ALBERTA SECURITIES COMMISSION

DECISION

Citation: Albinati, Re, 2009 ABASC 279 **Date: 20090608**

Denis M. Albinati

Panel:	Glenda A. Campbell, QC Stephen R. Murison
Appearing:	Denis M. Albinati for himself
	Karen Andreychuk and Lorenz Berner for Commission Staff
Dates of Hearing:	22 April and 21 May 2009
Date of Decision:	8 June 2009

I. INTRODUCTION

[1] On 6 March 2009 Denis M. Albinati (the "Applicant") filed with the Alberta Securities Commission (the "Commission") a hearing submission requesting that a hearing panel "review circumstances [and] evidence and arrive at a conclusion with regard to [the Applicant's] registration status" (the "Main Application"). On 30 March 2009 the Applicant filed additional material for inclusion in his hearing submission. Commission staff ("Staff" or "Commission Staff") filed their written submissions with the Commission Registrar on 8 April 2009 together with an affidavit sworn by Staff member David McKellar ("McKellar") on 3 April 2009.

[2] On 22 April 2009 the parties appeared before this panel, at our request, to:

- clarify the relief that the Applicant was seeking in his Main Application; and
- address the Applicant's supplementary application for disclosure of certain information (the "Disclosure Application").

[3] In the 22 April 2009 hearing (the "Interlocutory Hearing"), the Applicant clarified that, in his Main Application, he was seeking an order from the panel to the effect that all references to, or concerns or findings about, the Applicant expressed or made by either Commission Staff or staff of the Mutual Fund Dealers Association of Canada (the "MFDA") in compliance examinations conducted by them in 2005 and 2006, respectively, of the Applicant's former employer, Generation Financial Corp. ("Generation"), and in any associated examination reports:

- be disregarded by Commission Staff in (or struck from the Applicant's "record" for purposes of) their consideration of the Applicant's fitness for registration in any future application he might make under section 76 of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"); and
- be disregarded by MFDA staff in (or struck from the Applicant's "record" for purposes of) their consideration of any future MFDA membership application.

[4] Also in the Interlocutory Hearing, the panel, with the benefit of the Applicant's clarification, heard oral arguments from the parties concerning the Applicant's Disclosure Application in which he sought a variety of information that he described in a 14 April 2009 letter and for which he sought a summons in a 17 April 2009 letter. Staff opposed the Disclosure Application. After hearing the parties' arguments, the panel dismissed the Disclosure Application, with our reasons to follow.

[5] On 27 April 2009 the panel received the Applicant's written submissions in support of his Main Application along with an affidavit sworn by him on that date. In these submissions the Applicant provided further clarification – and some enlargement – of the relief that he was seeking in his Main Application – asking, under the heading "Relief Sought":

> 1. That the panel instruct ASC staff to disregard any and all information regarding the 2005 ASC compliance [sic] Examination and the 2006 MFDA Compliance Examination in determining my suitability for registration as a Director, Branch Manager or Chief Compliance Officer.

2. That the panel instruct the MFDA to disregard any and all reference to the 2006 compliance examination in determining my suitability to act as a director of an MFDA member

. . .

4. That the panel rule on the MFDA complaint pursuant to MFDA By-Law 26.1, 26.2 [sic] and if appropriate have it overturned and withdrawn as evidence from Mr. McKellars [sic] Affidavit

[6] On 21 May 2009 the panel heard oral arguments from the parties concerning the Main Application.

[7] Our reasons for our dismissal of the Disclosure Application and our decision and reasons on the Main Application follow.

II. BACKGROUND

[8] The Applicant is not currently registered under the Act, nor does he have a pending application for registration filed with the Commission. Instead, it is the Applicant's intent, according to his hearing submission, to seek registration as a "Limited Market Dealer" in Newfoundland and Labrador.

[9] The Applicant was most recently registered under the Act as a salesperson with Laurier Capital Planning Inc. ("Laurier"), an Alberta-based mutual fund dealer, from 24 January 2008 until Laurier surrendered its registration on 26 January 2009.

