IN THE MATTER OF THE SECURITIES ACT,
R.S.N.S. 1989, C. 418, AS AMENDED (the "Act")

- and -

IN THE MATTER OF

Bruce Patrick Schriver (the "Respondent")

DECISION ON PRELIMINARY MOTION

Hearing Date:	October 27, 2004
Panel:	H. Leslie O'Brien, Q.C. - Chairman James D. Nicoll, Commissioner Darren S. Nantes, Commissioner
Counsel:	R. Scott Peacock - for Commission Staff
	David Coles - for Bruce Patrick Schriver Nicole Godbout
Decision:	November 8th, 2004

This proceeding was commenced by Notice of Hearing (the "Notice") dated August 10, 2004, issued by the Nova Scotia Securities Commission (the "Commission") pursuant to sections 33, 134, 135, 135A and 136A of the Act.

The hearing convened on September 16, 2004, pursuant to the Notice. Shortly thereafter counsel for the Respondent raised a preliminary motion to strike out allegation number 13 of the statement of allegations (the "Statement of Allegations") which accompanied the Notice.

Counsel for staff of the Commission ("Staff Counsel") requested an adjournment to prepare submissions on the motion which he indicated he had heard for the first time that day.

The Commission granted the adjournment following further submissions from counsel for the Respondent and Staff Counsel.

The hearing reconvened on October 27, 2004, pursuant to a Notice of Hearing (the "Further Notice") dated October 13, 2004, issued by the Commission. The Further Notice stated the hearing was for the Commission to consider written and oral arguments pertaining to the preliminary motion.

Respondent's Submissions

Counsel for the Respondent submitted that the Commission did not have jurisdiction to find that section 30(3) of the Act has been contravened unless there had already been a ruling by the Mutual Fund Dealers Association of Canada (the "MFDA"), a recognized self-regulatory organization ("SRO"), that its by-laws, rules, regulatory instruments or policies had been contravened. Counsel

for the Respondent further submitted that the Commission had no jurisdiction to make an initial ruling and to hold otherwise would be contrary to the MFDA having been recognized as an SRO pursuant to section 30(1) of the Act.

Counsel for the Respondent took the position that before section 134(1)(a)(iii) of the Act could be invoked by the Commission the MFDA would have to have found the Respondent in breach of its by-laws, rules, regulatory instruments or policies. Having recognized the MFDA the Commission had no jurisdiction over the Respondent because the Recognition Order (as hereinafter defined) did not confer jurisdiction on the Commission to investigate or enforce MFDA by-laws, rules, regulatory instruments or policies and the Act did not delegate to the Commission such jurisdiction. Therefore since the Act did not delegate such jurisdiction it would be *ultra vires* for the Commission to do so.

Furthermore counsel for the Respondent submitted that certain sections of Schedule A to the Recognition Order, in particular sections 7(A), (B), (C), (D), (E) and (F) and sections 8(A), (C) and (D) showed that jurisdiction to determine a contravention of MFDA Rules resided in the MFDA and only in the MFDA.

Staff Counsel's Submissions

Staff Counsel submitted that the Act used imperative language in section 30(3) and the Legislature must have intended that the Commission could initiate proceedings against individuals who, in its opinion did not comply with SRO by-laws, rules, regulatory instruments or policies. Staff Counsel further submitted that the provisions of section 134(1)(a)(iii) of the Act are ancillary powers available to the Commission in exercising its public interest jurisdiction.

Staff Counsel stated that if the Respondent's position was accepted by the Commission members of SROs that had been recognized by the Commission pursuant to section 30(1) of the Act would be insulated from the supervision by and the commencement of proceedings by the Commission.

In addition Staff Counsel noted that in Schedule A to the Recognition Order, sections 7 and 8 make reference to the fact that any proceeding by the MFDA was "without prejudice to any action that may be taken by the Commission under securities legislation".

In support of his submissions Staff Counsel cited a number of authorities which discussed the public interest jurisdiction of securities commissions in Canada. In particular Staff Counsel cited *Anderson v. British Columbia Securities Commission (Executive Director) (2003), 2004 Carswell BC 9, (BCCA)* where the court held that the British Columbia Securities Commission could consider whether duties owed by directors of a company had been breached in exercising its public interest jurisdiction under section 161 of the B.C. Securities Act. Staff Counsel submitted that if a securities commission could consider whether duties imposed by another statute had been breached it could consider whether duties imposed by a recognized industry SRO had been violated.

Decision

The beginning point of our decision is section 1A(1) of the Act which sets forth the purpose of the legislation. Section 1 A (1) reads in part as follows:

> The purpose of this Act is to provide investors with protection from practices and activities that tend to undermine investor confidence in the fairness and efficiency of capital markets....

The Commission is charged with the responsibility of seeing that purpose is achieved and it must guide

decisions of the Commission.

