BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Warren, 2017 BCSECCOM 289 Date: 20170912

Rodney M. Warren and Mutual Fund Dealers Association of Canada

Panel	George C. Glover, Jr.	Commissioner
	Nigel P. Cave	Vice Chair
	Suzanne K. Wiltshire	Commissioner
Hearing Date	June 14, 2017	
Submissions Completed	July 14, 2017	
Date of Decision	September 12, 2017	

Appearing

Mike Adlem	For Rodney M. Warren
Christopher Corsetti	For Mutual Fund Dealers Association of Canada

Decision and Reasons

I. Introduction

[1] This is a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418, of the decision of a hearing panel of the Mutual Fund Dealers Association of Canada (MFDA) in the matter of Rodney M. Warren.

[2] On April 29, 2016, Warren entered into an Agreed Statement of Facts with the MFDA. In the Agreed Statement of Facts, Warren admitted that he failed to ensure that his leveraged investment recommendations were suitable for clients DZ and EZ and for clients HN and MN and that this constituted misconduct for which Warren may be punished on the exercise of discretion of an MFDA panel. A second allegation was withdrawn.

[3] A third allegation, that Warren failed to report a complaint to his member firm and attempted to negotiate a settlement with DZ and EZ, without the knowledge or approval of Warren's member firm, was not admitted and was contested at the MFDA hearing.

[4] On May 3-5, 2016, a hearing was held before an MFDA panel. Extensive documentary evidence was entered. Portions of interviews of DZ and EZ and of Warren by an MFDA investigator were read into evidence. Warren, who was represented by counsel, entered evidence by way of an affidavit on which he was cross-examined.

[5] On May 5, 2016, after the conclusion of the evidence and submissions, the MFDA panel deliberated and found that, contrary to MFDA policies and rules, Warren: failed to ensure that his leveraged investment recommendations were suitable for clients DZ and EZ and clients HN and MN; and, failed to report a complaint to Warren's member firm and attempted to negotiate a settlement with DZ and EZ, without his firm's knowledge or approval. The MFDA panel issued an Order suspending Warren for ninety days commencing May 9, 2016, to be followed by twelve months of strict supervision and a further twelve months of close supervision and imposing a $100,000 fine on Warren. The MFDA panel also ordered Warren to pay costs of $10,000. The MFDA panel also imposed a lifetime ban on Warren's offering his clients a leveraged investment strategy.

[6] The MFDA panel issued its Reasons for Decision on October 27, 2016.

[7] On November 25, 2016, the MFDA applied to the Commission for a hearing and review of the MFDA's 90-day suspension, submitting that this suspension was unreasonably short. The MFDA sought an increase in Warren's suspension to three years or more.

[8] On November 29, 2016, Warren applied to this Commission for a hearing and review of the MFDA's 90-day suspension, $100,000 fine and $10,000 costs award against him. As the suspension had expired prior to the Commission's hearing and review, Warren did not seek to vary that aspect of the MFDA Order. The variations sought by Warren were to set aside the $100,000 monetary penalty and costs award of $10,000 imposed by the MFDA panel. Warren also advised that he would seek to introduce new evidence about the effect of the sanctions on the basis that this new and compelling evidence would show a significant change in his circumstances.

[9] Warren and the MFDA made written and oral submissions on the merits of the review and attended at the Commission hearing. The executive director did not make any submissions and did not attend the hearing.

[10] At the Commission hearing, the Commission panel received Warren's testimony (the "new" evidence) concerning the impact of the sanctions on him and his change in circumstances. The MFDA cross-examined Warren on this "new" evidence and both Warren and the MFDA made oral submissions, with a view to assisting the Commission panel in determining whether the "new" evidence was admissible and whether such evidence should be considered by the Commission panel in its determination whether to revoke or vary the MFDA Order. At the request of the Commission panel, Warren and the MFDA made further written submissions, post-hearing, on the appropriateness of a Commission panel, sitting on a hearing and review of an MFDA decision, admitting and considering evidence of events and circumstances that arose after the MFDA Order.

