

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2012-0097

MANITOBA SECURITIES COMMISSION

ORIGINAL REPORT ISSUED OCTOBER 24, 2014

REVISED REPORT ISSUED DECEMBER 30, 2015

CASE SUMMARY

On February 22, 2012, Manitoba Ombudsman received a complaint regarding the Manitoba Securities Commission. The complainants alleged that the commission failed to formally investigate their grievance regarding an investment advisor. They also alleged that the commission did not provide them with sufficient information about their investment advisor, and did not share with them the investment advisor's active supervisory terms and conditions.

Based on our investigation, Manitoba Ombudsman found that the commission decision not to formally open an investigation into the complainants' concerns was not clearly wrong or unreasonable. However, the commission should have provided the complainants with the investment advisor's supervisory terms and conditions that were part of the public record when the complainants brought their grievance to the commission.

As a result of our investigation, the complaint is supported in part and two recommendations have been made to improve administrative accountability. Manitoba Ombudsman recommends that:

1. The Manitoba Securities Commission intake team should respond to questions about investment advisors and other commission registrants with all available public information, and should clearly explain their terms and definitions such as "supervisory terms and conditions" and "enforcement actions."
2. The Manitoba Securities Commission should provide the complainants with a letter of apology for incorrectly informing the complainants about the information available regarding the investment advisor.

The Manitoba Securities Commission has accepted the recommendations and taken steps to implement them.

HISTORY OF THIS REPORT

A report into this matter was originally issued on October 28, 2014. As a result of new information relating to the investment advisor's past conduct, however, Manitoba Ombudsman decided to re-open its investigation on November 20, 2014, to further investigate the Manitoba Securities Commission's decision not to formally investigate the complainants' matter.

This report, issued December 30, 2015, reflects the information contained in the original report, as well as new and revised information obtained during our review of the complaint. As our further investigation did not reveal a basis for additional recommendations, Manitoba Ombudsman stands by the recommendations made in the original report.

OMBUDSMAN JURISDICTION

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the Office of the Speaker. The responsibilities and authority of the ombudsman are set out in *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act*, and *The Public Interest Disclosure (Whistleblower Protection) Act*.

Under *The Ombudsman Act*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

The actions and decisions complained about in this case are matters of an administrative nature arising from actions and decisions made by the Manitoba Securities Commission in responding to a complaint about an investment advisor.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or municipal by-law. On other occasions it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits we also examine the fairness of the action or decision. A complaint can raise questions of procedural fairness, substantive fairness or relational fairness. Procedural fairness relates to how decisions are reached including the steps followed before, during and after decisions are made. Substantive fairness relates to the fairness of the decision itself and relational fairness relates to how people are treated during the decision-making process.

While our office has a mandate to investigate complaints, the investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker, and any witnesses we determine to be relevant to the case.

Administrative investigations can involve an analysis of statute or by-law provisions, document reviews, interviews and site visits.

The goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement. If a complaint is supported by a finding of maladministration, the ombudsman may make recommendations pursuant to section 36 of *The Ombudsman Act*.

Administrative investigations can also identify areas where improvements may be suggested to a government body without a finding of maladministration. Such suggestions are made to support and help government bodies achieve better administration, often through the adoption of best practices. Better administrative practices can improve the relationship between government and the public, and reduce administrative complaints.

THE COMPLAINT

On February 22, 2012, Manitoba Ombudsman received a complaint regarding the Manitoba Securities Commission's decision not to formally investigate an investment advisor registered with the commission – called a “registrant” by the commission. The complainants also alleged that the commission did not provide them with sufficient information about the registrant, information which was publicly available and should have been provided, including active supervisory terms and conditions.

KEY ISSUES

Our office agreed to investigate the following administrative issues:

- 1. Why did the Manitoba Securities Commission not conduct a formal investigation of the complaint under section 22 of *The Securities Act*?**
- 2. Why did the Manitoba Securities Commission not provide the complainants with all public information available about the registrant when they asked the commission for information in November 2011?**
- 3. Is the information available to the public regarding registrants of the Manitoba Securities Commission consistent with legislation and policy?**

BACKGROUND TO THE COMPLAINT

In 2006, the complainants invested the accumulative value of their Canadian Pacific Railway pension through an investment advisor registered with the commission – referred to as the “registrant.” The complainants' investment goals were to have a monthly retirement income and to pay off the mortgage on their home.

