

Re Gill

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Alvinder Singh Gill

2024 CIRO 45

Canadian Investment Regulatory Organization
Hearing Panel (Pacific District)

Heard: July 11-12, September 21, 22 and 29, 2023, and November 3, 2023
in Vancouver, British Columbia (via videoconference)
Decision (Misconduct): September 22, 2023
Decision (Penalty) and Reasons: April 04, 2024

Hearing Panel:

Joseph A. Bernardo, Chair
Barbara Fraser, Industry Representative
Sean Shore, Industry Representative

Appearances:

Brendan Forbes, CIRO Enforcement Counsel
Molly McCarthy, CIRO Enforcement Counsel
Alvinder Singh Gill, the Respondent (present)

DECISION (PENALTY) AND REASONS

I. INTRODUCTION

¶ 1 On January 1, 2023, the Mutual Fund Dealer’s Association of Canada (MFDA) and the Investment Industry Regulatory Organization of Canada (IIROC) merged to form a new self-regulatory organization now called the Canadian Investment Regulatory Organization (CIRO). Under CIRO’s transitional provisions, the conduct addressed by these reasons remains subject to the rules and bylaws of the MFDA that were in force at the time the conduct occurred.

Allegations

¶ 2 On November 11, 2022, the staff of the MFDA (Staff) issued a Notice of Hearing that alleged:

- (a) The Respondent was registered in British Columbia as a dealing representative with Sun Life Financial Investment Services (Sun Life), a Member of the MFDA, for two different periods.
- (b) During both periods the Respondent conducted business in and around Abbotsford, British Columbia.
- (c) While the Respondent was with Sun Life its policies and procedures:
 - (i) required Approved Persons to disclose and obtain written authorization from Sun Life prior to engaging in any outside activity; and

- (ii) prohibited Approved Persons from selling, marketing or distributing the products of, or otherwise representing, any financial institution or financial intermediary other than Sun Life and its affiliated companies.
- (d) The Respondent's initial employment with Sun Life began in October 2001.
- (i) Subsequently, in June 2008, the Respondent became licensed to sell insurance in British Columbia on behalf of The Canada Life Assurance Company (Canada Life).
 - (ii) Prior to doing so, the Respondent failed to disclose and obtain Sun Life's approval to conduct his outside insurance business.
 - (iii) In November 2008, about six months after he had become licensed to sell insurance, the Respondent left his employment at Sun Life, ending his initial period of registration.
- (e) On January 26, 2009, the Respondent registered a sole proprietorship, Greynote Group Financial Services (Greynote).
- (f) In 2010, while the Respondent was no longer registered in the securities industry, a mutual friend introduced DL and SL to the Respondent. DL and SL were a retired married couple. At this initial meeting, the Respondent told them that:
- (i) He serviced the investment accounts of certain individuals who had invested in a commercial real estate "trust fund investment" through Canada Life (Purported Investment).
 - (ii) These individuals wished to sell the Purported Investment, which had a remaining term of 3 to 5 years.
 - (iii) The Purported Investment was "no risk" and purchasing it would entitle DL and SL to receive previously accrued interest of 5.5% and generate up to 7% in further interest annually going forward.
- (g) The Purported Investment did not exist. It was a fiction neither known to, nor approved by, Canada Life.
- (h) Commencing in 2010, the Respondent solicited and received a total of \$329,625 from DL and SL on the false pretext the money would be used to purchase the Purported Investment.
- (i) The Respondent received these funds through a series of 18 payments he instructed DL and SL to make to either Greynote or himself personally.
 - (ii) From March 1, 2010 to September 28, 2015, the Respondent received a total of \$250,000 in 10 payments from DL and SL.
 - (iii) On March 9, 2016, the Respondent once again became registered in British Columbia as a dealing representative with Sun Life. He did not disclose to Sun Life his outside businesses, namely, that he owned and operated Greynote and was selling insurance for Canada Life.
 - (iv) From July 30, 2018 to September 4, 2019 and while once again under the jurisdiction of the MFDA, the Respondent received a total of \$79,625 in 8 payments from DL and SL.
- (i) From March 2016 to August 2020, the Respondent provided DL and SL with a series of account statements that disclosed:
- (i) their monies were held in Canada Life accounts under Greynote's name;
 - (ii) account deposits, withdrawals and values; and
 - (iii) the Respondent was the investment advisor associated with the Purported Investment.
- (j) These were all misrepresentations. The account statements that supposedly documented DL and

SL's holdings in the Purported Investment were forgeries containing false and misleading fictions.

(k) In late 2019, the Respondent told DL and SL they would need to invest additional amounts through him in order to continue holding the Purported Investment with Canada Life. DL and SL refused. They asked him to liquidate their investment and return their monies.

(l) Between approximately February 2020 and August 2020, the Respondent falsely represented to DL and SL that he had liquidated the Purported Investment and would return their monies.

(m) On August 26, 2020, DL and SL complained to Canada Life that the Respondent had failed to repay monies he had invested with Canada Life on their behalf.

(n) On September 21, 2020, Canada Life informed DL and SL that they did not hold investments with Canada Life and the account statements they had been given were fictitious.

(o) In October 2020:

- (i) Staff learned of DL and SL's complaint.
- (ii) The Respondent resigned from Sun Life.
- (iii) His employment with Canada Life ceased.

(p) On November 24, 2020, Staff emailed a letter to the Respondent advising it had commenced an investigation. The letter also informed the Respondent that he was required to provide Staff with certain information regarding Greynote, the Purported Investment and the Respondent's involvement with DL and SL.

(q) This information request proved fruitless, as would be all of Staff's subsequent attempts to obtain relevant information from the Respondent.

(r) Between November 26, 2020 and December 6, 2021, Staff repeatedly communicated with the Respondent to ask that he provide a written statement, documents and other information relevant to the investigation.

- (i) These communications explicitly warned the Respondent that failing to satisfy Staff's requests would constitute a failure to cooperate and risked enforcement proceedings for failing to cooperate.
- (ii) The Respondent replied to these communications, but never provided any of the requested information and documents.

(s) Three interview appointments scheduled with the Respondent were equally fruitless.

- (i) The first attempt to interview the Respondent took place on September 24, 2021. The Respondent attended the appointment, but Staff was forced to adjourn the interview when the Respondent failed or refused to answer Staff's questions.
- (ii) The interview was rescheduled to November 3, 2021. The Respondent again attended and Staff was once again compelled to adjourn the proceedings due to his failure to be responsive.
- (iii) Another appointment was scheduled for November 25, 2021 and the Respondent attended. He did not answer Staff's questions. Instead, the Respondent asked that the interview be adjourned for two to three weeks to enable him to hire legal counsel.

(t) The Respondent's failure to cooperate with the investigation prevented Staff from determining the full nature and extent of the Respondent's dealings with DL and SL, his use of Greynote and his promotion of the Purported Investment.

(u) The Respondent has failed to repay, or otherwise account for, monies he solicited and obtained from DL and SL.

(v) The Respondent is not currently registered in the securities industry in any capacity.

¶ 3 On the basis of the foregoing, the Notice of Hearing further alleged the Respondent had:

- (a) Between March 9, 2016 and October 20, 2020, misappropriated or failed to account for monies that he received from individuals, contrary to MFDA Rule 2.1.1.
- (b) Between March 9, 2016 and August 26, 2020, both orally and in writing misrepresented to individuals that he had invested their monies, contrary to MFDA Rule 2.1.1.
- (c) Between March 9, 2016 and October 20, 2020, engaged in outside activities without prior Member approval, contrary to Sun Life's policies and procedures and MFDA Rules 1.3.2, 2.1.1 and 1.1.2 (as it relates to MFDA Rule 2.5.1).
- (d) Commencing in approximately November 2020, failed to cooperate with an investigation by MFDA Staff into his conduct, contrary to section 22.1 of MFDA By-law No. 1.

Decision

¶ 4 The disciplinary hearing concerning these allegations commenced on July 11, 2023.

¶ 5 On September 22, 2023 the Hearing Panel ruled that the Respondent had engaged in the misconduct described in the Notice of Hearing.

¶ 6 On November 3, 2023, the parties concluded their respective sanction submissions. The Panel reserved its penalty decision.

