



Ontario
Securities
Commission

Commission des
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**IN THE MATTER OF THE *SECURITIES ACT*,
RSO 1990, c S.5**

- AND -

**IN THE MATTER OF
DANIEL WILLIAM YANAKY**

**REASONS AND DECISION
(Section 21.7 and Subsection 8(3) of the Act)**

Hearing: June 2, 2016

Decision: July 28, 2016

Panel: Janet Leiper - Chair of the Panel
AnneMarie Ryan - Commissioner
Judith N. Robertson - Commissioner

Appearances: Daniel William Yanaky - For himself
Maria L. Abate - For the Mutual Fund Dealers
Association of Canada
Matthew Britton - For Staff of the Commission

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REASONS AND DECISION

I. BACKGROUND

- [1] On June 2, 2016, the Ontario Securities Commission (the **Commission**) held a hearing to consider an application made by Daniel William Yanaky for a hearing and review of a decision by the Mutual Fund Dealer's Association (**MFDA**).
- [2] Yanaky was a registered mutual fund sales person with IPC Investment Corporation (**IPC**), and as an employee of IPC was an Approved Person pursuant to the MFDA *By-laws*.¹ On January 4, 2012, the MFDA received a report from IPC of a client complaint alleging that Yanaky had recommended that she and her husband (a non-client) invest in an "outside business activity." As a result, the MFDA commenced an investigation into this outside business activity, described as the "**Western Project**". On or about December 19, 2013, the MFDA received a report of another complaint involving another client of Yanaky's and the Western Project.
- [3] The MFDA sent five letters to Yanaky, between January 6, 2012 and June 6, 2012, requesting a written response to the complaints and answers to eleven questions as well as other documents. While Yanaky did respond to four of the five letters, the MFDA held a hearing on January 19th and 20th, 2015 and found that he did not provide answers to any of the questions or produce the documents requested by the MFDA.
- [4] The MFDA held in their decision that Yanaky failed to cooperate with MFDA Staff in the course of their investigation, contrary to s. 22.1 of MFDA *By-law* No. 1² and ordered that Yanaky:
- (a) Be permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any Member of the MFDA;
 - (b) Pay a fine of \$75,000; and
 - (c) Pay costs to the MFDA in the amount of \$5,000.
- (*Yanaky (Re)*, 2014 CarswellNat 1600 at para 13)
- [5] This Hearing Panel must decide whether there is reason to intervene with the decision of the MFDA and either substitute its own decision or remit the matter back to the MFDA for reconsideration. For the reasons below, we dismiss the application and confirm the decision of the MFDA.

II. ISSUES TO BE DETERMINED

- [6] Under section 21.7 of the *Securities Act* (the **Act**)³ the Commission has the authority to review regulatory decisions made by a self-regulatory organization, including the MFDA. Pursuant to s. 8(3) of the *Act*, the Commission may confirm the decision under review or make such other decision as the Commission

¹ The Mutual Fund Dealers Association of Canada, *By-law No 1*, 2013
<<http://www.mfda.ca/regulation/bylaw/By-law12-06-13.pdf>> (**MFDA By-law No 1**).

² MFDA *By-law No 1*.

³ RSO 1990, c. S.5

considers proper. At the hearing and review, we heard submissions from Yanaky, MFDA Staff and Commission Staff.

[7] The applicant, Yanaky, must show that his case fits within one of the following five grounds before the Commission will set aside or vary a decision of the MFDA (*Taub v Investment Dealers Association of Canada*, 2009 ONCA 628):

1. The MFDA proceeded on an incorrect principle;
2. The MFDA erred in law;
3. The MFDA overlooked material evidence;
4. New and compelling evidence was presented to the Commission that was not presented to the MFDA; or
5. The Commission's view of the public interest conflicts with that of the MFDA.

(*Taub* at para. 33)

[8] Based on the submissions of Yanaky, the Hearing Panel determined that there are two of these issues to address in this review:

- A. Did the MFDA Hearing Panel err in law because it did not have jurisdiction to investigate the activities of the applicant in relation to the Western Project; and
- B. Is there is new and compelling evidence presented to the Commission that was not presented to the MFDA?

