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**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED**

– AND –

IN THE MATTER OF GREGORY BURKE

DECISION
**(Subsections 30(5) and (5A)
and Section 6)**

Hearing	December 9 and 10, 2019	
Decision:	June 3, 2020	
Panel:	Shirley P. Lee, QC Michael Deturbide, QC Kenneth Wheelans	Chair Commissioner Commissioner
Counsel:	Brian K. Awad, QC	For Gregory Burke
	Lyla Simon	For the Mutual Fund Dealers Association of Canada

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I. BACKGROUND

A. INTRODUCTION

[1] On December 9 and 10, 2019, the Nova Scotia Securities Commission (the Commission) held a hearing (the Hearing) to consider an application (the Application) by Gregory Burke (Burke) under subsections 30(5) and (5A) of the *Securities Act*, R.S.N.S. 1989, c. 418, as amended (the Act). As a result of the COVID-19 outbreak, which led to the declaration of a "Provincial State of Emergency" under the *Emergency Management Act* (Nova Scotia) on March 22, 2020, as extended, the continuation of the Hearing scheduled for May 14, 2020, for oral submissions was cancelled and the Application concluded with a written hearing for final submissions from both parties.

[2] The Application is for a hearing and review of the Decision and Reasons (Penalty) of the Mutual Fund Dealers Association of Canada (the MFDA) issued against Burke dated December 19, 2017 (the MFDA Decision). The MFDA Decision was issued by the MFDA following a hearing on August 10, 2017 (the MFDA Hearing).

[3] Burke has been registered as a representative of a mutual fund dealer since January 1998. Since December 2, 2009, Burke has been registered as a dealing representative (previously known as a mutual fund salesperson) with Equity Associates Inc. (Equity), a Member of the MFDA.

[4] The MFDA Hearing related to client communications sent by Burke to seven clients of Equity (the Client Communications), with respect to investments that the clients held, or investments that Burke was recommending to them.

[5] At the MFDA Hearing, the MFDA was asked by the parties to make a finding on misconduct relating to the Client Communications described in the Agreed Statement of Facts dated August 8, 2017 (ASF), entered into between the staff of the MFDA and Burke, and to consider and determine the appropriate penalty to be imposed on Burke arising from the ASF.

[6] Paragraph 21 of the ASF reads as follows, with Burke being the Respondent referred to in that paragraph:

> 21. By engaging in the conduct described above, the Respondent admits that:
>
> i. Between August 2011 and November 2015, the Respondent sent written communications to seven clients containing misleading or incomplete information, unwarranted or exaggerated claims, and/or failing to identify the material assumptions upon which the conclusions were based, contrary to MFDA Rules 2.8.2 and 2.1.1.

[7] At the MFDA Hearing, the MFDA found that the conduct described in paragraph 21 of the ASF was conduct deserving discipline and proceeded to hear submissions on penalty. Written submissions were filed by both parties subsequent to the MFDA Hearing.

[8] After analyzing the relevant MFDA rules, powers of the hearing panel, factors to be considered in determining appropriate penalty, the MFDA penalty guidelines, prior MFDA decisions, and evidence and submissions from both parties, and noting that the breach of MFDA Rules 2.1.1 and 2.8.2 (the Breach) had been admitted by Burke, the MFDA ordered Burke to pay a fine of $10,000 and costs of $5,000, as set out in the MFDA Decision and the MFDA order dated December 21, 2017 (collectively with the MFDA Decision, the MFDA Decisions).

[9] Burke was represented by legal counsel (the Previous Counsel) throughout the MFDA hearing process, including the investigation and the preparation and signing of the ASF, up to and including the issuance of the MFDA Decisions.

B. THE APPLICATION

[10] In the Application, Burke is asking the Commission to:

(a) vacate the MFDA Decisions; and

(b) require the MFDA to grant Burke a new hearing on the merits before a new MFDA panel.

[11] For the Application, both parties provided affidavit and oral evidence and comprehensive written submissions. After consideration of the record of the MFDA proceeding and all the evidence and submissions, we find that Burke has not established a basis to intervene in the MFDA Decisions and dismiss the Application. Our reasons for the decision are set out below.

II. THE ISSUES

[12] In considering the Application, we will address the following issues:

(a) what is the appropriate standard of review for a hearing and review under subsections 30(5) and (5A) of the Act?

(b) has Burke established any grounds on which the Commission may intervene in the MFDA Decisions?

(c) to what extent should criminal law principles relating to withdrawal of a guilty plea be applied in the hearing and review of the MFDA Decisions?

(d) if there are grounds to intervene in the MFDA Decisions, what is the appropriate disposition of the matter by the Commission?

III. SUBMISSIONS OF THE PARTIES

A. BURKE'S SUBMISSIONS

[13] Burke submits that the basis for the Application is that the MFDA Decisions are unjust because, at the MFDA Hearing, the MFDA panel proceeded on the mistaken understanding that Burke had intended to admit the Breach, and to waive his right to contest the Breach.

[14] Burke submits that there are two analytical frameworks for deciding the Application.

[15] First, the Commission could apply the framework that has been developed in the field of criminal law with regard to applications to withdraw guilty pleas using the following three-part analysis from *R. v. Wong*, 2018 SCC 25 (the Wong Decision):

(a) was there a legally relevant consequence of the guilty plea of which the defendant was not aware?

(b) if so, is there at least a reasonable possibility that the defendant would not have pleaded guilty if the defendant had been aware of that consequence?

(c) if so, has the defendant suffered prejudice?