II. Application to Introduce New Evidence

[11] We will first consider the preliminary issue referred to in paragraph 10 above whether evidence of the actual consequences of the sanctions imposed by the MFDA panel, all of which occurred after the MFDA hearing and Order, is appropriate to be admitted as evidence and considered by this Commission panel on a hearing and review under section 28 of the Act.

[12] Warren submitted that the "new" evidence that was received by the Commission panel from him met the Commission's tests for admission and consideration.

[13] In summary, the "new" evidence provided by Warren in his testimony included the following:

- Clients left Warren
- He needed to wind down both his mutual fund and life insurance businesses
- He could not be licensed for mutual fund or insurance services
- He was unable to find any employment and has no job prospects
- He has no savings
- He borrowed money from his parents for living expenses
- He lost all of his friends but one
- His designation as a Certified Financial Planner was revoked
- He has no collateral for a loan and no way to raise any money
- The devastating emotional toll he has suffered

[14] Warren submitted that these events and circumstances constituted actual evidence of the consequences of the findings of misconduct by the MFDA panel, and the reputational damage caused by the publication of the substance of the Order and the sanctions imposed. Warren argued this "new" evidence proved that the effect of the sanctions imposed by the MFDA panel negated a key assumption made by the MFDA panel- that Warren would resume his mutual fund sales business following his suspension- and supported Warren's position that we should reduce or eliminate the monetary penalties.

[15] Warren submitted that new evidence should be admitted if the tribunal "made assumptions about future events and then, before the appeal was heard, the trial judge's assumptions are shown by the course of events to be or to have become incorrect."[1] Warren cited examples from civil court proceedings where appeals were allowed based on new evidence. These examples generally involved a significant unexpected change in a plaintiff's health or condition between the original hearing and the appeal. [2]

[1] *Bonar v. Bonar*, 2016 BCSC 2065

[2] E.g. *Knutson v. Farr,* 1984 Can LII 556 (BCCA); *Cory v. Marsh*, 1993 Can LII 1150 (BCCA) and *Jens v. Jens*, 2008 BCCA 392

[16] Warren also submitted that a Commission panel is not bound by the rules of evidence[3] and that it is the master of its own procedures. Warren cited BC Policy 15-601-Hearings, s. 2.7(a) which provides: "In enforcement matters, the primary test for admission of evidence is its relevance…. The Commission need not follow the formal rules of evidence that apply in the courts. Generally, evidence should be the best evidence." Warren argued that evidence of what he actually experienced was relevant as it was better evidence than speculation at the MFDA hearing about what the consequences of serious sanctions might be. He further submitted that the "new" evidence was also relevant to the MFDA's application that the suspension of Warren should be increased.

[17] The MFDA submitted that the Commission panel should not admit and consider evidence on the actual impacts of the MFDA panel's sanctions because the evidence did not exist at the time of the MFDA hearing and Order. The MFDA argued that such evidence is not relevant and does not meet the "new and compelling" test for admission and consideration. The MFDA further submitted that a hearing and review under section 28 of the Act is not a trial *de novo* and the evidence to be reviewed by the Commission panel is the evidence on the record at the MFDA hearing unless the evidence sought to be admitted and considered is "new and compelling".

[18] The MFDA relied on the Ontario Securities Commission decision in *Northern Securities Inc. (Re)*[4] which considered an application to admit evidence of the impact of sanctions ordered by a self-regulated organization (SRO). The Ontario Commission stated that it could consider "not only the information and documents that were before the [SRO] but also the additional information and evidence before it on the Application." The Ontario Commission panel declined to admit the requested new evidence in the *Northern Securities* case and stated that that Commission had taken "a restrained approach in exercising its discretion to allow new and compelling evidence to be tendered". That panel also stated that: "There is no general right of a party to introduce additional evidence on an application [for a hearing and review]. In order to establish that we should permit the introduction of additional evidence, the applicable test is whether or not the evidence is 'new and compelling'…."