¶ 7 After considering the character of the Respondent's misconduct, the Panel has determined that the appropriate outcome to this case would be to order:

- (a) A permanent prohibition.
- (b) A total fine of \$310,000.
- (c) Costs of \$30,000.

¶ 8 The reasons for the Panel's decision are explained below.

Procedural issues

¶ 9 The material facts in this case are straightforward and do not raise any evidentiary or interpretative issues. Nonetheless, the proceedings were unusually and unnecessarily drawn out. This was due to the Respondent's repeated attempts to obtain an adjournment.

¶ 10 In each instance the principal ground relied upon by the Respondent was the same: a claim that his mental health rendered him unfit to represent himself. To support this assertion of fact, the Respondent chose to enter medical information into the evidentiary record and made emphatic references to it throughout the hearing. The Respondent never asked that any part of this information be kept private. Asserting medical disability was central to how the Respondent chose to make use of his opportunity to be heard. Accordingly, these reasons must review and discuss personal information that the Panel in other circumstances would have endeavoured to keep confidential.

First appearance

¶ 11 On January 17, 2023, the first appearance in this matter took place before the Chair acting on behalf of the Hearing Panel further to MFDA Rule 7.2.4(b).

¶ 12 The Respondent had not yet filed a Reply, despite the requirement in MFDA Rule 8.1 that he do so within 20 days of having been served with the Notice of Hearing.

¶ 13 With the agreement of the parties the Chair ordered:

- (a) the Respondent to file a Reply on or before February 6, 2023;
- (b) deadlines for the parties to exchange witness statements and document disclosure; and

(c) the hearing to take place by videoconference from July 11 to 13, 2023.

¶ 14 The Respondent subsequently requested, and Staff granted, an extension of the Reply filing deadline. On February 14, 2023, the Respondent finally filed a Reply denying the allegations set out in the Notice of Hearing some three months before.

First adjournment application

¶ 15 On June 26, 2023, the Respondent filed a Notice of Motion seeking that:

- (a) The hearing be adjourned for approximately three months to a time after October 10, 2023.
- (b) The deadlines for the exchange of witness statements and document disclosure be amended accordingly.
- (c) The hearing be held in person.

¶ 16 The grounds claimed for the adjournment were that:

- (a) The Respondent lacked the proper mental focus to mount a defence due to having contracted COVID-19 around the end of April 2023.
- (b) The Respondent currently lacked the financial resources to hire legal counsel.
- (c) A delay of three months would not adversely impact the hearing.
- (d) At the first appearance the Respondent had agreed to the July hearing dates without an adequate understanding of the MFDA's Rules and Bylaws.
- (e) The Respondent was suffering from depression.
- (f) The poor air quality expected from summer wildfires would exacerbate the Respondent's continuing respiratory problems caused by COVID-19.

¶ 17 In the Notice of Motion, the Respondent stated that he would rely on the following evidence at the hearing of the motion:

- (a) A diagnosis that established the Respondent suffered from COVID-19 related disabilities that were exacerbated by immunosuppressive medication taken to treat Shrunken Lung Syndrome.
- (b) Proof that he lacked the financial resources to hire legal counsel.
- (c) The findings of any mental health professional of the Panel's choosing.

¶ 18 On July 7, 2023, the Chair heard the application by videoconference on the Panel's behalf.

¶ 19 The Respondent's submissions chiefly consisted of assertions about his current psychological condition.

- (a) He argued that the adjournment was necessary because his mental state made it impossible for him to mount a proper defence. The Respondent claimed he had been under such emotional stress that he had experienced suicidal ideation.
- (b) The Respondent also complained that Mr. Forbes, the Enforcement Counsel leading the prosecution of Staff's case, had declined to accept his offer to hold a pre-hearing conference to discuss settlement. The Chair cautioned the Respondent that in the hearing context it was improper to canvas potential settlement or to refer to the content of past settlement discussions.

¶ 20 The Respondent did not testify in support of his application. The evidence he submitted was limited to the following documents:

- (a) A two page, single-spaced typed document prepared by him at some unknown time that purported to explain certain aspects of his employment by Sun Life.
- (b) Copies of three emails that related to a civil suit arising from the events alleged in the Notice of Hearing.

(c) A note from a physician that stated the Respondent had prolonged COVID-19 symptoms as a result of being treated with immunosuppressants for a pre-existing lung condition.

¶ 21 In response, Staff observed that the evidence relied upon by the Respondent altogether failed to establish any of the grounds cited for the requested adjournment in the originating Notice of Motion.

(a) Taken at face value, the physician's note established the Respondent had respiratory problems. It said nothing about how those problems might affect his mental focus or otherwise interfere with his ability to mount a defence.

(b) The rest of the Respondent's evidence did not even have that bare potential relevance to the application.

(c) The Respondent had not provided an opinion from a qualified mental health professional that proceeding with the hearing as scheduled would be problematic for him psychologically, despite having had ample opportunity to obtain one during the 37 days between the date of the Notice's filing and the hearing of the application.

(d) The Respondent had also not explained how granting an adjournment of 90 days would serve to remedy his alleged psychological challenges. In Staff's submission, it would be unwise to rely on any of the Respondent's representations given his history of repeatedly failing to fulfill commitments made to the MFDA investigation.

(e) The delay caused by an adjournment at this late juncture would be contrary to the public's interest in seeing that serious allegations are resolved expeditiously. It would aggravate the delays already imposed by the Respondent's failure to cooperate during the investigation.

¶ 22 In support of this last point Staff submitted into evidence an affidavit from John Gallimore, an investigations manager at CIRO, dated July 6, 2023 (Gallimore Affidavit), which established that:

(a) Between November 4, 2020 and November 11, 2022, Staff wrote to the Respondent on 20 separate occasions asking that he provide information and documents.

(b) The Respondent replied with a total of 48 separate pieces of correspondence in which he repeatedly promised to accommodate the investigation.

(c) Among that correspondence were 18 separate requests for deadline extensions or adjournments the Respondent made between November 4, 2020 and May 23, 2023 that included promises to provide information or documents by a certain date.

(d) On three separate occasions, the Respondent agreed to meet with Staff to be interviewed. In each instance, he attended the scheduled meeting but entirely failed to answer Staff's questions.

(e) The Respondent never fulfilled any of his promises to provide Staff with the information or documents it had requested.

¶ 23 To the extent the evidence tendered by the Respondent was relevant to his adjournment application, it merely established that he had respiratory health problems. It did not speak to the extent — or even whether — his respiratory issues might interfere with the Respondent's ability to proceed with the hearing as scheduled. More critically, although the Respondent claimed his psychological difficulties were the key reason an adjournment ought to be granted, he did not tender any evidence to establish their existence.

¶ 24 The Respondent also did not challenge the material particulars of the Gallimore Affidavit, which established that during the investigation the Respondent had repeatedly and consistently evaded his obligation to be forthright when confronted by the MFDA's disciplinary process.

¶ 25 The decisions and rulings of hearing panels must be reasonable. A party who applies to a hearing panel for any form of relief must therefore support the request with a factual basis that allows the panel to conclude the relief is necessary to ensure procedural fairness or is otherwise reasonable in the circumstances. The evidence tendered by the Respondent did not meet this threshold.

¶ 26 The allegations in the Notice of Hearing were profoundly serious. They amounted to a claim the Respondent had committed a fraud. It is a truism that the public interest requires allegations of grave misconduct to be addressed and resolved as expeditiously as possible.

¶ 27 On behalf of the Panel, the Chair explained to the Respondent that an adjournment on the eve of the hearing could not be granted simply because he claimed necessity. The allegations against him were serious and the requested orders needed to be justified by evidence that established their appropriateness, which the Respondent had not done. For that reason his adjournment application was denied.

Second adjournment application

¶ 28 July 11, 2023 was the first day scheduled for the hearing of evidence. It proceeded in an unusual fashion. By email, the Respondent:

- (a) Filed another Notice of Motion.
- (b) Advised Staff that he was on his way to a hospital because he was purportedly in psychological crisis.

¶ 29 The Notice of Motion asked that:

- (a) The hearing be adjourned to an unspecified date in the future.
- (b) The Chair recuse himself from the Panel.
- (c) A pre-hearing conference be held.