III. ANALYSIS

ISSUE 1: Did the MFDA Hearing Panel err in law?

[9] The MFDA *Rules* require that no Approved Person shall engage in securities related business except in accordance with the *Rules*.⁴ The MFDA *Rules* set out that Approved Persons shall not engage in outside business activities without the knowledge and approval of the Member firm (in this case IPC).⁵ The MFDA *Rules* also impose a duty for Approved Persons to deal honestly and in good faith with its clients, observe high standards of ethics, refrain from engaging in any business conduct that is unbecoming or detrimental to the public interest, and be of such character, business repute and have such training as is consistent with these standards of conduct.⁶

[10] The ability of the MFDA to conduct investigations is set out in its *By-laws*.⁷ The MFDA has the authority to investigate the conduct of any Approved Person, as it considers necessary, in relation to compliance matters.⁸ For the purposes of such an investigation, an Approved Person is required to submit a report in

⁴ The Mutual Fund Dealers Association of Canada, *Rules*, 2016, rule 1.1.1 <<http://www.mfda.ca/regulation/rules/RulesMar17-16.pdf>> (**MFDA Rules**).

⁵ MFDA *Rules*, rule 1.2.1.

⁶ MFDA *Rules*, rule 2.1.1.

⁷ MFDA *By-law*, No 1.

⁸ MFDA, *By-law*, No 21.

writing, produce relevant copies of books, records and accounts, or to attend and give information respecting any such matters, as requested by the MFDA.⁹

- [11] Yanaky submits that the MFDA did not have jurisdiction to investigate the Western Project because it is a personal and philanthropic venture involving only his friends and himself, and as such, it is not an outside business activity. Mr. Yanaky stated before us that he has not been, nor does he expect to be, compensated in any manner for his involvement in the project.
- [12] Yanaky further submits that the MFDA did not have jurisdiction to investigate the matter because IPC was not directly involved with the Western Project. Proof of this, he states, is that one of the complainants in a parallel civil proceeding admitted in a sworn statement to knowing that IPC was not involved with the Western Project.
- [13] MFDA Staff submit that a venture is not outside the jurisdiction of the MFDA simply because the subject of the investigation characterizes it as philanthropic or involving only personal friends. MFDA Staff submit that while Yanaky may have considered some of those persons he introduced to the Western Project as friends, they were also clients of his with investment accounts placed at IPC. MFDA Staff further submit that if Approved Persons were able to avoid cooperating with investigations by characterizing business dealings as “personal”, the ability of the MFDA to investigate legitimate complaints would be severely impeded.
- [14] MFDA Staff submit that the investigation into the Western Project carried out by the MFDA was squarely within its jurisdiction and justified by the receipt of client complaints involving the applicant. The complaints raised four concerns, including that Yanaky might have been engaged in:
- a. Securities related business that was not carried on for the account of the Member, through the facilities of the Member and in accordance with the MFDA Rules;
 - b. Outside business activities without the knowledge and approval of the Member;
 - c. One or more contraventions of the standard of conduct that, among other things, require an Approved Person to deal fairly, honestly and in good faith with clients, observe high standards of ethics and conduct in the transaction of business or refrain from engaging in any business conduct which is unbecoming or detrimental to the public interest; and
 - d. An illegal distribution of securities that might be contrary to the Ontario securities law and/or outside the scope of the Applicant’s registration category as a dealing representative of a mutual fund dealer.
- [15] Commission Staff submitted that, in addition to the arguments made by MFDA Staff, the investigatory bar must be a low one in order for the MFDA to be an effective and credible regulator.
- [16] In *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3, the Supreme Court held that persons involved in the securities industries should not

⁹ MFDA, *By-law, No 22*.

have a high expectation of privacy (para 58). In concurring reasons Justice L’Heureux-Dube stated:

... I fail to see how market participants would not expect to be questioned by regulators from time to time as to their market activities, in order for the securities commission to be able to ensure that they or the corporations that they represent have complied with the prescribed standards.