[19] We have considered the submissions of the parties in this case on the preliminary question set out in paragraph 10 above whether this panel should admit and consider the "new" evidence received from Warren about the consequences of the MFDA's Order and sanctions. We address those submissions in the discussion below.

[20] Since the matter in issue here is a review of the appropriateness of the sanctions imposed on Warren by the MFDA panel, evidence of how the sanctions affected Warren meets the relevance standard for receiving the evidence. Following the usual practice of this and other commissions, we received the "new" evidence for the purpose of determining whether that evidence should be admitted and considered by us on the merits.

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[3] *Securities Act*, RSBC 1996, c. 418, s.173(c)
[4] 2013 LNONSC 1023

[21] On a hearing and review, the Commission will not admit and consider additional evidence unless that evidence is both new and compelling.[5]

[22] As Warren's "new" evidence consisted of his testimony concerning events and circumstances that occurred after the MFDA hearing and Order, it was clearly new evidence that was not available and could not have been available to the MFDA panel. In that sense, it was indisputably new evidence.

[23] The next step is to determine whether the "new" evidence is compelling.

[24] In general, a Commission panel in a hearing and review of an SRO decision under section 28 of the Act is reluctant to admit and consider evidence that did not exist at the time of the SRO hearing and order and, therefore, was not known by the SRO panel. It is in the public interest that there be some finality to SRO decisions and that hearings and reviews of SRO decisions do not become hearings *de novo* or provide an opportunity to retry the case. This concern is addressed by considering whether the new evidence is "compelling".

[25] In *Northern Securities,* the Ontario Securities Commission accepted the following statement in *Hahn*[6]*:* "In our view, that information would be considered 'compelling' if it would have changed the SRO's decision, had it been known at the time of the decision." While a Commission panel would rarely be certain that the SRO panel would have changed its decision if it knew of the new evidence, it indicates that "compelling" requires clearing a very high bar.

[26] Warren submitted that the MFDA panel did not know that a 90-day suspension in his circumstances was effectively a lifetime prohibition. Warren noted that although the 90-day suspension imposed by the MFDA panel had long since expired in early August 2016, he had not been able to obtain employment at all, let alone as an approved person for an MFDA member. Warren also noted that the MFDA's Order included 12-month periods of strict supervision followed by close supervision and a permanent prohibition on any leveraging of clients/investors, if he resumed his MFDA registration. Warren argued that these portions of the MFDA panel's Order demonstrate that the MFDA panel did not intend to impose a permanent prohibition; rather the panel assumed that Warren would return to being an approved person at some point following expiry of the 90-day suspension. In effect, Warren argued that had the MFDA panel known the effect of its 90-day suspension, it would have made a different order.

[27] We do not accept that the Order's inclusion of conditions imposed on Warren following the end of his suspension and return to practice as an approved person demonstrates that the MFDA panel must have assumed that he would not suffer, in effect, a permanent prohibition or that it would have changed its decision had it known that this would be the outcome. Rather, the Order provided, in effect, that Warren would be allowed to return to approved person status after 90 days, subject to conditions, and, indeed, he may still be

[5] See, for example, *Re: Terra Nova Partners LP*, 2017 BCSECCOM 76.
[6] *Hahn Investment Stewards & Co. Inc.*, 2009 ONSEC 41 (CanLII)

able to do so. The additional conditions would apply if and when that return to approved status occurs. The conditions serve to deal with Warren's possible return to his mutual fund business and no more.

[28] The MFDA submitted that the new evidence was not "compelling". The MFDA noted that at the MFDA hearing, Warren provided affidavit evidence of, and his counsel made submissions as to, the impacts Warren anticipated if he were given a lengthy suspension. The MFDA argued the MFDA panel was therefore alive to the issue of the potential impact of a lengthy suspension. The MFDA submitted that the "new" evidence merely corroborated, updated or supplemented the evidence and submissions that were before the MFDA panel.

[29] The MFDA also submitted that Warren's testimony as to his actual ability to pay the monetary sanctions, as summarized in paragraph 13 above, was not compelling as the ability to pay a penalty is not relevant. The MFDA also suggested that Warren might have financial resources to pay the monetary penalties. The MFDA made further arguments, based on its cross-examination of Warren on the "new" evidence, to the effect that some of Warren's financial difficulties were impacted by decisions he made after the Order was issued.