¶ 30 The grounds cited by the Respondent for why these requests should be granted were legally unsound, because:

(a) The Respondent incorrectly asserted it was improper for the Chair to have heard and ruled on his July 7, 2023 adjournment application in the absence of the other two Panel members. MFDA Rule 7.2.4(b) expressly authorizes chairs to act on the behalf of their hearing panels “for the purpose of hearing and determining... any procedural matter... including, without limitation, granting adjournments, setting dates for hearings, and making any other orders or directions”.

(b) The Respondent incorrectly characterized the July 7, 2023 appearance as a pre-hearing conference and on that basis claimed it would be improper for the Chair to continue sitting on the Panel. The Notice of Motion by which the Respondent initiated the July 7, 2023 appearance did not request a pre-hearing conference and none was ordered or took place. The Respondent had applied for and was given an opportunity to ask for an adjournment and related relief. As already noted, hearing panel chairs are authorized to hear and determine any procedural matter, including adjournment applications.

(c) The remaining reasons cited by the Respondent were a litany of insinuations and complaints that argued the ruling made on the Panel’s behalf by the Chair ought to be overturned.

¶ 31 Under Rule 1.2 of the MFDA Rules of Procedure, the definition of “hearing panel” includes a chair presiding alone over a motion or application. The ruling the Chair made on July 7, 2023 was therefore a ruling of the Panel itself. In asking that it be reversed, the Respondent was asking the Panel to review its own ruling. This was legally misconceived. Under the securities legislation of this province, the remedy for a respondent who believes a hearing panel ruling was wrong is to apply after the hearing has concluded to the British Columbia Securities Commission for a review of the panel’s final decision.

¶ 32 The Respondent attended the proceedings by telephone and represented that he was calling from the premises of a hospital.

¶ 33 The Panel reminded the Respondent that the Panel could only operate on the basis of the evidence before it. His representations that he was presently trying to get treatment or admitted to a hospital were not enough, especially given the uncontroverted evidence in the record concerning the Respondent’s pattern of delay during the MFDA investigation.

¶ 34 The Panel informed the Respondent that after considering his Notice of Motion it had decided not to hear his application because it was entirely groundless and had no hope of success.

¶ 35 After this ruling, Staff opened its case and brought forward two of its witnesses to testify. The first witness was SL, who was followed by a Canada Life senior investigation specialist. The Respondent cross-examined both witnesses and participated in the hearing until the end of that day's proceedings.

Third adjournment application

¶ 36 On July 12, 2023, the Respondent filed his third Notice of Motion seeking an adjournment.

¶ 37 The only ground cited was that the adjournment was necessary because his current mental state rendered him incapable of representing himself. Unlike the second adjournment application of the day before, the Respondent was not attempting to appeal a previous ruling. This time he was initiating a new application that relied on new and relevant evidence in the form of a psychiatrist's letter dated July 11, 2023, which Staff verified as authentic.

¶ 38 After the first hearing day concluded, the Respondent had been examined by a psychiatrist at Peace Arch Hospital. The letter, which was emailed to Staff at the Respondent's request, summarized the psychiatrist's preliminary assessment of the Respondent and addressed the question of his capacity to participate in the hearing. The Panel accepted the letter as providing a proper basis for considering the Respondent's adjournment request.

¶ 39 The letter stated the Respondent:

- (a) suffered from depression, anxiety, and related behavioural symptoms;
- (b) had been prescribed antidepressant, anti-anxiety, and insomnia medications and referred for psychiatric follow up;
- (c) was "not capable at this time of representing himself at the insurance investigation and his severe anxiety has resulted in ongoing pathological avoidance"; and
- (d) had reported feeling so overwhelmed he was contemplating suicide "as he did not feel capable of managing the increased stress of the investigation and trial".

¶ 40 Referring to the "trial", the psychiatrist in the letter said she "would be concerned if it were to proceed tomorrow that it would destabilize him further."

¶ 41 Staff opposed the adjournment by reiterating that the Respondent's history of evasion and delay during the investigation warranted scepticism about his claim of psychological disability at what was now the last stage of the disciplinary process. In addition:

- (a) Staff did not deny the Respondent found the hearing experience stressful. However, the psychiatrist's assessment was one thing and the opinion expressed about the Respondent's supposed incapacity to participate in the hearing was quite another. Unlike the psychiatrist, the Panel had the benefit of having observed the Respondent in the hearing the day before. Whatever his psychological discomfort, the record showed the Respondent was able to make motions, argue them, and ask witnesses questions that referenced the evidence.
- (b) An adjournment would be prejudicial to Staff's ability to prosecute its case, and the public's interest in having serious allegations resolved, because the hearing was Enforcement Counsel's last case before his imminent departure from CIRO.
- (c) Staff submitted that *TeamMax Investment Corporation*, a 2023 MFDA decision with similar facts, provided useful guidance. The respondent in that case had also repeatedly made applications seeking an adjournment on the grounds of mental health challenges. The hearing panel denied the applications, in part, by referencing the legal doctrine of *res judicata*.

TeamMax Investment Corporation (Re), MFDA File No. 202127, February 27, 2023.

¶ 42 At the risk of oversimplification, the doctrine of *res judicata* is the legal rule that prohibits parties from

re-litigating claims that have been already decided. The purpose of the rule is to prevent the waste of judicial resources and the confusion that would otherwise arise if multiple judgments about the same matter were permitted. The doctrine only applies, however, if the relevant facts and legal issues are the same in both cases.

¶ 43 The Panel did not agree it was appropriate to apply *res judicata*-like reasoning to the Respondent's third adjournment application.

(a) The rules of evidence do not apply to CIRO proceedings. In a contested hearing a hearing panel must still determine the relevance, reliability, and credibility of the evidence, but legal doctrines do not operate as binding exclusionary rules as they do in judicial proceedings. Rather, the determinative principles are natural justice and fairness, whose application is always contextual.

(b) Having been presented with new evidence relevant to the Respondent's capacity to defend himself, in the interests of fairness the Panel was obligated to consider it.

¶ 44 The psychiatrist's letter established two things:

(a) One was that the Respondent suffered from depression and anxiety that, among other things, manifested in a behavioural pattern of "ongoing pathological avoidance".

(b) The other was that the psychiatrist had a mistaken understanding of the Respondent's situation. The letter disclosed the psychiatrist believed he was the subject of an insurance investigation and trial. In reality, the Respondent was in the middle of a securities regulatory hearing defending himself against an allegation that he had defrauded a retired couple.

¶ 45 The Panel had no reason to dispute the psychiatrist's assessment but was not prepared to accept her opinion that the Respondent was not capable of representing himself.

(a) The psychiatrist's letter did not explain how the Respondent's psychological difficulties might interfere with his ability to defend himself. Instead, it expressed a worry that continuing with the proceeding might lead to the Respondent's further destabilization.

(b) It was not possible to infer from the letter alone whether the opinion expressed in it was based on anything more than a professional concern that continuing with the hearing *might* be problematic for the Respondent. What was clear, however, was that the opinion was predicated on a muddled understanding of the source of the Respondent's stress.

(c) The Respondent was not in a trial. There is a considerable difference between a courtroom and a CIRO hearing. A trial is governed by strict formalities and procedures, and the degree to which a person without legal counsel can be accommodated is sharply limited. By contrast, unrepresented respondents in a CIRO hearing are provided with considerable latitude. Indeed, by this juncture the Panel had already tolerated a spectrum of inappropriate and disruptive behaviours from the Respondent that would have been received with considerably less indulgence in a courtroom. The Respondent repeatedly:

- (i) interrupted and talked over other speakers, despite being told time and again to refrain from doing so;
- (ii) monologued about his emotional state;
- (iii) showed annoyance and insinuated bad faith when he did not get his own way;
- (iv) attempted to give evidence while making submissions, despite being told repeatedly that doing so was improper; and
- (v) ignored repeated direction to conduct himself in a manner appropriate to the proceedings.

¶ 46 Moreover, the Panel was aware of material facts unavailable to the psychiatrist.

(a) The Gallimore Affidavit had established that during the MFDA's investigation the Respondent had demonstrated a consistent pattern of telling Staff whatever it took to put off meeting his obligation to provide information.