[16] Second, the Commission could look to the traditional grounds for review set out in the Ontario Securities Commission (OSC) decision *Canada Malting Co., Re* (1986), 9 O.S.C.B. 3565 (the Canada Malting Decision). One of the grounds is that new and compelling evidence is presented on review that was not presented to the original decision maker. Burke submits that the Commission would or should find it both new and compelling that a registrant did not intend to admit wrongdoing or waive the right to contest an allegation at a hearing.

B. MFDA'S SUBMISSIONS

[17] The MFDA submits that only in rare circumstances should the Commission intervene in a decision of a self-regulatory organization (SRO) such as the MFDA. Before doing so, the Commission must be satisfied that Burke has met the heavy burden of demonstrating that its case fits within at least one of the five grounds for intervention set out in the Canada Malting Decision.

[18] The MFDA further submits that the evidence given by Burke is not new and compelling evidence.

[19] The MFDA further submits that it is not accurate or appropriate to analogize the Application to a request to withdraw a guilty plea in a criminal proceeding.

[20] If the Commission does proceed to consider this analogy, the MFDA submits that the burden is on Burke to show that the guilty plea was not valid and that the factors to consider are whether the guilty plea was voluntary, unequivocal, and informed. The MFDA submits that Burke has not met the burden of establishing that the ASF was invalid based on the criteria for nullification of a guilty plea.

IV. SECURITIES LAW ANALYSIS

A. HEARING AND REVIEW UNDER SUBSECTIONS 30(5) AND (5A) OF THE ACT

[21] The Commission has the authority to review a decision, order, or ruling of an SRO, in this case the MFDA, under subsections 30(5) and (5A) of the Act which provide as follows:

> 30(5) The Director or any person or company which is a registrant and directly affected by a decision, order or ruling of a self-regulatory organization is entitled to a hearing and review of the decision, order or ruling by the Commission to the same extent as if the decision, order or ruling had been a decision of the Director.
>
> 30(5A) Section 6 applies to the hearing and review of a decision, order or ruling under subsection (5) in the same manner as that Section applies to a hearing and review of a decision of the Director.

[22] Under subsection 6(2) of the Act, the registrant is required to send notice in writing to the Commission within 30 days after the mailing of the SRO decision requesting a hearing and review. Burke, through counsel, sent written notice dated January 18, 2018, to the Commission requesting a hearing and review of the MFDA Decision.

[23] Subsection 6(3) of the Act provides that, upon a hearing and review, the Commission may confirm the decision under review or make such other decision as the Commission considers proper.

[24] Section 2.1 of Rule 15-501 *General Rules of Practice and Procedure* (Rule 15-501) provides that these rules apply to all hearings before the Commission, including a review of an SRO decision pursuant to subsection 30(5) of the Act.

[25] Rule 15-501 sets out the Commission hearing process from the commencement of a proceeding to the issuance of the decision.

[26] Under Rule 15-501, the Commission exercises original jurisdiction for a hearing and review under subsection 30(5) of the Act similar to conducting a new trial, including the admission of new evidence.

B. STANDARD OF REVIEW OF AN MFDA DECISION

1. Law

[27] We will examine the securities laws of Ontario and British Columbia for guidance on the standard of review of an SRO decision.

a. Ontario

i. Hahn Decision

[28] The OSC considered the five principles from the Canada Malting Decision in its decision *Hahn Investment Stewards & Co. Inc.*, 2009 ONSEC 41 (CanLII) (the Hahn Decision). The Hahn Decision related to an application by Hahn Investment Stewards & Co. Inc. (Hahn) to the OSC for a hearing and review of a decision of the Investment Industry Regulatory Organization of Canada (IIROC) refusing to vary or cancel certain trades made in exchange-traded funds on Hahn's behalf.

[29] The OSC discussed the standard of review of an SRO decision in paragraph 80 of the Hahn Decision as follows:

> [80] *Re Canada Malting* stands as the foundational case of the Commission, on the standard of review. In that case, the Commission outlined the five grounds on which it might intervene with a decision of an SRO. The SRO in *Re Canada Malting* was the TSX as it then was. The five grounds established by the Commission in *Re Canada Malting* are:
>
> (a) the self-regulatory entity has proceeded on an incorrect principle;
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> (b) the self-regulatory entity has erred in law;
>
> (c) the self-regulatory entity has overlooked some material evidence;
>
> (d) new and compelling evidence is presented to the Commission that was not presented to the self-regulatory entity; or
>
> (e) the self-regulatory entity's perception of the public interest conflicts with that of the Commission.
>
> *Re Canada Malting*, *supra* at para. 24.

[30] In Hahn's application, the OSC considered the five grounds for intervention from the Canada Malting Decision, including whether new and compelling evidence was presented to the OSC that was not presented to IIROC.

[31] The majority of the OSC panel noted that Hahn was a sophisticated market participant and that it was reasonable to conclude that Hahn ought to have known the "new" information it was submitting to the OSC at the time of the trades that were

the subject of the IIROC decision and that Hahn did not provide this information to IIROC.

[32] The OSC majority noted that it was reviewing the actions of IIROC with deference. It expressed concern with parties classifying evidence as "new" evidence if the parties knew or ought to have known of the evidence at the time of the decisions being made by IIROC and stated at paragraph 197 of the decision as follows:

> [197] Absent, compelling explanatory evidence to the contrary, we are of the view that in the circumstances of this case, "new" means information that was not known to the party purporting to introduce it as new at the time of the SRO's decision. …

[33] Commissioner Thakrar, dissenting in part, found that the evidence presented by Hahn to the OSC was new and compelling information that was not presented or known to IIROC at the time of its decisions.