[30] In his reply submissions on the "new" evidence issue, Warren pointed out that the MFDA Penalty Guidelines state that: "The financial circumstances of the Respondent should also be taken into account in determining the appropriate fine."

[31] We note that in paragraph 52 of its Reasons for Decision, the MFDA panel referred to Warren's affidavit evidence and cross-examination on that affidavit regarding the professional and personal reputational damage he suffered as a result of the allegations and the decline in his client referrals prior to the MFDA hearing. The MFDA panel also referred to Warren's submission that if he were to be prohibited from working as a financial planner for any length of time, he would have no way to meet his personal or business obligations. The MFDA panel noted that although certain MFDA panels had considered financial difficulties of a respondent as a mitigating factor in ordering penalties and prohibitions, such panels still ordered penalties with both prohibitions and fines. The MFDA panel also referred to the MFDA's Penalty Guidelines and stated that it considered the recommendations of these Guidelines in making its Order.

[32] Although the MFDA's reasoning in applying the MFDA's Penalty Guidelines is minimal (see a fuller discussion of this below), it is clear that the MFDA panel took Warren's evidence and submissions on the anticipated impact of a lengthy suspension and significant monetary penalties into account.

[33] The MFDA panel heard, and referred in its Reasons for Decision to, Warren's evidence of anticipated dire consequences of a lengthy suspension and predictions of his inability to pay his business and personal expenses which would include any monetary penalties.

[34] The MFDA panel's Reasons for Decision indicate that it considered the possible consequences of the sanctions it imposed on Warren, including the combination of a lengthy suspension and significant monetary penalties. The "new" evidence was that the sanctions had, in fact, a serious impact on Warren. However, we conclude that these possible consequences were before the MFDA panel and were considered by it. Accordingly, we cannot conclude that the MFDA panel "would have changed [its] decision" as it related to the suspension and monetary penalties had it been aware of the "new" evidence submitted by Warren. The "new" evidence does not meet the "compelling" standard. We decline to grant Warren's application to admit the "new" evidence received from him at the Commission hearing and we will not consider it. Consequently, we will also not consider the "new" evidence which the MFDA has argued supports its position on the retention of the fine and costs award.

[35] We now proceed to consider the merits of the applications of both the MFDA and Warren on the basis of the evidence that was before the MFDA panel.

III. Section 28 and Standard of Review

[36] Section 28 of the Act provides that a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument of a self-regulatory organization (SRO) may apply by notice to the Commission for a hearing and review of the matter.

[37] Section 165(4) of the Act provides that, on a hearing and review, the Commission may confirm or vary the decision under review or make another decision it considers proper.

[38] Section 5.9(a) of BCP 15-601 sets out the Commission's framework for a section 28 review. It states:

> ***Where the review of an SRO decision proceeds as an appeal*** – The Commission does not provide parties with a second opinion on the matter decided by an SRO. If the decision under review is reasonable and was made in accordance with the law, the evidence, and the public interest, the Commission is generally reluctant to interfere simply because it might have made a different decision in the circumstances …
>
> In these circumstances, the Commission generally confirms the decision of the SRO, unless:
>
> - the SRO has made an error in law
> - the SRO has overlooked material evidence
> - new and compelling evidence is presented to the Commission, or
> - the Commission's view of the public interest is different from the SRO's.

[39] This Commission has quoted with approval and consistently followed section 5.9(a) in its section 28 reviews[7]. In *Marlene Legare and MFDA*, 2013 BCSCCOM 362 (at paragraph 13), the Commission made clear that the onus is on the applicant to both identify the criteria in section 5.9(a) that apply to the aspect of the MFDA panel's decision for which review is sought and show that the MFDA panel's decision in that regard is unreasonable.