- (b) From the way the Respondent had conducted himself in the hearing so far, it was clear he was capable of understanding and participating in the proceedings sufficiently to mount an active defence.
- (i) The Respondent had proved himself capable of advancing and speaking to adjournment applications, and then trying again when they were denied. In doing so, he put forward arguments that demonstrated he was able to identify and interpret various relevant MFDA Rules and requirements.
 - (ii) When cross-examining SL and the Canada Life investigator the day before, the Respondent had asked purposeful questions that showed he was capable of following and understanding Staff's evidence.
 - (iii) In replying to Staff's submissions opposing his application, the Respondent had competently argued that *TeamMax, supra*, should not be followed because its facts were distinguishable from those in his case.
- (c) As will be discussed in greater detail later, SL's testimony the day before had *prima facie* established the Respondent had lied and used forgeries to misappropriate money from CL and SL. Among other things, she testified that on August 26, 2020 the Respondent had confessed his wrongdoing to CL and SL.
- (d) The suicidal ideation reported in the psychiatrist's letter fit a pattern of the Respondent previously making similar statements to serve his own purposes.
- (i) At the August 26, 2020 meeting, the Respondent had proposed to compensate CL and SL for their losses by ending his life so that they could collect on his insurance policy — provided they did not report him to the authorities.
 - (ii) Central to the Respondent's first adjournment application had been a claim of suicidal ideation
 - (iii) After the Panel refused to hear his second adjournment application, the Respondent had become aggressive and repeatedly interrupted the Chair's explanation of the Panel's ruling. When directed to cease his interruptions and respect the need for proper order, the Respondent instead became even more argumentative. He claimed he had intended to commit suicide that day over videoconference during the hearing, so that the Panel could see for itself the consequences of denying him an adjournment. However, for the time being thoughts of his daughter had dissuaded him because, he informed the Panel, suicide was not a matter to be taken lightly. The tenor of these and other remarks in the same vein was manipulative: if the Panel refused to grant the Respondent the adjournment he was demanding, then he would effectively be left with no choice but to harm himself.

¶ 47 As before, the actual evidence before the Panel was insufficient to establish the plausibility of the Respondent's assertions. Accordingly, the Panel denied the Respondent's third adjournment application.

¶ 48 The hearing continued with Staff calling and examining its next witness, a representative from Sun Life.

- (a) The Respondent commenced his cross-examination of the witness.
- (b) He did not attempt to solicit answers that were relevant to the allegations of misconduct in the Notice of Hearing. Instead, the Respondent's questions were focused on establishing a narrative about his relationship with Sun Life and how he had been treated by its management.
- (c) The Respondent was unable to complete his cross-examination of the witness. This was because he had asked the witness to produce certain voice recordings relating to his employment, which she could not do without first obtaining permission from Sun Life. As a result, the cross-examination of the witness was deferred to the next day. This was the last scheduled hearing date.

Fourth adjournment application

¶ 49 When the Panel's refusal of his third adjournment request had been explained to the Respondent, the Chair observed the psychiatrist's letter had not indicated the Respondent was at risk of self-harm and that after his examination at Peace Arch Hospital he had not been held for observation for his own safety.

¶ 50 It was perhaps not a coincidence, then, that on July 13, 2023 the Panel learned from Staff that the Respondent had emailed to report he would not be attending the hearing because he was presently detained at Peace Arch Hospital further to an order issued under provincial mental health legislation. The Panel interpreted this communication as a renewal of the Respondent's request for an adjournment.

¶ 51 At the Panel's request, Staff telephoned Peace Arch Hospital to determine whether the Respondent had indeed been held for psychiatric evaluation. Emergency room personnel orally confirmed the Respondent had been detained on July 13, 2023, and subsequently faxed a copy of the relevant orders to Staff.

¶ 52 The Panel did not question that the Respondent had psychological challenges. On the contrary, that he was preliminarily assessed as demonstrating "ongoing pathological avoidance" was entirely consistent with how the Respondent had responded to the disciplinary process to date.

- (a) His tactic of making repeated adjournment applications was of a piece with how time and again he had made and failed to honour commitments to cooperate with Staff's investigation.
- (b) The Respondent had shown himself to be extraordinarily single-minded in his determination to put off the hearing and, therefore, the resolution of the very serious allegations against him.
- (c) Equally, it was clear from the litany of broken promises disclosed in the Gallimore Affidavit and the outright lying established by SL's testimony that it would be imprudent to take the Respondent's representations at face value.

¶ 53 Common sense dictated that the Panel scrutinize the Respondent's pleas for relief with particular care. With the Peace Arch Hospital detention occurring on the last scheduled day of the hearing, the possibility it had been orchestrated could not be discounted.

- (a) The detention had occurred only hours after the evidentiary significance of a mental health hold had been pointed out to the Respondent.
- (b) The orders indicated the Respondent had not been brought to the hospital under police custody. Rather, his detention occurred only after he had chosen to attend Peace Arch Hospital under his own volition.
- (c) The detention had been ordered less than 48 hours after the psychiatrist who had examined him on his first visit had declined to do so.
- (d) The detention orders were signed by two different physicians, neither of whom was the psychiatrist who had evaluated the Respondent on July 11, 2023.

¶ 54 These factors warranted asking searching questions into exactly how the detention had come about, but given the circumstances there was no possibility of obtaining timely answers. The Panel was confronted with the need to make an immediate decision about whether to continue with the hearing that day, and the essential facts were these: the Respondent was not present and it had been definitively confirmed that even if he had wished to participate in the hearing he presently was not free to do so.

¶ 55 The Panel ordered an adjournment to July 26, 2023 for an interim appearance to schedule dates for the continuation of the hearing.

¶ 56 On that date:

- (a) The Respondent attended by telephone.
- (b) Ms. McCarthy confirmed she had now assumed conduct of Staff's case as Enforcement Counsel.
- (c) With the agreement of the parties, the Panel ordered that the hearing resume on September 21 and 22, 2023.

Fifth adjournment application

¶ 57 On September 21, 2023, the Respondent failed to attend the hearing.

¶ 58 Apart from Staff and the Panel, the only other person attending the electronic hearing was a member of the public identified only by her first name.

¶ 59 Enforcement Counsel advised the Panel that about a week earlier, on September 15, 2023, the Respondent had told her that due to his continuing psychological distress he intended to make another adjournment application. He had not filed a Notice of Motion in the intervening period before the resumption of the hearing.

¶ 60 Staff tendered two items of correspondence. In the absence of evidence to the contrary, the Panel accepted them as authentic.

(a) One was a September 19, 2023 letter faxed to Enforcement Counsel from a physician. The author was not one of the doctors who had evaluated the Respondent at Peace Arch Hospital. Instead, it was from yet another physician, now the fifth doctor to become involved in the Respondent's ongoing attempt to put off the hearing. The material portion of the letter said simply this:

“Mr. Alvinder Singh Gill is facing mental health issues and he is unable to represent himself for the hearing panel. He is entitled and requests legal representation. He is requiring time to arrange for this.”

No diagnostic basis was provided to support the assertion the Respondent was unable to represent himself. As for the reference to his right to obtain legal representation, no physician or other outside expert is qualified to offer opinions on what a specific situation may or may not require in terms of procedural fairness. Determining what must be done to ensure natural justice goes to the heart of a hearing panel's jurisdiction, and when exercising that discretion a panel must rely on its own expertise and judgment.

(b) The other item was an email sent to Enforcement Counsel, who worked from CIRO's offices in Toronto, Ontario, from the Respondent's email address. The header indicated the email had been received at 3:16 am Eastern Daylight Time on the morning of September 21, 2023, which is to say it had been sent from British Columbia at 12:16 am Pacific Daylight Time. The email claimed that:

“Alvinder was taken in yesterday by the police to Surrey Memorial Hospital and is detained under the mental health act.”

¶ 61 Staff also tendered a CIRO investigator to testify regarding inquiries he had made that morning to confirm the Respondent's whereabouts. The investigator stated he had spoken to personnel at Surrey Memorial Hospital who confirmed the Respondent had been brought to the hospital by the police, but that he was still waiting to be seen by a psychiatrist in an individualized area where he was not able to use his telephone.

¶ 62 Staff submitted that given the Respondent's notice to Enforcement Counsel that he intended to seek an adjournment, the letter and email should be read together as constituting a request for one. However, Staff did not concede the request satisfied the test of necessity for an adjournment.