In 2011, the complainants became concerned about the registrant's handling of their investment portfolio. In August 2011, the complainants received an email from the registrant referencing recent "nerve-racking" weeks on the market. When the complainants received their statement of account for September 2011, they realized that the value of their investments had declined.

The complainants took action to address their concerns. They met with the registrant on November 3, 2011, to discuss their investment portfolio, but were not satisfied with the explanations he provided. The complainants contacted the Manitoba Securities Commission for assistance on November 9, 2011.

On November 10, 2011, the complainants met with investigators from the commission. The complainants explained that they weren't certain if there was a problem and requested that the commission review their investments. The investigators wanted to review certain documents, including know-your-client forms – which set out the client's risk tolerance, level of investment knowledge and financial circumstances – and account statements. The complainants obtained copies of the documents from the firm that employed the registrant and provided them to the commission on November 17, 2011.

Commission staff assessed the documents and concluded that there were no grounds to proceed to an investigation. While the value of the complainants' investment account had declined, the review had not identified any issues with the manner in which the registrant had managed the investments.

On November 24, 2011, a commission investigator informed the complainants of the decision not to pursue a formal investigation. The complainants raised new concerns regarding inconsistencies they had discovered upon examining their client forms. The investigator advised them that if they continued to have concerns, the first step would be to file a complaint with the registrant's firm.

The complainants set a second meeting with the registrant for November 30, 2011. In preparation for the meeting, the complainants asked the commission investigator for information about the registrant. On November 25, 2011, the commission investigator informed the complainants that there was no public information available about the registrant other than the fact of his registration. The complainants met with the registrant a second time and continued to be unsatisfied with the explanations he provided.

On November 29, 2011, the complainants again spoke with the commission investigator about the inaccuracies and irregularities on their client forms. The investigator again advised them that if they still felt they had a complaint against the registrant, they should first bring their complaint to the firm at which the registrant was employed. If they were unsatisfied with the firm's response, further complaint options would be provided with the firm's written response.

The complainants sought opinions from others in the investment industry. They were determined to pursue their matter when both an investment professional at a bank and an employee at the Mutual Fund Dealers Association of Canada felt the information presented by the complainants raised red flags. On December 21, 2011, they sent letters of complaint to the firm that employed the registrant and to the Mutual Fund Dealers Association.

On December 23, 2011, the complainants spoke with the commission investigator and advised him of the complaints they had made. They agreed to forward copies of their letters of complaint to the commission. The complainants also raised issues they had found with their know-your-client forms. The investigator encouraged the complainants to follow the complaint process with the registrant's firm, advising that if they were not satisfied with the results, they would have a number of further complaint options. The investigator also informed the complainants that public information about their registrant was available and that the information would be forwarded to them.

On December 28, 2011, the commission investigator provided the complainants with a copy of a newly reached settlement agreement between the registrant and the commission. The agreement resolved complaints made against the registrant years prior by other complainants and showed that the registrant had been under supervisory terms and conditions since 2004. The complainants proceeded to search the Canadian Securities Administrators website for information which confirmed that the registrant was subject to "monthly supervision reports."

On January 3, 2012, the complainants spoke with the commission investigator on a number of topics including his failure to mention the registrant's supervisory terms and conditions in November 2011. The commission investigator advised that the complainants could appeal to the commission if they were unsatisfied once the investigations by the registrant's firm and by the Mutual Fund Dealers Association had concluded.

The complainants were not satisfied with the investigator's response to their concerns and followed up with a letter to the chair of the commission dated January 10, 2012. They requested the commission commence a formal investigation and expressed their dissatisfaction with how the commission had handled their concerns thus far. The commission responded by way of letter dated January 31, 2012, declining to investigate. The letter advised that the commission had not found sufficient grounds to proceed to investigation and that it was aware of the investigations being conducted by the registrant's firm and the Mutual Fund Dealers Association.

Unsatisfied with the response, the complainants launched a formal complaint with the Manitoba Ombudsman on February 22, 2012.

During the remainder of 2012, the registrant remained registered with the commission until November 6, 2012, when his firm filed his termination notice with the commission. Approximately one year later on November 4, 2013, the commission denied the former registrant's application to be registered as a representative for another firm, citing a history of failing to comply with terms and conditions of registration and instances of incomplete and undated, but signed, know-your-client forms in client files.

POSITION OF THE COMPLAINANTS

The complainants believe that the Manitoba Securities Commission should have launched a formal investigation to review the actions of the registrant. The complainants are also of the view that the commission should have provided them with the publicly available information about the registrant, including his supervisory terms and conditions, in November 2011.