[34] Commissioner Thakrar noted that the majority placed significance on the fact that Hahn failed to inform IIROC of the information in question and that, while he agreed that Hahn bore some responsibility for failing to provide this information to IIROC, it was unclear as to who was ultimately responsible for ensuring that IIROC had this information at the time it made its decision. Those responsible could have included IIROC, the Toronto Stock Exchange, Hahn, the broker/dealer, or the trustee and manager of the securities in question.

ii. McQuillen Decision

[35] In *McQuillen, Re*, 37 O.S.C.B. 8580 (the McQuillen Decision), the OSC considered an application for a hearing and review of a decision of Market Regulation Services Inc. (RS) approving a settlement agreement between Mr. McQuillen and RS (the RS Agreement).

[36] Approximately six years after the RS Agreement, after a contested hearing, IIROC (successor to RS) concluded that trading by Mr. Berry, who hired Mr. McQuillen as his administrative assistant, did not contravene UMIR Rules 6.4 and 7.7(5) and all allegations against Mr. Berry were dismissed (the Berry Decision).

[37] The trading considered in the Berry Decision was the identical trading upon which the RS Agreement was based.

[38] After stating that the OSC exercises original jurisdiction akin to a trial de novo in a Section 21.7 hearing and review, which is substantively the same as subsections 30(5) and (5A) of the Act, the OSC states from paragraphs 40-44 of its decision that:

(a) although the OSC has a broad scope of authority on a hearing and review, in practice, it takes a more restrained approach and will generally defer to an SRO decision that is central to the SRO's specialized expertise; and

(b) only in rare circumstances will the OSC intervene in an SRO decision and, before doing so, it must be satisfied that the applicant has met the "heavy burden" of demonstrating that its case fits within at least one of the five grounds for intervention in the Canada Malting Decision.

[39] The OSC determined that the only relevant Canada Malting factor was whether new and compelling evidence was presented to it that was not before RS.

[40] The OSC found that the Berry Decision was new and compelling evidence since it was not, and could not have been, before RS when it approved the RS Agreement.

iii. Rankin Decision

[41] *Rankin, Re* (2011), 34 O.S.C.B. 11797 (the Rankin Decision) relates to an application under section 144 of the *Securities Act (*Ontario*)* by Mr. Rankin for revocation of an order of the OSC approving a settlement agreement between Mr. Rankin and staff of the OSC (the Rankin Agreement).

[42] Mr. Rankin submitted that he would not have entered into the Rankin Agreement if he had known two new facts and events relating to Mr. Duic, a key witness against Mr. Rankin in criminal and administrative proceedings against Mr. Rankin.

[43] Prior to the date of the Rankin Agreement, OSC staff had initiated an investigation into a possible breach by Mr. Duic. Subsequent to the OSC's approval of the Rankin Agreement, it issued a sanctions order against Mr. Duic.

[44] The Rankin Decision does not discuss the concept of "new and compelling" evidence as it relates to a revocation of an OSC order rather than a hearing and review. In paragraph 71 of the decision, the OSC notes that Mr. Rankin's application is based on facts that were not known to him at the time of the Rankin Agreement and on events that occurred subsequent to that agreement.

[45] The OSC allowed Mr. Rankin to proceed with his application which was subsequently dismissed.

iv. AiT Decision

[46] *AiT Advanced Information Technologies Corp., Re* (2008), 31 O.S.C.B. 10027 (the AiT Decision) relates to an application under section 144 of the *Securities Act* (Ontario) to revoke two orders approving settlement agreements between OSC staff, AiT Advanced Information Technologies Corp. (AiT), and Mr. Ash. At a contested hearing subsequent to the approval of the settlement agreements, the OSC found on identical facts that AiT was not in breach of the material change reporting requirements in the *Securities Act* (Ontario). This decision was not in existence at the time of the OSC orders.

[47] The OSC revoked the two orders since Mr. Ash could not be a party to AiT's being in violation of the *Securities Act* (Ontario) when there was no violation.

b. British Columbia

[48] Hearings to review an SRO decision by the British Columbia Securities Commission (BCSC) are governed by BC Policy 15-601 *Hearings*. Section 5.9 of that policy provides that, if an SRO decision under review is reasonable and was made in accordance with the law, evidence, and public interest, the BCSC will generally confirm the decision of the SRO unless:

(a) the SRO has made an error in law;

(b) the SRO has overlooked material evidence;

(c) new and compelling evidence is presented to the BCSC; or

(d) the BCSC's view of the public interest is different from the SRO's.

The BSCS may allow the review of an SRO decision to proceed as a new hearing where there is new and compelling evidence.

2. Analysis

a. Standard of Review

[49] The first issue raised by the Application is the appropriate standard of review for a hearing and review under subsections 30(5) and (5A) of the Act.

[50] Burke submits that the Application raises the question of whether he received a fair hearing before the MFDA. He submits that, pursuant to administrative law, where a reviewing tribunal is considering whether there is a breach of procedural fairness in the proceeding under review, it should apply a standard of review of "correctness" or apply no standard of review at all.

[51] In support of this submission, Burke cited *LIUNA, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40 (the CanMar Decision), a Nova Scotia Court of Appeal (NSCA) decision relating to an appeal of decision on a judicial review of a preliminary ruling and a certification of the Labour Board.