¶ 63 The Panel agreed it was reasonable to interpret the most recent communications from the Respondent's quarter, such as they were, as amounting to another adjournment request. Whether it should be granted was a separate question.

¶ 64 The Panel was once again presented with an ambiguous situation that compelled it to make an immediate ruling on the basis of limited information.

(a) The only confirmed facts the Panel could rely upon were that:

(i) The Respondent had agreed to September 21, 2023 as the date for the resumption of the hearing and his participation in it, but had failed to attend the proceedings after disclosing an intention to ask for an adjournment.

- (ii) An email sent from the Respondent's email address at 12:16 am on September 21, 2023 made a claim that he had been detained under mental health legislation that had not been verified. At the commencement of proceedings that day, the Respondent was still awaiting a psychiatric evaluation that might or might not result in his detention.
- (iii) Staff was not able to communicate with the Respondent.
- (b) From the beginning of the hearing the Respondent had at every opportunity invoked psychological distress to argue it was essential that the hearing be deferred, but had consistently failed to provide the evidence necessary to justify doing so.
- (c) At various times during both the MFDA investigation and the hearing the Respondent had also insisted the proceedings should be delayed in order to give him time to hire a lawyer. However, nothing in the available evidence provided a basis for believing he had ever made a serious attempt to retain legal counsel.
- (d) The sole purpose of the July 26, 2023 interim appearance had been to set dates for the continuation of the hearing. At that time, the Respondent had said nothing at all about his fitness to represent himself and failed to mention any other reason why the proceedings might need to be deferred.
- (e) The Panel had no information about the circumstances that had led the police to take the Respondent to Surrey Memorial Hospital.
- (f) To all appearances the Respondent did not have continuity of care. All of the diagnostic information tendered into evidence so far had been preliminary in nature. None had provided an actual assessment of his objective capacity to mount a defence within the framework of a CIRO hearing.
- (g) Based on the evidentiary record, the Respondent's representations could not be assumed to be either credible or reliable unless corroborated by cogent evidence.

¶ 65 Deciding an adjournment request in a disciplinary hearing involves balancing competing values. The public's interest in the expeditious disposition of misconduct allegations must always be weighed against the needs and rights of the litigants. In every instance, the paramount consideration is to ensure the respondent is given a fair opportunity to answer the allegations against them. Whether or not that requires granting an adjournment depends on the specific circumstances of the request.

- (a) The allegations of misconduct against the Respondent were serious, and Staff's case was both strong and straightforward.
- (b) With the Respondent's agreement, three days had originally been scheduled for the hearing. This would have been more than enough time for the Respondent to answer the case against him, had he not chosen to squander much of it by mounting a sequence of hasty and ill-considered adjournment applications. Far from demonstrating any intention to make use of the opportunity he had been given to respond to the allegations, the Respondent had shown he was determined to avoid the hearing.
- (c) The Panel was now dealing with the Respondent's fifth adjournment application. In a less serious case with less of a history of foot dragging — and where the record provoked fewer reservations about the motivation behind the request — uncertainty over a respondent's ability to attend the hearing might by itself be sufficient to justify an adjournment. In the Respondent's case, however, the reliability of his representations was a live issue.
- (d) The evidence already entered into the record included SL's testimony that the Respondent had confessed to CL and SL that he had misappropriated their monies.

¶ 66 The morning and early afternoon of the hearing on September 21, 2023 were taken up by efforts to ascertain the details of the Respondent's situation and the Panel's consideration of Staff's findings. Under MFDA Rules 13.5 and 7.3, a panel has jurisdiction to proceed with a hearing when a respondent who has received proper notice fails to attend. The Panel concluded the public interest would be best served by

continuing the proceedings in the Respondent's absence and so ordered.

¶ 67 Shortly thereafter, Staff informed the Panel that it had been able to confirm that the Respondent had been admitted to Surrey Memorial Hospital, but was expected to be discharged the following day.

¶ 68 This was a material development. It raised the question of whether the public's interest in having the allegations against the Respondent resolved was such that the hearing ought to continue in the Respondent's absence even after he had been admitted to hospital.

- (a) The Panel remained unaware of the circumstances that had led to the police escorting the Respondent to Surrey Memorial Hospital.
- (b) The Panel did not know whether the Respondent's admission to the hospital signified that he had been detained under mental health legislation or, alternatively, had been admitted voluntarily. That the latter was plausible was supported by the fact he was expected to be discharged the next day.
- (c) Nothing about the day's developments served to change the Panel's assessment that the Respondent had proved himself capable of representing himself. Ironically, this was largely due to the Panel having seen the Respondent in action as he determinedly sought to obtain an adjournment on the grounds of incapacity.
- (d) The interest of the public and the securities industry in CIRO hearings is not limited to the timely resolution of outstanding allegations of misconduct. It also includes a strong interest in the preservation of the credibility of the disciplinary process itself.
- (e) Staff's evidence had *prima facie* established that the Respondent had perpetrated and maintained a fraud against a retired couple for a period of ten years through a combination of outright lies and the use of forged account statements.

¶ 69 CIRO's essential purposes as a regulator are to protect the public and preserve the integrity of the securities industry. Although the Respondent had been admitted to Surrey Memorial Hospital, the status of his ability to access and participate in the hearing — or to communicate with CIRO — remained obscure. The Respondent's situation was one of continuing ambiguity. Taking into account the gravity of the allegations against him and the entire history of how the Respondent had so far elected to respond to the disciplinary process, the Panel concluded it would be inconsistent with CIRO's regulatory role to impose further delay on the hearing.

¶ 70 The ruling that the hearing should proceed in the Respondent's absence remained in place.

Hearing without Respondent

¶ 71 The hearing of evidence resumed in the Respondent's absence.

- (a) Following the July 13, 2023 adjournment, the Sun Life witness had remained under cross-examination. The Panel directed that the witness was still under oath, ought not to discuss her evidence with any person, and that Staff should keep the witness on stand-by in the event the Respondent chose to subsequently participate in the hearing.
- (b) Enforcement Counsel then called and examined Staff's last witness. This was the CIRO investigator who had already previously provided limited testimony about his inquiries into the Respondent's situation at Surrey Memorial Hospital. He now testified to review the facts Staff had uncovered relating to the Respondent's alleged misconduct. At the conclusion of his testimony, the Panel directed that the investigator remain available to resume his testimony in case the Respondent returned to the hearing and wished to cross-examine him.
- (c) The Panel directed Staff to use its best efforts to inform the Respondent that the hearing had continued in his absence and that Staff's case would remain open pending clarification of whether the Respondent would resume participating in the hearing the following day.

¶ 72 On September 22, 2023, the hearing resumed. The Respondent again failed to attend.

¶ 73 Enforcement Counsel advised the Panel that:

- (a) Staff had the previous evening had contacted Surrey Memorial Hospital to leave a message for the Respondent that the hearing had continued in his absence and would resume the next day.
- (b) The CIRO investigator had telephoned the hospital earlier that morning and received confirmation that the Respondent had not yet been discharged.
- (c) Staff had received from the Respondent copies of:
 - (i) a blank form itemizing the rights of involuntary patients under mental health legislation;
 - (ii) a prescription;
 - (iii) a note handwritten by the Respondent granting permission to Surrey Memorial Hospital personnel to forward information relating to his transport to the hospital by the police; and
 - (iv) an email the Respondent had sent earlier that morning that stated a doctor would contact Staff later that day.

¶ 74 None of these items contained information that clarified whether the Respondent had been involuntarily detained or simply admitted to hospital on September 21, 2023.

¶ 75 In the absence of any communication from the Respondent on that point, the Panel discharged the two witnesses who had been awaiting cross-examination and directed Enforcement Counsel to proceed with Staff's closing submissions.

¶ 76 Those submissions were interrupted when a psychiatrist from Surrey Memorial Hospital called into the hearing at the Respondent's request.

- (a) The proceedings were briefly recessed to enable Enforcement Counsel to take the call.
- (b) She subsequently reported that the only relevant information the psychiatrist was prepared to provide was that the Respondent would soon be discharged from the hospital.
- (c) The psychiatrist said nothing one way or the other about whether the Respondent had been involuntarily detained.