[40] As noted above, the parties requested a review of the following aspects of the MFDA panel's Order:

- Warren requested a review of the sanctions imposed by the MFDA panel and that we vary the sanctions by setting aside the $100,000 fine and the $10,000 in costs.
- The MFDA requested a review of the MFDA's 90-day suspension of Warren on the basis that it was inadequate and seeks a variation of the suspension to three years or longer.

(a) Warren's application

[41] Warren submitted that the MFDA panel overlooked material evidence, erred in law and proceeded on incorrect principles in ordering a 90-day suspension that was career ending along with a $100,000 fine and $10,000 in costs.

[42] Warren submitted that the Commission panel should not give deference to the MFDA panel's decision as the MFDA panel: did not call upon any expertise the MFDA panel members may have had; did not provide reasons for both a 90-day suspension and a $100,000 fine; did not address or distinguish *Re Steinhoff*[8], a Commission decision on which Warren relied; and, did not apply the MFDA's Penalty Guidelines.

[43] Warren submitted that the evidence did not support the MFDA's position that Warren's misconduct was "extremely serious".

[44] Warren submitted a long list of factors derived from the evidence at the MFDA hearing to support his contention that his misconduct was not "extremely serious". These factors included a 24-year history in the mutual fund industry without any prior disciplinary action, his cooperation with the MFDA investigation, his admission of misconduct regarding the unsuitability of the leveraged investment strategy recommended by him, and the full compensation paid by his member firm to DZ and EZ and HN and MN.

[45] Warren also submitted a summary of the evidence at the MFDA hearing regarding his financial circumstances and the likely impact of a lengthy suspension and a significant monetary penalty. This evidence included the expenses of operating both his mutual fund and life insurance businesses, future lease commitments and his personal expenses. He also summarized his evidence about the consequences he anticipated which included

[7] See, for example, *Terra Nova, Re Chang*, 2017 BCSECCOM 70 and *Doreen Lowe et al*., 2014 BCSECCOM 458.
[8] 2014 BCSECCOM 23

inability to meet his business and personal financial obligations, inability to pay staff salaries, loss of clients, termination of his mutual fund licence and loss of his life insurance contracts, unlikelihood of any MFDA dealer to offer him a licence and unlikelihood of the life insurance companies recontracting with him.

[46] Warren also relied heavily on *Re Steinhoff*, in which this Commission set aside a 12-month suspension imposed by an IIROC panel.[9] He stated that although he argued the application of this decision before the MFDA panel and provided the panel with a copy of that decision, the panel did not refer to this decision or explain why it chose not to follow it.

[47] Warren also submitted that although the MFDA panel made reference to the MFDA Penalty Guidelines, it made no specific reference in its Reason for Decision to the application of those provisions of the Guidelines relating to suspensions or ability to pay monetary penalties.

[48] Warren submitted that the MFDA panel's Reasons for Decision were inadequate, in particular, the MFDA panel's failure to explain why he should receive both a 90-day suspension and a $100,000 fine.

[49] Warren also submitted that the public interest was not served by a fine on top of a career-ending suspension.

[50] The MFDA submitted that the MFDA panel's Order and Reasons for Decision are owed deference by this Commission panel.

[51] The MFDA responded to Warren's submissions that the MFDA panel's sanctions constituted an error of law and that the panel overlooked material evidence by summarizing the evidence that supported the seriousness of Warren's misconduct. This evidence included the facts underlying Warren's admission of the allegation regarding the unsuitability of the leveraged investment strategy for four clients. The MFDA submissions also reviewed the facts that supported the MFDA panel's finding that Warren failed to report a complaint of DZ and EZ to his member firm and attempted to negotiate a settlement with DZ and EZ without involving Warren's member firm. Apart from the breaches of MFDA policies and Warren's member firm's policies found by the MFDA panel, the MFDA's submissions emphasized that these breaches prevented Warren's member firm's supervisory procedures coming into effect for several months after the initial complaint.

[52] The MFDA relies on a number of MFDA and IIROC decisions which it argued involved misconduct that was similar to that of Warren. Those decisions imposed either permanent prohibitions or suspensions of at least three years as well as significant monetary penalties, although in some of these cases the monetary penalties were less than $100,000.