POSITION OF THE MANITOBA SECURITIES COMMISSION

The Manitoba Securities Commission reviewed its decision not to investigate the complainants' grievance against the registrant and confirmed its conclusion that there were no grounds for a formal investigation of the matter. The commission acknowledges that the information about the registrant's supervisory terms and conditions was public information that could have been shared with the complainants in November 2011. However, the commission states that a misunderstanding about the nature of the information the complainants were seeking caused the investigator to mistakenly inform the complainants that no public information on the registrant was available.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- Interviews and correspondence with the complainants;
- Review of the complainants' documentation, including correspondence with the commission;
- Interviews and correspondence with Manitoba Securities Commission staff;
- Review of the correspondence between the complainants and the Mutual Fund Dealers Association of Canada, the firm which employed the registrant, and the Investment Industry Regulation Organization of Canada respecting the complaints filed by the complainants;
- Review of the registrant's settlement agreement with the commission dated December 15, 2011;
- Review of the commission's decision, dated November 4, 2013, to deny the former registrant's new registration application;
- Review of legislation and policy including *The Securities Act* and the commission's Local Policy 3.16 [Public Availability Of Material Filed Under The Securities Act]; and
- Review of the information available on the websites of the commission and the Canadian Securities Administrators.

ANALYSIS OF ISSUES AND EVIDENCE

1. Why did the Manitoba Securities Commission not conduct a formal investigation of the complaint under section 22 of *The Securities Act*?

The Manitoba Securities Commission is an independent agency of the Manitoba government that protects investors and promotes fair and efficient capital markets throughout the province. The commission's mandate is to "act in the public interest to protect Manitoba investors and to

facilitate the raising of capital while maintaining fairness and integrity in the securities marketplace.” As the independent office that protects investors and promotes fair and efficient business practices, the commission has many responsibilities including registering individuals and firms who wish to trade in capital markets, investigating breaches of legislation and regulation, and developing and offering public education.

As part of its mandate, the commission has broad discretion to conduct investigations under section 22 of *The Securities Act*:

Investigation of probable contravention or offence

22(1) *Where it appears probable to the commission that any person or company*

- (a) has contravened any of the provisions of this Act or the regulations; or*
- (b) has committed an offence under **The Corporations Act** that relates to the filing of documents with the commission or to the contents of any document that has been so filed; or*
- (c) has committed an offence under the **Criminal Code** (Canada) in connection with a trade in securities or derivatives;*

the commission may make, or by order appoint a person to make, such investigation as it deems expedient in the circumstances, and shall determine and prescribe the scope of the investigation.

Order for investigation

22(2) *The commission may make or, by order, appoint a person to make such investigation as it deems expedient*

- (a) for the due administration of Manitoba securities law or the regulation of the securities or derivatives markets in Manitoba;*
- (a.1) to assist in the due administration of the securities laws or the regulation of the securities or derivatives markets in another jurisdiction;*
- (b) for the protection of members of the public who have invested in securities of a company incorporated under a general or special Act of the Legislature that are listed or posted for trading on any exchange in the province recognized by the commission or have been since May 1, 1967, distributed in the course of primary distribution to the public under a prospectus filed with any securities commission in Canada or under a statement of material facts filed with any exchange in Canada; or*
- (c) into any matter relating to trading in securities or derivatives;*

and shall determine and prescribe the scope of the investigation.

The complainants contacted the commission for assistance in November 2011. They were uncertain whether the registrant had acted improperly, but were concerned that the value of their investment account had declined. The complainants met with investigators from the commission,

answered questions and discussed their concerns and subsequently provided the commission with additional documentation.

Upon reviewing the complainants' information and documentation, the commission determined that the matter did not warrant investigation. A commission investigator advised the complainants of the commission's decision on November 24, 2011.

The complainants were not satisfied with the commission's decision. They raised new concerns with the commission about the accuracy of information on their know-your-client forms. The complainants explained that they had trusted the registrant and had consequently signed documents verbally explained by the registrant without fully verifying their contents. However, upon reviewing their client forms, they had discovered that their income was not reported accurately and "leveraging" – a form of investing – was checked off on some forms, but not on others.

Subsequently, the complainants also learned that the commission was aware of previous misconduct on the part of the registrant. At the time the complainants approached the commission with their concerns, the commission was in settlement negotiations with the registrant respecting conduct dating from approximately 1999-2003. The registrant had recommended unsuitable investments and did not have completed client forms on file. As a result, the registrant was under a number of supervisory terms and conditions pending the settlement agreement, including the following restrictions:

3. [Registrant] did not execute any transactions in any accounts until the full and correct documentation was in place including a current KYC [know-your-client form].