¶ 77 Enforcement Counsel concluded Staff's submissions on liability.

¶ 78 The Panel ruled that the evidence tendered into the record had established each of the allegations set out in the Notice of Hearing, and adjourned the hearing of sanction submissions to September 29, 2023.

Sixth adjournment application

¶ 79 On September 29, 2023, the Respondent attended the hearing by telephone to speak to a Notice of Motion he had filed seeking an adjournment of 30 days.

¶ 80 At the outset of the proceedings, the Respondent informed the Panel he was also seeking leave to cross-examine the Sun Life witness and the CIRO investigator but that he would waive that part of his motion if permitted to testify.

¶ 81 The Notice of Motion largely consisted of accusations of bad treatment at the hands of the Panel, and amounted to an argument that the adjournment should be granted on two grounds.

- (a) One was the Respondent's claim the Panel had violated his right to be heard under section 20.1.5 of MFDA By-law No. 1, which provides that:

The Member or person summoned pursuant to Section 20.1 and the Corporation shall be entitled to appear and be heard at the hearing and shall be entitled to be represented by counsel or an agent and to call, examine and cross-examine witnesses and present evidence and submissions.

- (b) The other was the Respondent's usual claim that he was not fit to represent himself.

¶ 82 The Notice repeated the error of the Respondent's second adjournment application. Once again, he was

seeking to reverse a Panel ruling by appealing it to the Panel itself. In this instance, however, the Respondent wished to testify to support his motion.

¶ 83 In dealing with this latest application, the crucial consideration for the Panel was that the Respondent had returned to the hearing and was asking that the hearing of evidence be re-opened after the Panel had already ruled that the allegations in the Notice of Hearing had been proved. Although it was for the limited purpose of obtaining an adjournment, the Respondent was demonstrating an intention to avail himself of his opportunity to be heard.

¶ 84 As already mentioned, the public interest in expediting the disposition of misconduct allegations hearings must always be balanced against the need to ensure respondents are given a reasonable opportunity to defend themselves. In every instance, this requires taking into account the specific circumstances of the case.

¶ 85 To date, the Respondent had proved to be a source of considerable confusion and uncertainty at every stage of the hearing. However, he had also been unrepresented by legal counsel. It was conceivable that the Respondent's testimony could include new information that might require the Panel to not only reassess the adjournment question, but also the scope of its finding that he had engaged in the entirety of the misconduct alleged in the Notice of Hearing.

¶ 86 The Panel was prepared to receive from the Respondent whatever evidence and argument he wished to tender in his defence. On that basis, the Panel granted the Respondent leave to testify.

¶ 87 The Respondent testified that:

- (a) For over a decade, he had suffered from growing anxiety over his employment situation. He was now getting therapy, but had been experiencing suicidal ideation for the two years preceding the hearing and remained paralyzed by anxiety.
- (b) After being detained at Peace Arch Hospital on July 13, 2023 he remained in detention until July 21.
- (c) He had been told that if he was in distress and unable to contact his therapist, he should contact the Surrey Mental Health and Substance Use Urgent Care Response Centre.
 - (i) He did so on September 20, 2023, the day before the hearing was scheduled to resume.
 - (ii) The care centre responded to his representations by dispatching the police to his residence, who took him into custody and delivered him to Surrey Memorial Hospital.
 - (iii) After being seen by a psychiatrist the next day, he had been admitted to the hospital on September 21, 2023 and then discharged on September 22, 2023.
 - (iv) He had not been able to attend the hearing on either September 21 or 22, 2023 because he had been detained under mental health legislation.
- (d) His wife was suffering from a life threatening illness, had left their relationship, and would not support his attempts to hire a lawyer.
- (e) The member of the public who had attended to observe the hearing on September 21, 2023 was the Respondent's sister.

¶ 88 When the Respondent was cross-examined by Enforcement Counsel, he showed a clear understanding of the questions he was asked and provided responsive answers that demonstrated a good recollection of events.

¶ 89 In the course of his testimony, the Respondent tendered several items into evidence:

- (a) A prescription issued when he was released from Peace Arch Hospital, to establish that he was receiving medication for anxiety and depression.
- (b) A video clip of security camera footage that showed the police attending the entrance area of the Respondent's residence and taking him into custody.

(c) An audio recording of the Respondent's July 7, 2023 adjournment application he had apparently taken surreptitiously.

¶ 90 The Respondent did not submit the one piece of evidence that would have allowed the Panel to draw a definitive conclusion about his physical ability to participate in the hearing on September 21 and 22, 2023.

(a) When the Respondent was held at Peace Arch Hospital on July 13, 2023, the Respondent's adjournment request had been supported by copies of the relevant detention orders, which had been faxed to Staff that same day.

(b) Neither the Respondent nor anyone acting on his behalf had arranged for a similar order to be forwarded to Staff on September 21, 2023, the day Enforcement Counsel received the email claiming the Respondent had been detained at Surrey Memorial Hospital.

(c) The Respondent had likewise failed to tender such a document into evidence when he returned to the hearing on September 29, 2023.

¶ 91 Staff opposed the Respondent's adjournment request, arguing that he had shown himself more than able to represent himself in his attempts to forestall the hearing. As for his application to cross-examine the Sun Life witness and CIRO investigator, had it not been abandoned Staff would have opposed it because the Respondent had failed to provide proper notice.

¶ 92 The Respondent's motion was undeniably ill-founded. Not only had he failed to provide adequate notice, but more critically the Respondent had once again improperly framed his adjournment request as an appeal. These were not trivial considerations: the orderly disposition of allegations in a hearing very much depends on the parties observing CIRO's Rules of Procedure.

¶ 93 Be that as it may, in the interests of fairness the Panel had granted the Respondent leave to testify. It was therefore now incumbent on the Panel to assess the significance of his evidence.

(a) The thrust of the Respondent's testimony was to justify his absence on September 21 and 22, 2023 in the hope this would help him obtain the adjournment he was seeking.

(b) The video clip of the police attending his residence corroborated the Respondent's testimony about being taken into custody by them.

(c) Based on that event, it was reasonable to conclude on a balance of probabilities that the Respondent, in all likelihood, had been admitted to Surrey Memorial Hospital under a mental health detention order.

(d) This meant when the hearing had continued in his absence on September 21 and 22, 2023, the Respondent had truly been physically unable to participate in the hearing.

(e) The Panel, therefore, had to consider whether the Respondent's ability to answer the allegations against him had been materially disadvantaged by his enforced absence from the proceedings.

¶ 94 The answer was no. The Panel had not made any final orders against the Respondent. It had not yet even heard Staff's sanction submissions. The fact of the matter was that the hearing was not over, and the Panel had indicated it was prepared to receive evidence and argument from the Respondent. His opportunity to be heard remained undiminished. How he chose to make use of it, as ever, was up to him.

¶ 95 The question the Panel now had to answer, once again, was whether the Respondent had provided evidence that justified granting an adjournment. Again, the answer was no.

(a) His testimony only confirmed what the Panel already knew from its own experience, namely, that he was entirely focused on avoiding the hearing.

(b) To establish the sweeping assertion that he was incapable of representing himself in CIRO proceedings, the Respondent needed to provide a proper expert opinion from a qualified mental health professional. This had been made clear to the Respondent when his first adjournment application had been refused. For all the subsequent drama surrounding his continuing demand for an adjournment, the

Respondent had consistently failed to provide the necessary opinion. Instead, he had offered circumstantial evidence that was sufficient to confirm he had psychological challenges, but no more than that.

(c) When testifying on his own behalf and under cross examination, the Respondent demonstrated that he understood the case against him and was able to provide calibrated responses when questioned. As he had with his previous five attempts to put off the hearing, in advancing his sixth adjournment request the Respondent had once again confirmed he was capable of representing himself.

¶ 96 The Panel denied the Respondent's request for a 30-day adjournment.

¶ 97 Staff commenced its submissions on sanctions, but was unable to complete them in the remaining time available that day. The hearing was adjourned to November 3, 2023.

¶ 98 On November 3, 2023, the Respondent attended and participated in the proceedings. After Staff completed its sanction submissions, the Panel received the Respondent's submissions and reserved its decision on penalty.