[52] In paragraph 52 of the CanMar Decision, the NSCA noted that nobody had suggested that the Labour Board unfairly managed a part of the process that preceded the Board's Preliminary Decision, as defined in the CanMar Decision. CanMar Contracting Ltd.'s application for judicial review challenged the decision i.e. the end product of the preliminary dispute, and the judge of the Supreme Court of Nova Scotia who considered the judicial review set aside the Board's Preliminary Decision. The NSCA concluded that this required the application of a standard of review of reasonableness.

[53] The matter before us is not a judicial review of the procedural fairness in the MFDA proceedings that led to the MFDA Decisions. Similar to the situation in the CanMar Decision, the Application is for a review of the MFDA Decisions, the end product of the MFDA proceedings that led to these decisions.

[54] We find that the appropriate standard of review for the Application is the standard set out for review of an SRO decision in the Canada Malting Decision.

b. Grounds for Intervention in the MFDA Decisions

[55] The second issue raised by the Application is whether Burke has established any grounds on which the Commission may intervene in the MFDA Decisions.

[56] Burke submits that the Commission could look at the grounds for review in the Canada Malting Decision on the basis of whether there is new and compelling evidence to support the Application.

[57] Burke submits that the Commission should find it both new and compelling that a registrant (Burke) had never intended to admit wrongdoing or waive the right to contest the allegations against him at a hearing.

[58] In particular, Burke submits that:

(a) he lacked experience with the MFDA hearing process and did not know that he could speak at the MFDA Hearing;

(b) he had been struggling with the Previous Counsel for several months. Specifically:

i. Burke had instructed the Previous Counsel to remove the admission of a breach when he reviewed the draft ASF and, when the document was sent to him a second time, he signed it without reading it, assuming that the Previous Counsel had complied with his direction;

ii. the Previous Counsel was pressuring Burke to settle and admit a breach and waive his right to contest the allegations at a hearing; and

iii. Burke understood that the MFDA Hearing would be when the Previous Counsel would present his defence and the Previous Counsel never explained to Burke what would happen at the hearing;

(c) at the MFDA Hearing, the MFDA panel conducted no inquiry directly with Burke as to his intentions; and

(d) there was a disconnect between Burke and the Previous Counsel that was unknown to anyone, including Burke, and did not exist until the MFDA Hearing was underway on August 10, 2017.

[59] The MFDA submits that the information presented to the Commission is not properly characterized as “new” as Burke already knew all of the information at the time of the MFDA Hearing, even if he did not bring it to anyone’s attention.

[60] The MFDA Decisions are decisions that are central to the MFDA’s specialized expertise. The Commission should generally defer to an MFDA decision unless the applicant can demonstrate that its case fits within one of the five grounds for intervention in the Canada Malting Decision.

[61] As the applicant, Burke has the heavy burden of demonstrating that the Application involves “new and compelling” evidence presented to the Commission that was not presented to the MFDA.

[62] In the decisions referred to herein, the “new” information that the OSC was being asked to consider at either a hearing and review or an application for revocation of a previous decision was information that was not known to the applicant, or not in existence, at the time of the making of the decision that was under review or to be revoked.

[63] Paragraph 197 of the Hahn Decision provides that “… “new” means information that was not known to the party purporting to introduce it as new **at the time of the SRO’s decision**” (emphasis added). In this case, the time of the SRO’s decision was late December 2017 when the MFDA issued the MFDA Decisions

[64] Burke submitted that the disconnect between himself and the Previous Counsel was unknown to him and did not exist until the MFDA Hearing was underway. He stated that he was sickened by what he heard at the hearing when he became aware that he had agreed to the Breach in the ASF.

[65] No evidence was provided by Burke that any concerns or objections of the nature referred to in his submissions were raised with MFDA staff by either Burke or the Previous Counsel at the MFDA Hearing or at any time up to the issuance of the MFDA Decisions.

[66] The information provided by Burke to the Commission in his affidavit and oral testimony was information that was known to Burke and in existence prior to and at the time of the issuance of the MFDA Decisions.

[67] The information provided by Burke was information that was solely within his knowledge. It would have been his responsibility to provide it to MFDA staff, either directly or through the Previous Counsel. It was not information that could have been provided by a third party, as was the case of the information discussed by Commissioner Thakrar in the dissenting opinion of the Hahn Decision.

[68] The information provided by Burke to the Commission is not "new" and, therefore, is not new and compelling evidence presented to the Commission that was not presented to the MFDA.

[69] We find that Burke has not established any grounds for the Commission to intervene in the MFDA Decisions based upon the principles in the Canada Malting Decision.

V. CRIMINAL LAW ANALYSIS

A. APPLICATION OF CRIMINAL LAW PRINCIPLES TO SECURITIES PROCEEDINGS

1. Law

[70] The third issue in the Application is the extent to which criminal law principles relating to withdrawal of a guilty plea should be applied in a hearing and review of the MFDA Decisions.

[71] No decisions were provided by either party that contained a discussion of the appropriateness of applying criminal law principles to a hearing and review of an SRO decision.

a. Rankin Decision

[72] In the Rankin Decision, the OSC set out several principles to be applied in a section 144 revocation application. One principle was that the OSC should revoke or vary a previous sanctions order where "there is manifest unfairness to a respondent". In determining whether there was manifest unfairness to Mr. Rankin, the OSC decided that it would be relevant to consider when a court would set aside a negotiated guilty plea in a criminal matter.

[73] At the beginning of its analysis, the OSC noted that, in considering the principles derived from the criminal cases, Mr. Rankin had not pleaded guilty to any criminal charge and had penal sanctions imposed on him.