9. All articles, promotional materials and advertisements had to be approved by the Compliance Officer prior to dissemination. Promotion of leverage was not communicated verbally or in writing and was reviewed and approved by Compliance.

15. No blank forms could be signed to facilitate transactions.

The registrant had breached his terms and conditions in 2009 by having signed, but undated forms in his client files.

In light of the commission's knowledge of the registrant's previous conduct and the issues they raised with their client forms, the complainants are of the view that the commission ought to have opened an investigation into their concerns.

As an independent agency with broad discretion to determine whether to investigate and to prescribe the scope of the investigation, the statutory threshold for Manitoba Ombudsman's review of the commission's investigation decisions is the "clearly wrong or unreasonable" test set out in section 23 of *The Ombudsman Act*:

Limitation on review of discretionary powers

*23(2) Where, in the course of or after an investigation of any decision, act or omission, done or omitted by a department, agency of the government or municipality, or any officer or employee thereof in the exercise of a discretion vested in that department, agency, municipality, officer, or employee, the Ombudsman is satisfied that the decision, act or omission is not **clearly wrong or unreasonable**, the Ombudsman shall make no further investigation of the matter and shall report to the complainant that he is so satisfied. [Emphasis added]*

The threshold or benchmark of clearly wrong or unreasonable is a significantly higher test than allegations of administrative errors or omissions. A difference of opinion regarding the application of legislation, policy, or the weight given to evidence would not constitute a finding of clearly wrong or unreasonable. There must be conclusive evidence that readily and plainly identifies the imputed error, and that error must be shown to significantly affect the result or decision.

In the course of our original investigation, the commission explained to our office that an investor's first point of complaint should be to the registrant's firm. The Manitoba regulatory framework requires individuals who wish to register with the commission to be sponsored by a firm already registered with the commission. If an investor's complaint is not resolved by the registrant's firm, the complaint may be brought to the commission which will determine whether to proceed to a formal investigation.

In many instances where there is a decision to investigate, the commission refers the information to the relevant national self-regulatory organization, such as the Mutual Fund Dealers Association of Canada or the Investment Industry Regulation Organization of Canada for further investigation. The self-regulatory organization undertaking the investigation notifies the commission when they commence investigations into Manitoba registrants and sends a closing letter with the results once an investigation is complete. The commission generally will not duplicate ongoing investigations by self-regulatory organizations. If an investor is not satisfied with the investigation by a self-regulatory organization, he or she may then make a complaint to the commission.

In this case, when the complainants contacted the commission with their concerns, the commission agreed to review the complainants' investment account and advise whether there was a basis for a complaint. Investigators and compliance staff at the commission reviewed the information provided by the complainants, concluding that the investments were suitable and that no formal investigation was required by the commission:

In my opinion, there does not appear to be grounds for a complaint. [Complainant] has signed the KYCs [know-your-client forms] and various updates acknowledging his change in risk and investment objectives. A cursory review of the holdings indicates that the portfolios appear to be well diversified and in line with his objectives on the KYCs. While the account has decreased in value, consideration must be given to the fact that [complainant] also took a

monthly draw from the account which eroded his capital, and affected the ability for the account to recover when markets began to improve.

The commission advised our office in a letter dated May 4, 2012, that it was satisfied that its initial decision not to investigate based on the information and documentation available was appropriate. There had been good communication about the file between all levels at the commission and the conclusions were verified.

It is clear staff reviewed account information and documentation respecting the matter as well as details of the complaints made by [complainants]. Additional staff were consulted to review the account information to determine whether there was a valid basis for a complaint. This review was conducted independently of the initial review done by the investigators and the same conclusion was reached. As a result, it was determined that there was insufficient evidence to warrant further investigation into the matter.

A commission investigator contacted the complainants on November 24, 2011, to advise them that based on the review of the documentation, the commission would not be proceeding with an investigation. The complainants disagreed with the commission's assessment and inquired about making a complaint with the Mutual Fund Dealers Association of Canada or the Ombudsman for Banking Services and Investments. The investigator advised them that the first step was to make a written complaint to the firm and that the firm's response would provide further complaint options regarding the Mutual Fund Dealers Association of Canada and the Ombudsman for Banking Services and Investments.