II. PENALTY

General principles

¶ 99 Penalties in CIRO enforcement proceedings are justifiable to the extent that they serve to protect the investing public from future harm. They must be forward looking, in the sense that they should be preventative in orientation, not retrospective or punitive.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, at paras. 59, 68.

¶ 100 In this regard, general deterrence is the central consideration:

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... and the circumstances of the person charged [.]

Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672 at para. 61.

¶ 101 The weight to be given general deterrence in any given case, therefore, must always be based on a thorough assessment of the character of the misconduct. Moreover, to be reasonable a penalty in the regulatory context must be supported by a rational analysis that establishes the penalty as proportional to the misconduct.

Cartaway, supra, at para. 64.

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at paras. 14, 85.

¶ 102 Previous hearing panel decisions have consistently identified certain key factors as relevant to the determination of sanctions. These are summarized in the CIRO Sanction Guidelines issued on February 1, 2024 (reproducing the same guidance formerly provided by the MFDA Sanction Guidelines) to assist hearing panels in their penalty deliberations. The factors especially relevant to this case are that:

(a) Effective specific and general deterrence is crucial to preventing inappropriate conduct and ensuring public confidence in the mutual fund industry and the fairness of the capital market.

(b) Public confidence requires that sanctions accurately reflect the mitigating and aggravating factors disclosed by the facts.

(c) Proper weight should be given to the relative seriousness of the proven misconduct. Distinctions should be drawn between negligent and deliberately deceptive conduct, and between isolated and repeated incidents.

(d) A hearing panel should consider the degree to which a respondent has accepted responsibility

for their misconduct. Attempts to frustrate, delay or undermine an investigation or hearing, including by concealing or intentionally providing misleading information, should be considered an aggravating factor.

(e) Sanctions should reflect whether or not the misconduct resulted in the respondent receiving benefits or investors sustaining harm.

Material facts

¶ 103 To establish its case, Staff principally relied on affidavit testimony. In addition to the Gallimore Affidavit, it entered into evidence the affidavit testimony of the previously mentioned CIRO investigator, a witness from Canada Life, a witness from Sun Life and SL.

¶ 104 All the witnesses except John Gallimore testified in person to review and confirm their affidavit evidence. By themselves, the Gallimore Affidavit and SL's testimony were sufficient to establish the material particulars alleged in the Notice of Hearing, with the testimony of the other witnesses serving to corroborate that core evidence.

¶ 105 The Respondent never attempted to dispute Staff's case.

(a) When cross-examining Staff's witnesses, the Respondent made no effort to contradict the testimony Staff had elicited from them.

(b) In his own testimony, the Respondent likewise declined to contradict Staff's case. Moreover, at no time during the hearing did he attempt to tender evidence that would have served to raise doubts about the allegations against him.

(c) Instead, to the extent he was interested in marshalling any facts at all in his defense, the Respondent had largely devoted his energies to attempting to establish that DL and SL had been unreasonable in settlement discussions (notwithstanding that he had eventually reached agreement with them) and that Sun Life's workplace environment had been unsupportive.

¶ 106 The evidence against the Respondent was overwhelming. In the case of SL's testimony, it was devastating.

(a) SL's testimony had principally consisted of reviewing and affirming a July 7, 2023 affidavit Staff had entered into the record.

(b) Her evidence confirmed each of the allegations in the Notice of Hearing that related to the Respondent's dealings with CL and SL.

(c) SL's testimony also established that:

(i) On April 16, 2018, the Respondent had transferred \$71,638.02 to CL and SL at their request after he had represented to them that part of the Purported Investment had matured.

(ii) On August 26, 2020, the Respondent had attended CL and SL's residence and admitted the Purported Investment did not exist, the account statements he had sent CL and SL were false, and his promises to repay them had also been false. He also claimed that reporting him to the police or a regulatory organization would result in CL and SL getting none of their money back because none would be left over after he was fined.

(iii) Immediately after the meeting, CL and SL filed complaints with the Royal Canadian Mounted Police and Canada Life. CL and SL subsequently also filed a complaint with Sun Life. They have not received any compensation from either Canada Life or Sun Life.

(iv) On September 25, 2020, CL and SL filed a Notice of Civil Claim against the Respondent in the Supreme Court of British Columbia seeking damages for civil fraud. The material facts upon which the claim was founded were the same as the facts set out in the Notice of Hearing alleging the Respondent had misappropriated monies belonging to CL and SL.

(v) On November 4, 2020, CL and SL entered into an agreement with the Respondent under

which he promised to compensate CL and SL for their losses by either paying them: \$445,000 (representing a combined return of outstanding capital and payment of foregone earnings) by December 31, 2020; or, alternatively, \$450,000 (which included an additional \$5,000 in respect of foregone earnings) by January 31, 2021.

- (vi) Further to this agreement, the Respondent provided CL and SL's legal counsel with a signed Consent Judgment in the amount of \$450,000 to be registered against him in the event he failed to compensate CL and SL as he had promised.
 - (vii) The Respondent failed to pay. On June 9, 2021, the Consent Judgment was registered against him in the Supreme Court of British Columbia.
 - (viii) The Respondent has failed to make any payment towards the \$450,000 he owes CL and SL. As at the date of SL's testimony, the Respondent's fraud had imposed a net financial loss on CL and SL of \$258,486.98.
- (d) The Respondent's cross-examination of SL failed to raise any doubts whatsoever about either the credibility or reliability of her testimony. He did not attempt to impeach her evidence that he had confessed to the fraud when she and DL had met him on August 26, 2020.
- (e) SL's affidavit included a copy of the Notice of Claim that she and DL had filed against the Respondent alleging civil fraud, and a copy of the Consent Judgment registered against him on June 9, 2021 in the Supreme Court of British Columbia. Arguably, Staff could have established the entire substance of its misrepresentation and misappropriation allegations by relying on those two items alone.

Submissions

¶ 107 MFDA Rule 2.1.1 requires Approved Persons to observe high ethical standards and, in particular, to refrain from business conduct unbecoming or detrimental to the public interest.

¶ 108 The Notice of Hearing alleged the Respondent's misconduct was part of an ongoing scheme that began after his first period registration with Sun Life and had continued into his second period of employment with the Member, but specifically charged him with only the portion of the misconduct that occurred during his second registration.

¶ 109 In Staff's submission, the determination of sanctions in this case should be based on a purposive interpretation of MFDA Rule 2.1.1 that took into account the full extent of the Respondent's misconduct from beginning to end.

¶ 110 There was nothing controversial about this proposition. When a portion of an Approved Person's misconduct has occurred during a period when they were not registered, it is typical for a hearing panel to take into account the full extent of the misconduct and the harm caused by it.

Brauns (Re) [2014], MFDA File No. 201203, February 4, 2014, at paras. 59 and 84.

Crackower (Re) [2005], MFDA File No. 200506, July 20, 2005 at pp. 7 and 9.

Brown-John (Re) [2005], MFDA File No. 200502, June 27, 2005 at p. 4.

Andersen (Re) [2005], MFDA File No. 200508, November 23, 2005 at pp. 2 and 4.

¶ 111 On behalf of Staff, Enforcement Counsel reviewed the sanction outcomes in a large number of cases where the misconduct was more or less comparable to the Respondent's misconduct or elements of it. She also submitted a bill of costs that established approximately \$48,000 of Staff time had been expended on the investigation and hearing, exclusive of office expenses and time expended on case assessment and internal meetings. On the basis of this information, Staff submitted that it would be appropriate to order:

- (a) A permanent prohibition.
- (b) A total fine of not less than \$175,000, representing penalties of:

- (i) \$100,000 for defrauding DL and S;
 - (ii) \$25,000 for engaging in unauthorized outside activity; and
 - (iii) \$50,000 for failing to cooperate with the investigation.
- (c) Costs of \$30,000.

¶ 112 For his part, the Respondent provided written submissions on sanction in which he placed heavy emphasis on his mental health issues as a mitigating factor and on the fact that DL and SL had not been Sun Life mutual fund clients.

- (a) He did not oppose the permanent prohibition or the \$25,000 fine for engaging in outside business as proposed by Staff.
- (b) With respect to his misappropriation of monies and use of false and misleading statements, he proposed a \$25,000 fine.
- (c) He did not believe he should pay any fine at all for his failure to co-operate because, he argued, it had been “due to proven mental illness”.
- (d) He proposed a costs order of \$15,000.