Section 30(1) of the Act allows the Commission to recognize a person or company as a SRO. There is no dispute about the MFDA having been recognized by the Commission by order dated November 26, 2001. On April 8, 2004, an Amendment and Restatement of Recognition Order was made (the "Recognition Order") which "restated the MFDA's recognition as a self-regulatory organization so that the recognition pursuant to section 30 of the Act continues, subject to the terms and conditions attached as Schedule A". The MFDA once recognized by the Commission falls within the definition of "self-regulatory organization" in section 2(1) (aqa) of the Act.

The obligations of a member of a SRO are set out in section 30(3) of the Act as follows:

> Any member of a self-regulatory organization who trades in securities within the Province shall comply with the by-laws, rules, regulations and policies of the self-regulatory organization except to the extent that such by-laws, rules or regulations are inconsistent with this Act, the regulations or the policies of the Commission.

Section 134(1) of the Act gives the Commission the power to make a wide range of orders to foster compliance with the purposes of the Act. Of particular importance to this motion by counsel for the Respondent is section 134(1)(a)(iii) which reads as follows:

> Where the Commission considers it to be in the public interest, the Commission, after a hearing, may order
>
> (a) that a person or company comply with or cease contravening, and that the directors and senior officers of the

> person or company cause the person or company to comply with or cease contravening....
>
> > (iii) a by-law, rule or other regulatory instrument or policy or a direction, decision, order or ruling made under a by-law, rule, regulation or policy of a self-regulatory organization;

We are of the opinion that nothing in sections 30(3) and 134(1)(a)(iii) of the Act restricts the authority of the Commission to consider evidence relating to non-compliance with the by-laws, rules, regulations and policies of the MFDA.

If we accepted the submission of counsel for the Respondent the Commission would never become involved if the SRO sanctioned a member and the member accepted the sanction imposed. This would be the case even if the sanction imposed by the SRO was such as to undermine investor confidence in the fairness of the capital markets. Furthermore if the Respondent's position was adopted a lengthy delay by or complete failure by the SRO to take action would leave the Commission unable to take specific action against the member. Indeed in reply to such questions Mr. Coles as counsel to the Respondent said in his submission the only recourse for the Commission would be to move under section 151 of the Act to revoke the recognition of the SRO.

Clearly securities commissions have been given administrative powers to act in what they consider to be the "public interest". The scope of these powers has been interpreted quite broadly by various adjudicating bodies.

Many of the orders the Commission may make in the public interest under section 134(1) of the Act are similar to those the Ontario Securities Commission ("OSC") may fashion under section 127(1) of the Ontario Securities Act. Iacobucci J. of the Supreme Court of Canada in the 2001 decision in

Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)(2001), Carswell Ont. 1959 stated at para 45:

> In exercising its discretion the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally.

His Lordship also remarked at para. 39:

> The Legislature clearly intended that the OSC have a very wide discretion in such matters. The permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case.

Accordingly it is clear that we must consider the purpose of the Act as expressed in section 1A(1) when making orders under section 134(1) of the Act. It is not necessary for us to find a breach of the Act before making an order under section 134(1) of the Act.
See Re: Phillip M. Robinson (1993), 1 C.C.L.S. 147 (NSSC).

The British Columbia Court of Appeal in *Anderson v. British Columbia Securities Commission (Executive Director), supra,* held that the British Columbia Securities Commission could consider whether the respondent had breached the provisions of the British Columbia Company Act when exercising its public interest jurisdiction under section 161 of the British Columbia Securities Act. In Robinson *supra,* the Commission considered the breach of fiduciary duties by the respondent in exercising its public interest jurisdiction.

We note that Staff Counsel is not seeking an order under section 134(1)(a)(iii) of the Act

directly in this proceeding. Staff Counsel seeks to present evidence relating to non-compliance with the by-laws, rules, regulations and policies of the MFDA in support of an order under section 134(1)(c) of the Act.

In our considered opinion we are entitled to consider whether the Respondent has or has not complied with the by-laws, rules, regulatory instruments or policies of the MFDA. We find there is nothing in section 134(1) of the Act that specifically makes our granting of an order under any part of that section first conditional on a finding by the MFDA that their by-laws, rules, regulatory instruments or policies have been breached by the Respondent. If our authority under section 134(1) of the Act was conditional on a prior finding of breach by the MFDA this would allow the Respondent and, indeed, any member of a SRO to shelter from the jurisdiction of the Commission and this result would defeat the purpose of the Act as expressed in section 1A(1).

Clearly these is nothing in the Recognition Order which displaces our conclusion. Indeed Schedule A to the Recognition Order in sections 7 and 8 make it clear that any action that may be taken by the MFDA is without prejudice to the Commission taking action under securities legislation.

In conclusion the motion by counsel for the Respondent to strike out allegation number 13 of the Statement of Allegations is dismissed.

"H. Leslie O'Brien"

H. Leslie O'Brien

"James D. Nicoll"

James D. Nicoll

"D. Nantes"

D. Nantes