[10] The Applicant deposed in his affidavit to having been a registrant under the Act since 1977, for nine of those years as a "Trading Officer for MD Management". From 15 August 2003 to 16 May 2006 the Applicant was registered under the Act as a director and officer (trading) with Generation, an Alberta-based mutual fund dealer. During that period the Applicant was Generation's president and chief executive officer ("CEO"), and from 22 November 2005 to 16 May 2006 he also served as Generation's chief compliance officer.

[11] In January 2004 the MFDA commenced a compliance examination of Generation for the period 1 February 2003 to 21 January 2004. The MFDA provided the resulting 25 August 2004 examination report (the "2004 MFDA Compliance Report") to the Applicant, who in August 2004 was Generation's president and CEO. The MFDA identified several deficiencies requiring "immediate corrective action". Some of the deficiencies had been identified by the MFDA earlier – in 2002 – but had yet to be addressed or resolved by Generation.

[12] On, or about, 15 April 2005 the MFDA sent Generation a "warning letter" regarding the Applicant's inappropriate handling of a client complaint (the "2005 MFDA Warning Letter"). The Applicant was still Generation's president and CEO at this time.

[13] In December 2005 Commission Staff completed a compliance examination of Generation (the "2005 ASC Compliance Examination") and identified deficiencies consistent with those identified by the MFDA in its 2004 MFDA Compliance Report. By this point, the Applicant was also Generation's chief compliance officer.

[14] At a February 2006 conference that both the Applicant and McKellar were attending, the Applicant expressed to McKellar concerns with what the Applicant saw as Commission duplication of the MFDA's compliance oversight of mutual fund dealers. McKellar had been since January 2006 the Commission's Director, Market Regulation (the "Director"); earlier, from December 1977 to December 2003 he had been the Commission's Manager, Registration and Compliance. In response to the concerns expressed by the Applicant, McKellar – apparently accepting that some duplication would otherwise have occurred – directed Commission Staff to cease working on their compliance examination report and instead to refer their examination results to the MFDA. Commission Staff informed the Applicant of this referral. As a result, Commission Staff did not prepare a final report or meet with Generation management to discuss the 2005 ASC Compliance Examination.

[15] The Applicant's employment with Generation was terminated for cause on 16 May 2006. On 18 May 2006, at the Applicant's request, the Applicant met with McKellar and others to discuss this termination. At this meeting, according to McKellar's affidavit, the Applicant admitted to "failing with respect to his compliance duties at Generation".

[16] In July 2006, in consequence of Commission Staff's referral of the 2005 ASC Compliance Examination results to the MFDA, the MFDA conducted a follow-up compliance examination of Generation (the "2006 MFDA Compliance Examination"), which identified several repeat deficiencies. The 2006 MFDA Compliance Examination, although covering a period during which the Applicant had been employed by Generation, was conducted after his employment had been terminated, so the MFDA issued its report on its examination (the "2006 MFDA Compliance Report") to Generation, not to the Applicant.

[17] On 13 February 2007 Laurier applied to the Commission's Executive Director for registration as a dealer in the category of mutual fund dealer. Laurier's application disclosed that the Applicant was its president and CEO and that Victor Lee ("Lee") was its "Vice President COO, Compliance".

[18] On 5 November 2007 the Applicant and Lee met with Commission Staff, including McKellar. Given the deficiencies identified in Commission Staff and MFDA compliance examinations of Generation (and, according to McKellar's affidavit, the Applicant's admitted compliance failures at Generation), Commission Staff expressed concerns to the Applicant and Lee about the Applicant's involvement, for the time being, in a compliance-related role with Laurier: although the Applicant was not proposing to hold a direct compliance position with Laurier, he, as an officer, director and significant shareholder, would be in a position to influence or control Laurier's compliance function. Commission Staff explained that, once Laurier was operating successfully and demonstrating a strong compliance culture, they would be prepared to revisit their position with respect to the Applicant. The Applicant and Lee responded to the concerns raised by proposing that the Applicant resign as an officer and director of Laurier, reduce his shareholding and take only what they termed "a non-active role" with Laurier. This proposal, they suggested, would allow the compliance function at Laurier to be performed independently of the Applicant's influence or control. Commission Staff requested that this proposal be reduced to writing for their consideration.