[74] At paragraphs 94 and 95 of the Rankin Decision, the OSC noted that Mr. Rankin was represented by experienced legal counsel at the time of the Rankin Agreement and that he had a full appreciation of the nature of the allegations against him, the strengths and weaknesses of the case, and the nature and quality of the evidence. Accordingly, the OSC found that Mr. Rankin's agreement to the terms of the Rankin Agreement was "voluntary, unequivocal and informed" within the meaning of *R. v.T. (R.)* (1992), 10 O.R. (3d) 514 (Ont.C.A.).

2. Analysis

[75] Burke submits that the MFDA Decisions are unjust and that Commission should apply the framework that has been developed in criminal law with regard to applications to withdraw guilty pleas and apply a Wong-type analysis.

[76] The MFDA submits that an analogy of the Application to a request to withdraw a guilty plea in a criminal proceeding is not accurate or appropriate. The MFDA notes the following differences between professional disciplinary proceedings and criminal proceedings:

(a) MFDA disciplinary proceedings are self-regulatory in nature and are civil matters, not criminal or quasi-criminal matters; and

(b) regulatory bodies such as the MFDA focus on protecting the public interest and regulatory sanctions address the individual as well as the possible impacts of acts and remedial measures on the profession itself and on the public, whereas criminal proceedings result in penal consequences.

[77] In the circumstances of the Application, noting the differences between MFDA proceedings and criminal proceedings, we will consider the principles for withdrawal of a negotiated guilty plea in a criminal matter.

B. CRIMINAL LAW PRINCIPLES

1. Law

a. Symonds Decision

[78] In the decision *R. v. Symonds*, 2018 NSCA 34, Mr. Symonds appealed his criminal conviction for procuring a person for sexual services on the basis that his guilty plea was not valid and gave rise to a miscarriage of justice. He stated that his trial counsel's incompetence was the reason for the miscarriage of justice and moved to introduce fresh evidence. At the Provincial Court hearing, neither Mr. Symonds' counsel nor the judge asked Mr. Symonds to confirm the guilty plea, Mr. Symonds said nothing, and a conviction was entered. At the hearing for sentencing, Mr. Symonds was not asked to confirm his agreement with the facts and the court proceeded directly to sentencing.

[79] At paragraphs 17 and 18 of its decision, the NSCA noted that its ability to intervene where there is a miscarriage of justice is found in paragraph 686(1)(a)(iii) of the *Criminal Code* (Canada) (the Code) which provides a court of appeal with the authority to allow the appeal where it is of the opinion that there was a miscarriage of justice. The NSCA then noted that an invalid plea will give rise to a miscarriage of justice and that the central issue for it to determine was whether Mr. Symonds' guilty plea was valid.

[80] The NSCA reviewed a number of foundational principles in paragraph 20 of its decision as they were set out in *R. v. Henneberry*, 2017 NSCA 71, including the following:

(a) the onus is on the appellant to demonstrate on a balance of probabilities that their plea was invalid. A valid guilty plea must be voluntary, informed, and unequivocal. To be informed, the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea;

(b) a guilty plea entered in open court will be presumed to be voluntary unless the contrary is shown;

(c) several factors may affect the voluntariness of a guilty plea, including whether the appellant was pressured to enter the guilty plea, and whether a person in authority coerced or oppressed the appellant; and

(d) the mere presence of emotions such as anxiety and feelings of pressure does not render a plea involuntary. These emotions must have reached a level where they impaired the appellant's ability to make a conscious volitional choice.

[81] The NSCA stated, in paragraphs 23-25 of its decision, that fresh evidence may be received by it under subsection 683(1) of the Code "where it considers it in the interest of justice" to do so, and where an appellant's complaints are focused on the fairness of the trial process itself.

[82] The NSCA provisionally admitted the fresh evidence offered by the parties as it was necessary to determine whether Mr. Symonds' conviction constituted a miscarriage of justice.

[83] In considering Mr. Symonds' assertion that he felt pressured by his counsel to plead guilty, the NSCA stated the following at paragraph 50 of its decision:

> [50] There is a presumption that the appellant's guilty plea, entered in open court and in his presence, is voluntary. However, it is rebuttable. As stated in *T. (R.)*, *supra*, undue pressure exerted by counsel (or others) can lead to a plea being found to be involuntary. However, the feelings of pressure and emotional upheaval must have been sufficient to have impaired the appellant's ability to make a "conscious volitional choice". The mere presence of such emotions do not render a plea involuntary unless credible and competent evidence establishes the pressure exerted overcame the appellant's free will.

[84] The NSCA found that the evidence provided by Mr. Symonds did not support his assertions that he was pressured by his counsel to plead guilty and was unaware of the nature of the charges laid against him. It concluded that he failed to show that his plea was invalid and dismissed the appeal.

b. Wong Decision

[85] In the Wong Decision, Mr. Wong, a permanent resident of Canada, had plead guilty to a charge of trafficking in cocaine, was convicted, and sentenced to nine months imprisonment. Before entering his plea, Mr. Wong did not know that a guilty plea might have immigration consequences. He first learned of this while serving his prison sentence.

[86] The issue before the Supreme Court of Canada (SCC) was the proper approach for considering whether a guilty plea can be withdrawn on the basis that the accused was unaware of a collateral consequence stemming from that plea such that there was a miscarriage of justice under paragraph 686(1)(a)(iii) of the Code.

[87] The SCC noted that the finality of a guilty plea requires that the plea be voluntary, unequivocal and informed. For a plea to be informed, an accused must be aware of both the criminal consequences of the plea and the legally relevant collateral consequences. The consequences of the plea involve an awareness that a conviction and penalty may follow. A legally relevant collateral consequence is a non-criminal consequence that is typically state imposed, flows from conviction or sentence, and impacts serious interests of the accused.