¶ 113 In his oral submissions, the Respondent was chiefly concerned to explain how diminished mental capacity was the root cause of his misconduct, and said he had not been employed since 2020. He had agreed to the Consent Judgment, he said, because he accepted that he had committed the underlying misconduct.

¶ 114 The Respondent’s written submissions were accompanied by a number of appendices. These included: correspondence between the Respondent and Staff; a statement apparently typed by the Respondent containing factual representations; and a copy of the mental health order under which the Respondent had been detained at Surrey Memorial Hospital.

¶ 115 None of these documents had been previously entered into the evidentiary record. The Respondent did not explain why the detention order was only being produced now at the very last stage in the proceedings.

Analysis

¶ 116 To the extent it affects a respondent’s ability to pay, a health issue may be considered a mitigating factor in the determination of a financial penalty.

- (a) However, as the CIRO Sanction Guidelines make clear, before a hearing panel considers reducing or waiving an otherwise appropriate fine it ought to have before it clear and cogent evidence that establishes the respondent’s objective financial situation.
- (b) The burden of providing it falls on the respondent, who should provide evidence of financial hardship in the form of affidavits or declarations supported by tax returns, bank and investment account statements, audited financial statements or other verified financial information.
- (c) Once proven, a respondent’s constrained ability to pay is only one of a number of factors relevant to the determination of financial sanctions and the relative weight it ought to be given depends on the circumstances. The need for general and specific deterrence must always be prominent in a hearing panel’s sanction deliberations.

¶ 117 Through his repeated attempts to obtain an adjournment, the Respondent had entered into the record assorted bits of evidence relating to his various *ad hoc* encounters with the health system. Taken together, these were sufficient to confirm the Respondent had psychological and respiratory problems. Apart from his own testimony, however, he did not provide evidence that substantiated how his health issues might constrain his ability to earn income or otherwise limited his financial circumstances. Without that information it was not possible for the Panel to make any kind of determination about the Respondent’s ability to pay, let alone consider it as a mitigating factor.

¶ 118 As for the Respondent’s submission that no fine whatsoever should be ordered against him for failing to

cooperate, this was not actually a claim that his mental health should be considered a mitigating factor for sanctioning purposes. It was an assertion that the Respondent ought to be altogether absolved from liability for the misconduct because he had not been fully responsible for his actions. To establish that proposition, the Respondent needed to provide an expert opinion from a qualified mental health professional assessing his mental capacity at the time of the misconduct. He never did so.

¶ 119 It is difficult to imagine misconduct more detrimental to the public interest than an Approved Person perpetrating a financial fraud against a retired couple.

- (a) The Respondent ingratiated himself with DL and SL by misrepresenting himself as a registered financial advisor, thereby deceiving them into believing that by giving him their money they were entering into a professional trust relationship with him.
- (b) To perpetrate the fraud, the Respondent engaged in a pattern of continuous deception for roughly a decade that included the extensive use of forged account statements. The defining characteristic of the Respondent's misconduct was its deliberateness.
- (c) The Respondent's misconduct imposed a financial loss on CL and SL of \$258,486.98. It is reasonable to infer he obtained a corresponding ill-gotten gain in the same amount.
- (d) That DL and SL were not Sun Life mutual fund clients is irrelevant. Lying to a retired couple in order to cheat them out of their money was a blatant and grotesque failure to observe the most basic ethical standards required of registrants. The Respondent was an Approved Person and as such the profoundly dishonest nature of his misconduct was necessarily corrosive of public confidence in the mutual fund industry.
- (e) That the Respondent agreed to the Consent Judgment was not a mitigating factor. Depending on the circumstances, it might well be reasonable to treat a voluntary arrangement to repay a victim as mitigating. The Consent Judgment, however, came about only because commencing litigation against the Respondent was the only remedy available to DL and CL for the loss they had suffered at his hands. To date, the Respondent has not repaid any of the money he owes them.
- (f) Failing to cooperate with a CIRO investigation always constitutes serious misconduct, because a fully transparent mutual fund industry is fundamental for the effective supervision of its participants and the protection of the investing public.
 - (i) Under Section 24.1.4 of MFDA By-law No.1, the Respondent as a former Approved Person remained obligated to cooperate with CIRO's inquiries for a period of 5 years after leaving the industry. Notwithstanding the considerable latitude Staff gave the Respondent after he failed to meet one deadline after another, he was completely unresponsive to Staff's information requests.
 - (ii) The Respondent's refusal to answer any of Staff's questions blocked CIRO from learning what happened to the money he had deceived DL and SL into giving him. This remains obscure to this day.
 - (iii) The Respondent's failure to cooperate also prevented CIRO from obtaining information it needed to determine whether or not he had defrauded other persons while he had been registered as an Approved Person.
- (g) Far from showing remorse, the Respondent attributed his misconduct to an unsubstantiated combination of emotional and psychological problems, poor guidance and supervision from Sun Life, economic stress, cultural conditioning, and the difficult attitudes of everyone involved except himself.

III. CONCLUSION

Specific deterrence

¶ 120 The permanent prohibition recommended by Staff is necessary for the purposes of specific deterrence. An Approved Person who has misappropriated investor funds and then refuses to cooperate with a CIRO

investigation presents an unacceptably high risk of harm to the investing public. In all such cases, public protection warrants a permanent prohibition.

General deterrence

¶ 121 It is crucial that respondents who have profited financially from their misconduct be prevented from retaining their ill-gotten gains. That is not an issue in this case. Disgorgement ceased to be a consideration for the disciplinary process once the Consent Judgment was filed against the Respondent in Supreme Court.

¶ 122 For general deterrence purposes, therefore, the total financial penalty the Respondent is ordered to pay must be based purely on an assessment of the character of the misconduct. In this respect, it is important to observe that the Respondent engaged in two distinct categories of serious misconduct. First, he defrauded CL and SL. Second, he failed to cooperate with the MFDA investigation.

¶ 123 After beginning his second period of registration as an Approved Person, the Respondent was able to continue perpetrating the fraud only because he concealed his outside activities from Sun Life's supervision. The objective harm caused by the fraud and the unauthorized outside business activity was the one and the same. In determining a proportional financial penalty for the misconduct, therefore, it is appropriate to treat the fraud and failure to disclose outside activity globally as a single whole.

¶ 124 In this regard, the cardinal consideration is that the misappropriation and the deception that enabled it must attract a financial penalty that accurately reflects the gravity of the misconduct and the harm it imposed on the victims.

(a) The Respondent deprived a retired couple of \$258,486.98 by lying to them over a period of 10 years.

(b) The duration of the deception was extraordinary. It was also a reflection of the Respondent's deliberate intent. For example, in her testimony SL explained that before providing one of his forged account statements the Respondent would require CL and SL to return the previous one to him. By minimizing the circulation of potentially incriminating forgeries, the Respondent was purposefully working to reduce the risk of his fraud being discovered. He carried on with this calculated exercise in deception for 10 years.

(c) Given the aggravated character of the misconduct, in the interests of general deterrence it would be inappropriate to order a fine that was less than the benefit the Respondent derived from perpetrating the fraud.

¶ 125 CIRO cannot protect the investing public without an effective investigative capability. It follows that failures to cooperate with CIRO investigations must attract sanctions that lead participants in the mutual fund industry to recognize that frustrating or delaying CIRO investigations will lead to serious consequences. The \$50,000 fine recommended by Staff with respect to the Respondent's failure to cooperate is entirely consistent with the relevant sanction precedents.

Orders

¶ 126 In the Panel's view, the appropriate sanctions to be ordered against the Respondent are as follows:

(a) A permanent prohibition.

(b) A total fine of \$310,000, representing

(i) \$260,000 in respect of the misappropriation and misrepresentations that comprised the Respondent's outside business activity; and

(ii) \$50,000 in respect of the Respondent's failure to cooperate with the investigation.

(c) Costs of \$30,000.

Dated at Vancouver, British Columbia this 4 day of April 2024

“Joseph Bernardo”

Joseph A. Bernardo, Chair

“Barbara Fraser”

Barbara Fraser, Industry Representative

“Sean Shore”

Sean Shore, Industry Representative

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