[19] By a 5 November 2007 letter from Laurier, signed by the Applicant and Lee, Laurier and the Applicant agreed that the Applicant would resign as a director of Laurier, assume the position of Laurier's "[m]arketing coordinator and representative" and reduce his shareholding from 84% to 40%. Commission Staff told the Applicant and Lee that Staff would be prepared to recommend registration of Laurier, but on those terms and conditions. Commission Staff also informed the Applicant and Lee of Staff's willingness to revisit these terms and conditions on Laurier's registration after an initial compliance examination was completed and Laurier was operating successfully and able to demonstrate a strong compliance culture.

[20] The Applicant and Lee consented to these terms and conditions on Laurier's registration. On 24 January 2008 the Commission granted Laurier's application for registration as a mutual fund dealer subject to these terms and conditions, and the MFDA approved Laurier for membership in the MFDA.

[21] The Applicant apparently approached the Executive Director to express concerns about these terms and conditions on Laurier's registration, even though they had been proposed by Lee and the Applicant and agreed to by Laurier and the Applicant. In February 2008 the Executive Director advised the Applicant that, while he might not technically have a right to a hearing under section 76(3) of the Act regarding these terms and conditions, the Executive Director was willing to refer the Applicant's concerns to a Commission hearing panel. The Applicant apparently did not pursue that option at the time.

[22] By a 21 March 2008 letter Lee, for Laurier, advised Commission Staff that the MFDA had closed its enforcement file with respect to the Applicant. In the letter Lee suggested that there should no longer be concern about the Applicant's conduct and requested that the Applicant be allowed to assume the role of branch manager with Laurier. Commission Staff demurred, advising Lee that they were not prepared to recommend that the Applicant be registered as a branch manager until they had performed an initial compliance examination of Laurier's operations and determined that its compliance structure was working efficiently and effectively.

[23] On the same topic, the MFDA responded to Lee in a 2 April 2008 letter as follows:

> In your letter, you also request Mr. Albinati be allowed to assume the role as a branch manager. The MFDA would view this as a breach of Laurier's terms and conditions of membership which can only be amended by mutual agreement between Laurier and the MFDA. The MFDA has concerns with Mr. Albinati acting in any compliance capacity and those concerns resulted in the terms and conditions on Laurier's MFDA membership. Until and unless Laurier is advised otherwise by the MFDA, the terms and conditions on Laurier's membership with the MFDA remain in place and are to be complied with. The fact that an Enforcement case relating to Mr. Albinati has been closed does not in any way amend or alter Laurier's terms and conditions of membership or alleviate staff's concerns with respect to Mr. Albinati"s [sic] ability to act in a supervisory capacity.

[24] Subsequently, Lee requested that Laurier's terms and conditions relating to the Applicant be removed and replaced with a written undertaking to the Commission, to which request the Commission agreed. This was a cosmetic change; the substantive conditionality of Laurier's registration remaining unchanged although differently expressed.

[25] Commencing on 26 May 2008, MFDA staff and Commission Staff conducted separate onsite compliance examinations of Laurier. Commission Staff's examination identified what Staff perceived as several breaches of Laurier's terms and conditions of registration and several serious compliance deficiencies. After issuing their 13 July 2008 report on their examination, Commission Staff met and corresponded with Laurier personnel to discuss the report and Laurier's responses to it.

[26] Commencing on 15 September 2008, Commission Staff conducted a follow-up compliance examination of Laurier, but a final report was not issued because the Commission suspended Laurier's registration (pending surrender) on 17 November 2008. Laurier voluntarily surrendered its registration effective 26 January 2009, with the Applicant's registration being terminated concurrently.