[88] The SCC determined that Mr. Wong's guilty plea was uninformed, and therefore invalid, as he was not aware of the immigration consequences of his conviction and sentence and that these consequences were legally relevant consequences.

[89] The key issue considered by the SCC was the appropriate analysis to determine the prejudice that must be shown to establish a miscarriage of justice. The majority of the SCC determined that the accused should be required to establish subjective prejudice through the filing of an affidavit establishing a reasonable possibility that they would have either opted for a trial and pleaded not guilty, or pleaded guilty but with different conditions. This would be followed by an objective assessment of the creditability of the accused's subjective claim.

[90] Based on this analysis, the majority concluded that Mr. Wong did not state in his affidavit that he would have proceeded differently and, therefore, he had not established prejudice giving rise to a miscarriage of justice.

c. Cherrington Decision

[91] In *R. v. Cherrington*, 2018 ONCA 653 (the Cherrington Decision), Mr. Cherrington appealed his conviction and sentence for fraud subsequent to entering a guilty plea. The issue before the Ontario Court of Appeal (Ont. CA) was whether Mr. Cherrington's plea was fully informed and voluntary. Mr. Cherrington sought to set aside his guilty plea on the following two grounds:

(a) his trial counsel's failure to provide effective legal assistance, including that counsel was pressuring Mr. Cherrington to plead guilty without devising a trial strategy; and

(b) Mr. Cherrington failed to appreciate the situation and didn't grasp the effect and consequences of a guilty plea due to his medical condition arising from a car accident.

[92] Noting that the Ont. CA can, in the interests of justice, receive fresh evidence, it considered fresh evidence submitted by the parties.

[93] The Ont. CA set out the governing principle for whether a guilty plea was voluntary in paragraph 21 of its decision as follows:

> [21] A plea of guilty is *voluntary* if it represents the conscious volitional decision of an accused for reasons that the accused regards as appropriate. Pleas of guilty entered in open court in the presence of counsel are presumed to be voluntary. The presumption is rebuttable, as for example, by evidence of an accused's limited cognitive capacity, a mental disorder or condition, or cognitive or emotional issues such as anxiety, depression, chronic pain, anger management problems and difficulty in communication. However, an accused who claims involuntariness must demonstrate that he or she lacked the capacity to make an active or conscious choice whether to plead guilty: *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (Ont. C.A.), at p. 519; *R. v. W.(M.A.)*, 2008 ONCA 555, 237 C.C.C. (3d) 560 (Ont. C.A.), at paras. 23-37. To enter a voluntary plea of guilty, an accused need only be able to understand the process leading to the plea, communicate with counsel, and make an active or conscious choice. Whether the choice to plead guilty is wise, rational or in the accused's best interest is not part of the inquiry: *W.(M.A.)*, at para. 35; *R. v. Baylis*, 2015 ONCA 477, 326 C.C.C. (3d) 18 (Ont.C.A.), at para. 47.

[94] The Ont. CA found that, based on the evidence and record, there was no support for Mr. Cherrington's allegation that his guilty plea was involuntary and uninformed and dismissed the appeal.

2. Analysis

a. General

[95] The criminal law decisions reflect a balance between ensuring a procedurally fair trial for the accused while preserving the finality and order that are essential to the integrity of the criminal process, including the plea-bargaining process.

[96] A similar balance is equally important for securities proceedings, including SRO proceedings. There is a considerable public interest in preserving the efficiency, stability and integrity of the settlement process under which settlement agreements or agreed statements of facts entered into between staff of securities regulators and respondents are considered final. This must be balanced against procedural fairness to the respondents.

[97] Given that the primary submission of Burke is that the MFDA Decisions are unjust and that the criminal law principles from a Wong-type analysis should be applied to the Application, we will consider whether Burke's guilty plea, the admission of the Breach in the ASF, was valid – i.e. voluntary, unequivocal, and informed. If not, what prejudice must be shown to establish that Burke suffered a miscarriage of justice which should result in a withdrawal of his guilty plea.

[98] The onus is on Burke to demonstrate on a balance of probabilities that his plea was invalid.

b. Fresh Evidence

[99] Burke has provided fresh evidence for the Commission's consideration in an affidavit and in oral testimony.

[100] The MFDA submits that in applying the principles from the Symonds Decision, the information that Burke is asking the Commission to consider is not fresh evidence and its consideration would not be in the interests of justice.

[101] To consider Burke's submission that the MFDA Decisions are unjust, we find it appropriate to admit and consider the fresh evidence provided by both parties.

c. Was the Plea Voluntary, Unequivocal, and Informed

[102] At the time of the MFDA proceedings, Burke had approximately 20 years' experience in the financial services industry and considered himself to be quite experienced in the industry. His business included mutual funds and some insurance and mortgages.

[103] Burke agreed that the mutual fund industry is a document-intensive industry and he explained that he goes over documents with his clients before he has them sign the documents.

[104] As a registrant, Burke is required under Nova Scotia securities laws to have the proficiency to sell mutual fund securities. Burke would not be considered a layperson.

[105] For the reasons below, we are satisfied that Burke's guilty plea, the admission of the Breach in the ASF, was valid – i.e. voluntary, unequivocal, and informed.

i. Voluntary

[106] For a guilty plea to be voluntary, it must represent the conscious volitional decision of the accused.

[107] A guilty plea in open court in the presence of counsel and the accused is presumed to be voluntary. We will consider whether the presumption applies in this case.