[9] 2011 IIROC No.54 and 2012 IIROC 39

[53] In his reply, Warren submitted that each of the decisions relied upon by the MFDA involved misconduct that was more serious than that of Warren. Warren also referred to a number of MFDA and IIROC decisions in which lesser or no suspensions were imposed as well as lower monetary penalties.

[54] Warren relied heavily on this Commission's decision in *Re Steinhoff* in which the registrant was found by the IIROC panel to have made investments which involved $120,000 borrowed on margin for two clients that were unsuitable given their circumstances. The IIROC panel imposed sanctions that included a 12- month suspension, a $100,000 monetary penalty and costs of $20,000. On a hearing and review, this Commission set aside one allegation but accepted the IIROC panel's finding that the investments made by Steinhoff were unsuitable. The Commission varied the sanctions imposed by the IIROC panel by eliminating the suspension while sustaining the monetary penalties. The Commission panel stated that: "Suspension of any length beyond the range of a normal vacation is, for a registered representative, an extremely serious matter. A suspension of one year, what the IIROC panel ordered here, is tantamount to the termination of the registrant's career." The Commission panel referred to the registrant's age (mid-fifties) and the need to build a new book of business, even with a clean slate. The Commission panel accepted that the registrant made a serious mistake but found that the public interest did not demand that her career be ended. She had had a 25-year career with no previous regulatory sanctions and there was no evidence that she represented an ongoing threat to clients or to the reputation of the securities markets. The Commission panel concluded that no suspension was warranted but upheld the IIROC panel's $100,000 fine. In making that order the Commission panel stated that it had considered "the objectives of regulatory orders, the factors relevant to sanction [and] the parties' submissions …." The Commission panel also stated that the penalty which it imposed "will adequately deter [the registrant] and other registrants from failing to meet suitability requirements."

[55] In the present matter, the MFDA panel's Reasons for Decision referred to the *Re Steinhoff* case as follows: "We …have taken into account the comments of the British Columbia Securities Commission in *Re Steinhoff*. However, our view of those comments is that they are very fact specific. The Commission was not making a finding of law, which would be binding on us, but instead simply expressing their opinion on the effect of suspensions generally, and making a finding of fact in respect of the case in front of them."

[56] The MFDA submitted that Warren's misconduct was more serious than that in *Re Steinhoff* including failure to report a complaint and attempting to negotiate a settlement without his member firm's knowledge or approval, thus circumventing the member's complaint handling and supervision process. The clients affected by Warren's misconduct were also seniors who are acknowledged to be a more vulnerable class of investors.

[57] The evidence before the MFDA panel fully supported its finding that Warren's misconduct was very serious. DZ and EZ were well into their 70s and HN and MN were approaching retirement by the time of the MFDA hearing. The unsuitable leveraged investment strategy had been employed by Warren for almost 10 years, in the case of DZ and EZ, and for over six years, in the case of HN and MN. The amounts of loans to support the leveraging strategies were very large compared to the net worth of DZ and EZ and HN and MN. Warren failed to disclose to his member firm a series of written and oral complaints by DZ and EZ, including family members and their lawyer, for about four months. Warren clearly attempted for over one month to settle the complaints of DZ and EZ without advising his member firm. This misconduct was far more pervasive and serious than was found by this Commission in *Steinhoff*.

[58] Regarding Warren's submissions that the MFDA panel ignored his financial situation and inability to pay any significant monetary penalties, there was substantial evidence tendered at the MFDA hearing regarding Warren's financial situation and the likely consequences of a substantial suspension and significant monetary penalties. As noted above, the MFDA panel's Reasons for Decision refer in paragraphs 52 and 53 to its consideration of Warren's evidence on the potential impacts of a lengthy suspension and significant monetary penalties.