III. DISCLOSURE APPLICATION

[27] In the Interlocutory Hearing, the Applicant clarified, and thereby narrowed, the relief sought in his Main Application. We dismissed the Applicant's Disclosure Application seeking information as described in his 14 April 2009 letter to the Commission Registrar because the information he sought was simply not relevant to the narrowed relief he sought. We also note that the information he sought is similarly irrelevant to the relief as further clarified and somewhat enlarged by him on 27 April 2009.

IV. MAIN APPLICATION

A. Parties' Positions

1. Staff

[28] Staff argued that the panel has no jurisdiction to grant the relief sought by the Applicant.

[29] Staff referred the panel to section 76(3) of the Act – the provision on which a registrant would typically rely as the basis for any review of its registration. That section provides that "[t]he Executive Director shall not refuse to grant, renew, reinstate or amend registration or impose terms and conditions on it without giving the registrant or applicant an opportunity to be heard". Staff referred to the Executive Director's February 2008 advice to the Applicant of the Executive Director's willingness to refer the Applicant's concerns about Laurier's terms and conditions of registration to a Commission hearing panel. Staff noted, however, that the context in which that advice was given no longer exists; in effect, with Laurier's surrender of its registration in January 2009 and the consequent extinction of any terms and conditions or undertaking, nothing remains for a panel to review. Second, Staff contended that the Applicant, while a former registrant under the Act, is no longer a registrant and does not have a pending application for registration, renewal, reinstatement or amendment of registration, and therefore that the Applicant is not entitled to a hearing under section 76(3). Further, Staff argued that, although the Applicant's "complaint" in part concerns registration issues, it does not relate to an existing application for registration and thus the Applicant has no standing to ask a panel for relief.

[30] Staff noted that, in essence, the Applicant appears to be seeking an order that would direct them to ignore the Applicant's past conduct as a registrant in the hypothetical context of a

future application by the Applicant for registration under the Act. Staff contended that a Commission hearing panel has no authority under the Act to grant such relief.

[31] Staff also argued that, even if Commission hearing panels had the authority to grant such relief, it would not be in the public interest to grant the relief requested by the Applicant. Staff submitted that under section 76 of the Act the Executive Director or his authorized delegate acts as gatekeeper for the capital market, in which role he is required to assess suitability for registration. This task requires consideration of such factors as the applicant's educational qualifications, work experience (including duration, currency, positions and compliance history) and overall proficiency. Thus, according to Staff, they must and do assess each application case by case taking into account all relevant circumstances at the time of and in the context of an actual application.

[32] Staff noted the fundamental role of the registration requirement under Alberta securities laws in protecting investors and fostering a fair and efficient capital market. Staff emphasized that registration is a privilege, not a right, and that past behaviour in the market is a factor relevant to assessing an applicant's suitability for registration.

[33] Staff argued that, in any event, there was no evidence of unfairness, unreasonableness or impropriety on the part of Staff in the imposition of the terms and conditions on Laurier's registration. In this regard, Staff pointed out that these terms and conditions were proposed and consented to by the Applicant and Lee. Staff also noted that the Applicant and Lee were made aware of Staff's willingness to revisit the terms and conditions once Laurier had demonstrated, in an initial compliance examination, a strong compliance culture, but that ultimately there was no such demonstration.

[34] In short, Staff argued that the Applicant's request for an order that would prohibit Staff from considering the Applicant's history as a registrant in the event he were to apply for registration in the future ignores the Commission's responsibility to protect investors. They contended that the Applicant's position appeared to suggest, wrongly, that the Commission is responsible for assuring an individual's enjoyment of a profitable livelihood in the capital market. Thus, according to Staff, it would not be in the public interest to make such an order.