[108] Burke retained the Previous Counsel in April 2016 when he was contacted by Stephen Davis (Davis) about the MFDA investigation. Davis was the investigator for the MFDA proceeding.

[109] The Previous Counsel can be considered as an experienced and senior lawyer. The MFDA provided information from the Previous Counsel's law firm website regarding his experience and Burke has not disputed that information.

[110] The Previous Counsel was familiar with Burke's case. Burke recalled having met the Previous Counsel three times and stated that their communication was mostly through emails and phone calls. The Previous Counsel was present with Burke at the MFDA interview on May 19, 2016.

[111] The Previous Counsel represented and was present with Burke at the MFDA Hearing.

[112] At the MFDA Hearing, MFDA counsel read paragraph 21 of the ASF and asked the MFDA panel to make a finding on the misconduct. The Previous Counsel stated that he had "no objection to that". The MFDA panel determined that the conduct admitted by Burke in paragraph 21 of the ASF was conduct deserving discipline.

[113] Based upon these facts, the presumption is that Burke's guilty plea in the ASF at the MFDA Hearing was voluntary.

[114] The presumption is rebuttable. It can be rebutted if it can be shown that undue pressure was exerted by counsel to plead guilty. Burke submitted that the Previous Counsel was pressuring him to settle, admit a breach and waive his right to a hearing. He submitted that the Previous Counsel was not taking "no" for an answer and referred to the following emails from the Previous Counsel to MFDA counsel in which the Previous Counsel wrote:

(a) "Let me speak with my client. The draft [ASF] is completely reasonable – I just need to calm him down" (July 26, 2017); and

(b) "I will work on my cliey [sic]" (July 27, 2017).

[115] These two emails were sent towards the beginning of the negotiations on the ASF when Burke may have had some reservations about signing the ASF. There is no evidence that any pressure Burke felt at that time continued until August 8, 2017, to have overcome his free will when he signed the ASF.

[116] When asked by MFDA counsel whether the Previous Counsel had exercised any pressure on him to sign the ASF, Burke replied:

> Well, other than he said that it was time sensitive and I had to get it signed and get it over to him right away. That's about the only conversation that we had. We never discussed the statement of facts at all. He just told me to go ahead and read them.

[117] We find that the evidence does not support a finding that there was undue pressure by the Previous Counsel on Burke to sign the ASF.

[118] The presumption can also be rebutted if the accused can show that there were feelings of pressure and emotional upheaval that overcame the accused's free will.

[119] Burke described some family concerns in late July and early August 2017 when his house was in disarray. This matter was not raised in Burke's submissions and no evidence was provided that it was at a level to have overcome his free will.

[120] The presumption that Burke's guilty plea was voluntary has not been rebutted. Burke has not met the burden of establishing that his plea was involuntary.

ii. Unequivocal

[121] The Symonds Decision provides some guidance on determining whether a guilty plea is unequivocal. The NSCA looked at whether the accused gave instructions to counsel to enter a guilty plea and whether the accused understood the legal proceedings and the significance of a guilty plea.

[122] No evidence was provided that Burke explicitly gave instructions to the Previous Counsel to enter a guilty plea. Burke did sign the last page of the ASF and send it back to the Previous Counsel. He submitted that he instructed the Previous Counsel to remove the paragraph from the draft ASF regarding the Breach and that he signed it without reading it, assuming the Previous Counsel had complied with his request.

[123] Burke also submitted that he lacked experience with the MFDA hearing process and that the Previous Counsel never explained to him what would happen at the MFDA Hearing. He did not know that he could speak at the hearing and thought it would be when the Previous Counsel would argue his innocence and present his defence.

[124] We will examine events leading up to, and including, the MFDA Hearing in considering these submissions.

[125] Burke was involved with settlement negotiations between the Previous Counsel and MFDA staff in late April and throughout May 2017. The draft settlement agreement contained the facts and the MFDA rules alleged to have been breached.

[126] After MFDA staff advised the Previous Counsel of the fine and costs being sought, settlement negotiations ended.

[127] A Reply (undated) was filed with the MFDA on June 15, 2017. It contained several references to Burke's admissions to a minor infraction of MFDA rules with a letter of reprimand as the proposed penalty. Burke provided information to the Previous Counsel to determine which documents to attach to the Reply.

[128] On July 31, 2017, Burke sent an email to the Previous Counsel admitting to not including references in the emails and stating that what should be presented is a warning letter with no costs. Burke stated that he wasn't admitting guilt in the letter and he meant that, if he was found guilty after a good defence, the penalty should be a warning letter. No evidence was provided that Burke clarified this with the Previous Counsel.

[129] In early August 2017, the emails between MFDA staff and the Previous Counsel reflect detailed comments from Burke on the contents of the draft ASF which were incorporated into the draft by MFDA staff. Burke recalls reviewing two drafts.

[130] Burke signed the ASF and returned it to the Previous Counsel. It was signed by MFDA staff and presented at the MFDA Hearing where the MFDA panel found that the conduct in paragraph 21 of the ASF was conduct deserving discipline. This was followed by submissions on penalty by MFDA counsel.

[131] Previous Counsel then made his submissions. Burke said that red flags started going up the minute that the Previous Counsel started with the negative comments, saying that Burke was guilty for failing to set out material assumptions and had not performed properly. He realized the Previous Counsel was not there to defend him.

[132] Burke said that, as the Previous Counsel spoke, he felt like something was torn out of him and that he had his head down and his hands over his face, and that, when the Previous Counsel sat down, he “tore the strip off him” and asked the Previous Counsel what he had done.

