be addressed at the Hearing. MFDA Staff shall forthwith communicate with Ms. McArthur and the Panel, to arrange a resumption teleconference, on notice, to take place as soon as possible to select a date for the Hearing.

DATED this 30th day of March, 2016.

"H. Michael Kelly"

H. Michael Kelly, Q.C.
Chair

"Kenneth P. Mann"

Kenneth P. Mann
Industry Representative

"Robert C. White"

Robert C. White
Industry Representative

APPENDIX A - List of authorities presented to the Panel:

1. M.F.D.A. File No. 201322 Re: Jacques James Seribuock
2. O.S.C. File No. 1993 LSONOSC 362; also (1993) 16 OSCB 5667 Re: Robinson et. al
3. Robinson v Ontario (Securities Commission) Ontario Divisional Court [1993] O.J. No. 3042
4. Stickney v. Trusz [1973] O.J. 2279; 2 O.R. (2d) 469 Ontario High Court - Zuber J.
5. Malley (Re) 2014 LNIROOC 10; 2014 LNOCRCVM 10
6. Hennig (Re) 2006 LNABASC 479
7. Schoer (Re) 2011 LNIROOC 21
8. Allen (Re) 2001 I.D.A.C.D. No.8
9. New Brunswick Financial and Consumer Services Commission v. Pierre Emond and Armel Drapeau 2015-08-27; Docket No. 2300-E1.