2. The Applicant

[35] The Applicant submitted that his entitlement to a hearing is founded in section 76 of the Act, and in the Executive Director's advice to him of the Executive Director's willingness to refer the Applicant's concerns about Laurier's terms and conditions of registration to a Commission hearing panel. The Applicant requested that the panel direct Commission Staff to disregard any and all information regarding the 2005 ASC Compliance Examination and the 2006 MFDA Compliance Examination, whether or not in any associated examination reports, in any future Staff determination (or that the panel strike from the Applicant's "record" any such information for purposes of any future Staff determination) of the Applicant's suitability for registration as a director, branch manager or chief compliance officer.

[36] The Applicant also submitted that MFDA By-law No. 1 gives him a right of appeal to the Commission from any decision affecting him made by the MFDA. The Applicant requested that

the panel direct the MFDA to disregard any and all references to the 2006 MFDA Compliance Examination, and the associated examination report, in any future MFDA determination (or that the panel strike from the Applicant's "record" any such references for purposes of any future MFDA determination) of the Applicant's suitability to act as a director of any mutual fund dealer. He also requested that the panel rule on and, if appropriate, overturn the client complaint mentioned in the 2005 MFDA Warning Letter.

[37] The gist of the Applicant's argument was that the specified information and references ought to be disregarded in (or struck for purposes of) any future determinations of his suitability as a director, branch manager or chief compliance officer of any mutual fund dealer because he has never been given an opportunity to review or defend the 2005 ASC Compliance Examination, the 2006 MFDA Compliance Examination or any associated examination reports for which, he said, he has been held accountable. The Applicant asked that he be given a "clean slate".

[38] Despite the narrowing of the relief sought, the Applicant in the course of his submissions, written and oral, expressed several concerns in a variety of areas such as: what he perceived to be unethical or illegal business conduct by, among others, former fellow business owners or directors and three individuals associated with a business competitor (who he repeatedly pointed out were former Commission employees); the manner in which certain former Commission employees interacted with him in connection with the 2005 ASC Compliance Examination or conducted themselves once they left their employment with the Commission; the conduct of the 2005 ASC Compliance Examination; policies of the Commission concerning what he termed "conflicts of interest"; and conduct by certain current and former Commission employees that he alleged demonstrated a conflict of interest. The Applicant urged the panel to investigate or direct others to investigate a range of matters including conflicts of interest and Commission policies thereon, conduct of certain former Commission employees after they had left to join the private sector; and even some alleged disclosure deficiencies in a financial institution prospectus.

B. Order to Direct Commission Staff

1. Jurisdiction to Grant the Requested Relief

[39] The Commission has a broad public interest jurisdiction. However, its jurisdiction is not unlimited; its powers are limited to those given to it by the Act. In his Main Application the Applicant, a former registrant, sought to constrain Commission Staff from considering certain information in possible future determinations of his suitability and non-objectionability for registration as a director, branch manager or chief compliance officer of a mutual fund dealer under the Act. The question we must determine is whether the Commission has the jurisdiction to order the relief sought by the Applicant. Staff said that we do not. The Applicant suggested that we do, under section 76 of the Act.

[40] Section 76 of the Act sets out the parameters under which the Executive Director or his delegate grants, refuses to grant or imposes terms and conditions on applicants for registration under the Act. Section 76(1) provides:

> 76(1) Unless it appears to the Executive Director that

> (a) an applicant is not suitable for registration, renewal of registration, reinstatement of registration or amendment of registration, or
> (b) the proposed registration, renewal of registration, reinstatement of registration or amendment of registration is objectionable,
>
> the Executive Director shall grant to the applicant the registration, renewal of registration, reinstatement of registration or amendment of registration being applied for.