[133] The MFDA Hearing took approximately two and a half hours. There were three breaks. Prior to the third break, after the Previous Counsel had completed his submissions, the MFDA panel Chair provided the Previous Counsel with the opportunity to meet with his client and let the panel know after the break if he needed to say anything further.

[134] After the break, the MFDA panel Chair asked the Previous Counsel if there was anything further, and the Previous Counsel replied “nothing”.

[135] By this time, Burke knew that the Previous Counsel had not amended the ASF as he had requested and that the ASF that the MFDA panel had accepted contained his admission of the Breach. He knew what was happening at the hearing and that the Previous Counsel was not there to argue his innocence and present his defence.

[136] No evidence was provided regarding the Previous Counsel’s response to Burke’s anger at the MFDA Hearing or what was discussed between the two of them about how the hearing was proceeding or whether the ASF could be revoked. The record of the MFDA Hearing shows that the hearing concluded with no objections from Burke or the Previous Counsel.

[137] Davis, who was present at the MFDA Hearing, said that he never heard any objections about the ASF or the misconduct from Burke during the hearing or any time after the hearing.

[138] Based on these events, we conclude that the Previous Counsel had instructions, whether implicit or explicit, to enter the plea in the ASF. There is no evidence that Burke did anything to correct the situation when he realized the ASF contained his admission of the Breach.

[139] We also conclude that Burke had an understanding of the legal proceedings and the significance of a guilty plea.

[140] Burke has not met the burden of establishing that his plea was equivocal.

iii. Informed

[141] For a guilty plea to be informed, the accused must be aware of the nature of the allegations against him, the effect of the plea, and the consequences of the plea. The consequences of a plea include the criminal consequences and the legally relevant collateral consequences. In the Application, there are no legally relevant collateral consequences within the meaning of this term in the Wong Decision.

[142] All three elements of an informed guilty plea are demonstrated in Burke's participation in the review of the draft settlement agreement, and the preparation of the Reply, the ASF, and the Post-Hearing Submissions on Penalty dated August 25, 2017 (the Penalty Submissions).

[143] Between July 24, 2017, and August 3, 2017, during the time of negotiating the ASF, there were nine emails between the Previous Counsel and Burke. The emails from the Previous Counsel dated July 25, 2017, and August 3, 2017, at 11:10 a.m., clearly state the Previous Counsel's opinion that there was a breach of section 2.8.2, being a technical breach of MFDA rules, which was why he was asking for a reprimand.

[144] From mid to late August 2017, the Previous Counsel communicated with Burke to prepare the Penalty Submissions which described the circumstances of the Breach, the seriousness of the Breach, and the penalties.

[145] The August 17, 2017, email from Burke to the Previous Counsel contained nine very detailed comments on the draft submissions which were reflected in the Penalty Submissions. In paragraph 8 of the email, Burke stated "I am guilty of section (b) not (a), failed to identify the material assumptions made in arriving at these conclusions". This comment was reflected in paragraph 9 of the Penalty Submissions, parts of which were in bold type.

[146] Burke stated that the sentence in his email should have read "If I am guilty of …". It is difficult to reconcile this submission with the detailed and precise wording in the email. No evidence was provided by Burke to show that he corrected this error.

[147] We find that Burke has not met the burden of establishing that his plea was uninformed.

d. Miscarriage of Justice

[148] Burke had requested the Commission to apply a Wong-type analysis to the Application.

[149] In the Wong Decision, the SCC found Mr. Wong's plea to be uninformed and, therefore, invalid. The issue considered by the SCC was the proper approach for considering whether an invalid guilty plea should be withdrawn when an accused was unaware of a collateral consequence stemming from that plea, resulting in prejudice to the accused and a miscarriage of justice.

[150] A Wong-type analysis is not required for the Application as we found that Burke has not established that his plea in the ASF was invalid.

[151] Therefore, it is not necessary to determine if there was a miscarriage of justice, a concept that comes from paragraph 686(1)(a)(iii) of the Code.

VI. GROUNDS FOR INTERVENTION

[152] We find that the submissions and evidence presented by Burke do not provide a basis for the Commission to intervene in the MFDA Decisions under either securities law principles or criminal law principles.

[153] Accordingly, it is not necessary for the Commission to address the fourth issue of the appropriate disposition of the matter upon finding the plea to be invalid.

VII. CONCLUSION

[154] The finality of an agreement signed by a respondent and accepted or approved by a securities regulator at a hearing is important for ensuring the integrity, stability and efficiency of the securities regulatory system. Effective securities regulatory enforcement proceedings are dependent upon accurate information provided by participating parties, including respondents. Decision makers make their decisions based upon the evidence that has been put before them. If, at an enforcement hearing, the respondent realizes that the information being presented to the hearing panel is not accurate or the respondent does not understand the proceeding, it is incumbent upon them to make the hearing panel aware of this before the panel makes its final decision.

[155] There is no evidence that from the time of the MFDA Hearing, when Burke became aware that the Previous Counsel was not there to argue his innocence and present his defence, to the issuance of the MFDA Decisions, Burke made anyone aware of the concerns he has raised in the Application.

[156] Based on our findings, we conclude that the MFDA acted appropriately in making the MFDA Decisions.

[157] The Application is dismissed.

DATED at Halifax, Nova Scotia, this 3rd day of June, 2020.

NOVA SCOTIA SECURITIES COMMISSION

(signed) *"Shirley P. Lee"*
Shirley P. Lee, QC
Chair

(signed) *"Michael Deturbide"*
Michael Deturbide, QC
Commissioner

(signed) *"Kenneth Wheelans"*
Kenneth Wheelans
Commissioner