(*Branch* at para 78.)

- [17] The MFDA had the power under its *By-laws* to require Yanaky to provide a written report, answer questions and produce documents. It was justified in doing so. Indeed, following customer complaints of this nature, it was required to do so. We agree with the submissions of MFDA Staff and Commission Staff that effective regulation of the securities industry requires regulators to have the ability to conduct investigations into and require full cooperation from registered individuals, especially in response to client complaints.
- [18] The MFDA was obligated to investigate these complaints as they were made by clients of an Approved Person and brought forward by the registrant, IPC, to the MFDA. If the venture was indeed a personal philanthropic activity and not an outside business activity, Yanaky was required to provide sufficient information to the MFDA to prove this to them.
- [19] We take further guidance from the Supreme Court that market participants should expect to be actively regulated by their regulator. We conclude that the MFDA did not commit an error of law in deciding that it had jurisdiction to investigate the activities of Yanaky in relation to the Western Project.

ISSUE 2: Was there new and compelling evidence presented to the Commission?

1. Yanaky’s professional obligations as an accountant

- [20] Yanaky testified before us that he could not answer questions or provide documentation during the MFDA’s investigation because of his professional obligations as a Certified Management Accountant. He submitted that doing so would reveal confidential information about his friends and clients and would result in disciplinary action by the Chartered Professional Accountants of Ontario.
- [21] Yanaky did not make this argument in any of his responses to the letters sent to him by the MFDA, or at the hearing before the MFDA. He provided no documentation in support of this argument. Furthermore, he did not demonstrate how answering any of the questions or providing any of the documentation would breach this obligation, particularly given the general nature of the questions which did not seek to elicit tax or other personal information about any client.
- [22] Accordingly we attach no weight to this argument. We find that Yanaky’s argument that he was not able to cooperate with the MFDA investigation because of other professional obligations is not compelling evidence sufficient to warrant an intervention with the MFDA decision.

2. Overlooked material evidence

- [23] In his evidence before the Hearing Panel, Yanaky stated that he had answered the questions asked of him by the MFDA during its investigation and stated that the MFDA had a document with the answers in its possession. The existence of such a document was not raised at the hearing before the MFDA. We were not provided with the document and MFDA Staff denied any knowledge of such a document.
- [24] In his submissions, Yanaky appeared to concede that he had not made a substantive response to the questions from the MFDA. It was his view that the MFDA was acting outside of its jurisdiction and that they did not have the right to ask for information about what he characterized as a "personal venture" involving friends and family. In further written submissions received after the hearing, Yanaky stated again that while he had not specifically answered the MFDA questions, he had responded to them by stating that the Western Project was a personal venture and therefore outside of the scope of the MFDA authority
- [25] Mr. Yanaky has effectively conceded that there is no overlooked material evidence that was not before the MFDA. Given our finding on the authority of the MFDA above, this ground of review must fail.

IV. CONCLUSION

- [26] Effective oversight of registered mutual funds salespersons requires an obligation on the part of registrants to respond to their regulators, who in turn are accountable to the public. The MFDA is entitled to request substantive responses to its questions, especially where a complaint is made. A registrant may disagree with the assertion of jurisdiction, but they cannot refuse to provide sufficient information to allow an appropriate evaluation by the regulator, especially as in this case, where the initial complaint on its face concerns potential business dealings with clients of the registrant. We are of the view that the MFDA was entitled and obliged to act on the complaint.
- [27] Based on these findings, we conclude that the MFDA acted appropriately in making its decision and order against Yanaky. The evidence and argument presented by Yanaky provide no basis for intervention. Accordingly, the application is dismissed.

Dated at Toronto this 28th day of July, 2016.

"Janet Leiper"

Janet Leiper

"Judith N. Robertson"

Judith N. Robertson

"AnneMarie Ryan"

AnneMarie Ryan