[41] Thus, the Act gives responsibility to the Executive Director to review every application for registration to determine whether the applicant is suitable for registration and whether registering the applicant would be non-objectionable. In this case the Executive Director's delegate, the Director, is responsible for those tasks. In evaluating suitability and non-objectionability, or fitness for registration, the Director considers three fundamental criteria that have been established in securities law jurisprudence and enunciated again in connection with the Canadian Securities Administrators' registration reform project:

- integrity, which includes honesty and good faith, particularly in client dealings and compliance with Alberta securities laws;
- competence, which includes prescribed proficiency and knowledge of Alberta securities laws; and
- financial solvency, which is a predictor of an ability to meet financial obligations and an indicator of risk that an individual may engage in self-interested activities at the expense of client interest.

[42] Under section 76(3) of the Act the Director (as the Executive Director's delegate) "shall not refuse to grant, renew, reinstate or amend registration or impose terms and conditions . . . without giving the registrant or applicant an opportunity to be heard". Under section 35(1) an appeal to a Commission hearing panel lies from any such decision of the Executive Director.

[43] Commission hearing panels do not direct Staff in how they carry out their statutory obligation under section 76(1) of the Act to evaluate an applicant's fitness for registration. Rather, the Act gives the Director (as the Executive Director's delegate) exclusive jurisdiction to make that determination, including what terms and conditions to attach to a registration. That said, the Act does provide safeguards to ensure that Staff do not act capriciously or arbitrarily. An applicant is given the opportunity to be heard by the Executive Director and, if unsatisfied, to have the Executive Director's decision reviewed by a Commission hearing panel.

[44] The Commission's jurisdiction under section 35(1) of the Act in appeal of a decision under section 76(3) is clearly premised on a person or company having made an application for registration that has either been refused or made subject to terms and conditions by the Executive Director (or his delegate), with that person or company then requesting a review of that decision by a Commission hearing panel. In this case, the Applicant is not currently a registrant under the Act or subject to any terms and conditions, and he has no pending application for registration before the Director; rather, the relief sought by the Applicant is in relation to possible future applications for registration. In short, there has been no refusal of a current application for registration, nor are there any terms or conditions on an extant registration, that would give a

Commission hearing panel the authority to exercise its power of review under section 35(1) of the Act.

[45] Thus, we find that a Commission hearing panel, such as this panel, has no jurisdiction under sections 35 and 76 of the Act to grant the relief sought by the Applicant.

[46] The Executive Director advised the Applicant of the Executive Director's willingness to refer the Applicant's concerns about Laurier's terms and conditions of registration to a Commission hearing panel, presumably under section 30 of the Act. However, the circumstances no longer exist to support such a referral. The terms and conditions on Laurier's registration that were the subject of the Executive Director's advice disappeared with the surrender of that registration in January 2009. Nothing remains that could be the subject of a Commission panel review under section 30.

[47] In respect of the range of matters that the Applicant urged the panel to investigate or direct others to investigate, it suffices to observe that Commission hearing panels do not launch or conduct investigations and that neither section 76 nor section 30 of the Act, on which the Applicant relied, empowers this panel to do so.

[48] We therefore find that a Commission hearing panel does not have the statutory authority to grant the relief sought by the Applicant. Consequently, we deny on jurisdictional grounds the Applicant's request for an order directing Commission Staff to disregard any and all information regarding the 2005 ASC Compliance Examination and the 2006 MFDA Compliance Examination, whether or not in any associated examination reports, in any future Staff determination (or an order striking from the Applicant's "record" any such information for purposes of any future Staff determination) of the Applicant's suitability for registration as a director, branch manager or chief compliance officer. We also deny on jurisdictional grounds the Applicant's request to investigate or direct others to investigate the range of matters mentioned in the course of his submissions, written and oral.

2. Public Interest Considerations

[49] We are of the view that even if we had the jurisdiction to grant the relief sought by the Applicant it would not be in the public interest to do so.

[50] The Commission's overarching responsibility is the protection of the investing public and the fostering of a fair and efficient capital market and confidence in that market. Registrants play a crucial role in both the capital market system and investor protection. The requirement to register under Alberta securities laws exists for the protection of the investing public by ensuring that applicants for registration have a certain degree of integrity, competence and solvency when application for registration is made. Without registration (or an available registration exemption), no sales of securities can be made. Thus, registrants are given the privilege of selling securities, a privilege that is not available to others. In result, in the context of mutual fund securities, for example, it is expected that mutual fund dealers and their salespersons, directors and officers will further the Commission's mandate by protecting their investor clients, as well as fostering a market for mutual fund securities that is both fair and efficient.