[59] As to Warren's submission that the MFDA panel failed to articulate its reasons for imposing the suspension and monetary penalties which it ordered, we agree the MFDA panel's Reasons for Decision are sparse in this regard. But they do include a review of the facts, the applicable MFDA policies, Warren's member firm's policies, the parties' submissions and applicable precedent decisions (both of the MFDA and other SROs and by this and other commissions upon hearings and reviews), albeit with little further explanation as to why the public interest warranted the suspension and monetary penalties which it imposed.

[60] As stated in *Lake v. Canada (Minister of Justice)*[10], "The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The …reasons must make it clear that he considered the individual's submissions… and must provide some basis for understanding why those submissions were rejected."

[61] The MFDA panel's Reasons for Decision show the rationale behind its conclusions that Warren committed serious misconduct contrary to multiple MFDA policies and Warren's member firm's policies.

[62] However, the MFDA's explanations for its sanctions regarding Warren are minimal. More complete explanations of how the panel applied the factors relevant to sanctions to the evidence should in future be provided by SRO decision makers in this regard. The MFDA panel refers to various factors that relate to sanction, including the gravity of the offences, the need to maintain investors' confidence in the markets and the trust of

[10] [2008]1 SCR 761 at para. 46

clients, the importance of protection of the markets from future misconduct by the respondent as well as by others (general deterrence). The MFDA panel then refers to the MFDA's proposed sanctions and to Warren's submissions, referred to above, concerning the potential impact of a substantial suspension and significant monetary penalties. The MFDA panel references three decisions of MFDA panels where submissions on financial difficulties were addressed and also refers to the MFDA Penalty Guidelines, noting that it had considered the MFDA Penalty Guidelines but that they are not mandatory. The MFDA panel then concludes as follows: "After carefully considering the evidence, the submissions of counsel, and the authorities cited with respect to penalty, it is the unanimous view of this panel that the following penalties be imposed on the Respondent, (which we ordered on May 5, 2016):…" (The penalties included in the MFDA Order were then repeated.)

[63] As stated in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*[11], "… if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met." The *Dunsmuir* criteria require reasons to demonstrate "justification, transparency and intelligibility"[12].

[64] Therefore, notwithstanding our concerns about the absence of sufficient explicit reasoning in the MFDA's Reasons for Decision for imposing the sanctions which it imposed on Warren, we find the reasons are sufficient to permit us to determine whether the MFDA's conclusions are reasonable in light of all of the evidence and submissions before the MFDA panel.

[65] We have reviewed the cases referred to by both the MFDA and Warren regarding sanctions meted out by the MFDA and other SROs and the decisions of this and other commissions and appeal courts addressing the appropriateness of sanctions. What is apparent is that the sanctions vary, as they should, based on all the facts and circumstances of each case and the application of the factors relevant to sanctions to these facts and circumstances.

[66] It is clear on the record that the MFDA panel had before it evidence that it considered in its determination of the sanctions which it imposed. This evidence included the likelihood of serious consequences to Warren's career and business of a lengthy suspension and the financial hardship to Warren and others of the combination of a substantial suspension and a significant monetary penalty.

[67] We find that the MFDA panel did not overlook material evidence, make an error in law or proceed on an incorrect principle. The MFDA panel considered the MFDA Penalty Guidelines and concluded that both a lengthy suspension and a significant monetary penalty were appropriate in all the circumstances. The MFDA panel considered this Commission's decision in *Steinhoff* and distinguished it.

[11] [2011] S.C.J. No. 62 at para 16
[12] 2008 SCC 9, [2008] 1 S.C.R.190 at para 47

[68] Taking into consideration both the 90-day suspension and the monetary penalty, we find that the $100,000 fine imposed by the MFDA panel was within the scope of reasonableness taking into account applicable law, the evidence on the record and the parties' submissions. The sanctions are within the range of suspensions and monetary penalties imposed in comparable cases before the MFDA and other relevant SROs. Despite several factors which Warren suggested should be taken into account in mitigation, we find that none of them warrants reducing the $100,000 fine imposed by the MFDA panel. He was guilty of multiple acts of serious misconduct, involving significant amounts, over an extended period of time. Accordingly, under section 165(4) of the Act, we confirm the MFDA panel's decision regarding its penalty of a $100,000 fine against Warren.