[51] However, the privilege of registration comes with constraints and requirements and may not be available to all who seek to avail themselves of the benefits of registration. As the Commission commented in *Re Lysalta Capital Development Corporation*, (2004) ABSECCOM ENF-#1491166v1 at para. 48:

> [I]t is [not] the responsibility of the regulatory system or of those who administer it to assure for any particular market participant a profitable or fulfilling role of its own choosing. Mutual fund dealers operate in a regulated industry, and regulation can undoubtedly be constraining. Some participants may find the requirements or constraints not to their liking. We endeavour to deal fairly and objectively with all market participants, but it is not our task to craft a regulatory structure that happens to satisfy the business model, or any other attribute, of each and every current or prospective market participant. Our decisions are made in light of the fundamental objectives of securities regulation mentioned earlier.

[52] The Act imposes on the Director a duty to satisfy himself that an applicant for registration is fit for registration. The evaluation undertaken by the Director during the registration process exists for the protection of the investing public. In assessing fitness for registration the Director necessarily relies heavily on present and past conduct as predictors of what an applicant's future behaviour might reasonably be expected to be. If there are elements of past behaviour that cause concern, the Director may well consider imposing terms and conditions on an applicant's registration, as was the case here. Terms and conditions are generally imposed if the Director believes an applicant does not meet the three suitability and non-objectionability criteria discussed above, but the problems are not serious enough to warrant complete denial of registration. In such cases, terms and conditions are typically designed to address the shortcomings of the applicant in meeting these criteria.

[53] We believe that it is integral to our public policy regulatory regime that the Director retain broad discretion to consider all circumstances he deems relevant in making his determination as to suitability and non-objectionability at the time an application is made. Members of the public who deal with those who participate in the securities industry, including mutual fund salespersons, directors and officers, should be confident that they are dealing with persons of integrity who possess certain competencies. This is assured by the Act giving the Director the positive obligation to assess fitness of potential applicants for registration. We believe that the Commission would be derelict in its public interest responsibility to protect the investing public were we to circumscribe, or fetter in advance, the Director's discretion and limit his access to information that he considers relevant in making his future assessments of suitability and non-objectionability of any applicant for registration. We would decline to do so.

[54] It appears from the evidence before us that the Applicant was treated fairly, reasonably and without impropriety by Staff. The evidence is clear that the Applicant had been associated with a mutual fund dealer for which compliance issues arose while he was that dealer's chief compliance officer or in a supervisory role. Individuals permitted to occupy compliance or supervisory roles are expected and required to oversee other salespersons' activities and are the front-line enforcers charged with ensuring that their firm's salespersons comply with applicable securities laws and practise sound and ethical business practices. By acting as gatekeeper for the protection of the capital market, the Director has an obligation to ensure that any individual who seeks registration in a compliance or supervisory role is fit for that role.

[55] With knowledge of the Applicant's history, the Director did not refuse to register the Applicant but, in 2008, granted him registration as a mutual fund salesperson. What the Applicant wanted, however, was to be Laurier's compliance officer or in another compliance-related role. Laurier's registration was subject to terms and conditions relating to the Applicant, which included that the Applicant would not act as a director or officer of, or in a compliance capacity with, Laurier. Staff, however, advised Laurier (through Lee) and the Applicant that they would be prepared to revisit the question of whether the Applicant could undertake a compliance-related role with Laurier once Laurier had demonstrated, in an initial compliance examination, a strong compliance culture. Before that issue could be revisited, Laurier surrendered its registration, which terminated the Applicant's registration.

[56] Given Laurier's voluntary surrender of its registration, it appears to us that Laurier and the Applicant were not prepared, or able, to alleviate the Director's concerns as to the Applicant's fitness to act in a compliance-related role by complying with suggestions made by Staff. So, the Applicant sought to have this panel give him the "clean slate" he so desires. Had we the power to do so we would have declined. An applicant's compliance history is a relevant factor for any future assessment of the applicant's fitness as a registrant under the Act, and that is particularly so when the applicant is seeking to be registered in a compliance-related role. To order the Executive Director (or his delegate, the Director) to disregard any suggestion of past compliance concerns associated with an applicant for registration could expose the investing public to risk, a risk that is simply not compatible with our investor protection mandate. Our primary responsibility is investor protection; it is not to ensure that individuals are able to pursue their desired or preferred employment in the securities industry.

C. Order to Direct MFDA

[57] In his Main Application the Applicant also sought to have us direct the MFDA to disregard any and all references to the 2006 MFDA Compliance Examination, and the associated examination report, in any future MFDA determination (or have us strike from the Applicant's "record" any such references for purposes of any future MFDA determination) of the Applicant's suitability to act as a director of any MFDA member.

[58] As noted, the Commission has only the powers that are given to it under its enabling legislation – the Act. There are no provisions in the Act enabling us to direct the MFDA to disregard information it compiled or findings it made three years ago – or at all. Therefore, the Applicant's proposed direction to the MFDA would have to take the form of an appeal to this Commission of the 2006 MFDA Compliance Report.

[59] Under section 26.1 of MFDA By-law No. 1, a "person directly affected by a decision of . . . the [MFDA] . . . may request any securities commission given jurisdiction in the matter under its enabling legislation to review such decision". Section 73 of the Act is the relevant section giving this Commission the jurisdiction referred to in section 26.1 of MFDA By-law No. 1. Section 73(1) of the Act provides the Applicant with the right to appeal an MFDA decision to this Commission. Section 73(2) provides that section 36 of the Act applies to any such appeal. Under section 36(1) such an appeal must be started within 30 days from the day the appellant is served with written notice of the decision. Section 36(2) provides for an extension of that 30-day period, but only if the Commission receives an application from the appellant

within that period and considers it would not be prejudicial to the public interest to extend that period.

[60] The 30-day appeal period under section 36(1) of the Act expired long before the Applicant raised this matter with the Commission. He did not apply to extend that appeal period within the 30 days. As stated by the Alberta Court of Appeal in considering this section in *Bahcheli v. Alberta Securities Commission*, 2007 ABCA 166 at para. 73, "[t]here is no power to extend the time for appeal fixed by statute other than as prescribed by that statute".

[61] As the Applicant did not undertake a timely appeal of the 2006 MFDA Compliance Report, we have no jurisdiction to review it or its application. We therefore deny the Applicant's request to direct the MFDA to disregard any and all references to the 2006 MFDA Compliance Examination, and the associated examination report, in any future MFDA determination (or to strike from the Applicant's "record" any such references for purposes of any future MFDA determination) of the Applicant's suitability to act as a director of any MFDA member.

D. 2005 MFDA Warning Letter

[62] The Applicant further requested that this panel rule on and, if appropriate, overturn the complaint contained in the 2005 MFDA Warning Letter. However, we have no jurisdiction to review this complaint because, as discussed above, the Applicant did not pursue a timely appeal of the MFDA's treatment of it. We therefore deny this request of the Applicant.

[63] We note that, in his written submissions under the heading "Overview", the Applicant also asked that this panel review and rule on "the decision" of the MFDA not to allow the Applicant to serve as a director of Laurier. We also deny this request, there being no such decision before us and, we surmise, there being no pursuit of a timely appeal of it.

E. Decision

[64] For the reasons given above, we dismiss the Applicant's Main Application.

V. MATTER CONCLUDED

[65] This matter is now concluded.

8 June 2009

For the Commission:

"original signed by"
Glenda A. Campbell, QC

"original signed by"
Stephen R. Murison