[69] Having found that the MFDA's decision to impose a monetary penalty of $100,000 against Warren in combination with a 90-day suspension was not unreasonable in all of the circumstances, we also find that there is no compelling public interest basis upon which to revoke or vary the $100,000 monetary penalty.

[70] Warren also submitted that the MFDA panel's awarding of $10,000 in costs should be set aside as there was no evidence before the MFDA panel on any costs incurred by the MFDA in this matter and there was no basis for this award. Warren also submitted that the costs award added to the inappropriateness of the aggregate of the monetary penalties, given his inability to pay.

[71] The MFDA merely submitted that costs are awarded as a matter of course in MFDA hearings and that costs as awarded in this case are substantially less than the MFDA's actual staff costs in this proceeding.

[72] We agree with Warren that the costs award of $10,000 cannot stand and we order that the MFDA Order be varied accordingly. There was no evidence of the costs incurred by the MFDA in this matter. While an award of costs is in the discretion of the MFDA panel[13], it is an error in law for a panel to make an award of costs on no evidence whatsoever. A respondent must also have an opportunity to lead evidence and make submissions disputing any costs the MFDA seeks and the appropriateness of a costs award in all of the circumstances. It should not be unduly difficult for the MFDA to produce evidence for at least some of its costs in an MFDA proceeding.

(b) The MFDA's application

[73] The MFDA's application for a hearing and review of this matter asks us to vary the Order of the MFDA panel to increase the suspension of Warren from 90 days to at least three years.

[13] MFDA By-law 24.2

[74] The MFDA's submissions argue that the Commission panel should increase the suspension on the basis that the MFDA panel erred in law and proceeded on an incorrect principle by failing to give adequate weight to the seriousness of Warren's misconduct and that the MFDA panel did not give sufficient weight to general deterrence. The MFDA also submitted that the 90-day suspension was inconsistent with the public interest.

[75] As noted above, the MFDA and Warren provided case references where both longer and shorter suspensions were imposed in cases which both parties argued were comparable. The MFDA submitted that a 90-day suspension of Warren, given all of the evidence and circumstances, was outside the "range of possible, acceptable, outcomes which are defensible in respect of the facts and law[14]."

[76] Warren's submissions on the inappropriateness of a substantial suspension and significant monetary penalties supporting his request for elimination of the monetary penalties effectively stand in rebuttal of the MFDA's submissions supporting an increase in the suspension.

[77] We have found that the MFDA panel did not overlook material evidence, make an error in law or proceed on an incorrect principle in ordering the 90-day suspension in combination with a $100,000 monetary penalty. We also concluded that the MFDA's sanctions of a 90-day suspension and $100,000 fine are within the range of possible reasonable outcomes. These conclusions also apply to the MFDA's request for this Commission panel to increase the length of Warren's suspension.

[78] While general deterrence is a valid and appropriate factor in assessing an appropriate set of sanctions for misconduct, that factor is only one of the relevant factors and should not dominate a tribunal's deliberations.

[79] For the same reasons that apply to Warren's request to revoke or vary the MFDA Order relating to the monetary sanction imposed on him, we also do not consider that there is a compelling public interest basis to increase the 90-day suspension as requested by the MFDA.

[80] Accordingly, we dismiss the MFDA's application to increase the length of the suspension imposed on Warren by the MFDA panel and confirm the MFDA's Order in that regard.

[14] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 3 SCR 895

IV. Ruling

[81] In summary, we:

- Dismiss Warren's application to admit and consider "new" evidence
- Dismiss Warren's application to set aside the $100,000 monetary penalty imposed by the MFDA panel
- Allow Warren's application to set aside the $10,000 award of costs imposed by the MFDA panel and vary the Order accordingly, and
- Dismiss the MFDA's application to increase the 90-day suspension imposed on Warren by the MFDA panel.

September 12, 2017

For the Commission

George C. Glover, Jr.
Commissioner

Nigel P. Cave
Vice Chair

Suzanne K. Wiltshire
Commissioner