The complainants continued to be in contact with the commission, raising additional concerns about the accuracy of the information on their client forms. The complainants also pursued their concerns by sending letters of complaint to the firm and to the Mutual Fund Dealers Association of Canada on December 21, 2011.

The complainants were frustrated and viewed the commission's decision not to investigate as a failure to take their matter seriously. In a letter to the chair of the commission dated January 10, 2012, the complainants requested the commission commence a formal investigation and expressed their dissatisfaction with how the commission had handled their concerns thus far. The commission responded by way of letter dated January 31, 2012. The letter declined to investigate, indicating that the commission had not found sufficient grounds to proceed to investigation and that it was aware of the investigations being conducted by the registrant's firm and the Mutual Fund Dealers Association of Canada.

As previously noted, the complainants brought forward new information, which they felt was material to the matter, after the release of our report in October 2014. Specifically, the complainants advised our office that in addition to the 2009 breaches of the registrant's supervisory terms and conditions, investigations by the Mutual Fund Dealers Association of Canada had found that the registrant acted contrary to rules established by the association on multiple occasions from 2006-2008. Our office was unaware of these incidents and it was unclear to us whether the commission was aware of this aspect of the registrant's history when

making its decision not to investigate the registrant. As a result, our office reopened to the investigation.

However, in a letter dated June 30, 2015, the commission advised our office that information regarding the registrant's previous conduct (including the incidents from 2006-2008) as well as discrepancies in the complainant's client forms, were all taken into account when the commission assessed whether to open a formal investigation:

Staff were alert to the discrepancies between the know your client information which was recorded and signed by [complainants], and what [complainants] told staff his investment risk tolerance was. Staff was also aware of [registrant]'s past history. This information was taken into account in staff's evaluation of whether [complainants] may have a complaint.

As the state of the account was being assessed over a number of years, the staff review also took into account the investment loan taken by the [complainants] on the account, as well as the redemptions and monthly withdrawals made over time by the [complainants].

Even in light of these discrepancies, it was the opinion of staff, on the whole of the information provided, that the portfolio of investments were suitable and that there did not appear to be any basis to make a complaint.

The commission further explained that if it had determined that an investigation was warranted, the matter would have been referred to the Mutual Fund Dealers Association of Canada, in keeping with the complaint process whereby complaints about registrants who are also registered with a self-regulatory organization are referred to that organization. As the Mutual Fund Dealers Association of Canada was already investigating the registrant, the commission advised that it forwarded the complainants' concerns about their client forms to the association for its investigation.

In our office's view, the commission conducted a thorough review of the complainants' concerns. Commission staff examined the information provided by the complainants to determine whether there was a basis for complaint on any basis. Staff took into account the suitability and diversity of the investments made by the registrant, withdrawals the complainants made from their investments, discrepancies on the complainants' client forms and the registrant's past conduct. The commission also reviewed its decision not to investigate, arriving at the same conclusion that there was insufficient evidence to warrant a formal investigation.

However, our office notes that the commission handled the complainant's matter inconsistently with the commission's description of the complaint process. Despite advising our office that the first step of the complaint process is for a client to go to their registrant's firm, when the complainants approached the commission with their concerns, the commission agreed to review their investment account.

The commission explained to our office that it attempts to assist members of the public who may have a complaint, regardless of whether they have followed the complaint process. The commission's intake team collects information from potential complainants to assist in

determining whether they may have a complaint and what the nature of the complaint may be. The commission then directs the potential complainant to make their complaint in accordance with the complaint process.

In our office's view, the commission could have communicated better with the complainants about the complaint process. The complainants were confused and frustrated by the decision not to investigate their concerns. The commission did not clearly communicate that complaints must first be directed to other organizations – a registrant's firm and/or a self-regulatory organization such as the Mutual Fund Dealers Association.

While the commission could have communicated more effectively with the complainants and been clearer about the complaint process, nonetheless the commission took appropriate steps to assess the complainants' investment account. It was also within the commission's discretion to take into account that another organization, the Mutual Fund Dealers Association of Canada, was looking into the complainants' concerns. As such, our office cannot conclude that the decision of the commission not to launch a formal investigation was clearly wrong or unreasonable.

2. Why did the Manitoba Securities Commission not provide the complainants with all public information available about the registrant when they asked the commission for information in November 2011?

The complainants requested information about the registrant from the Manitoba Securities Commission in November 2011. In an email dated November 25, 2011, a senior investigator with the commission wrote:

I checked the system and we have not taken action against [registrant]. There is no public information available other than he is registered.

However, on December 23, 2011, the same investigator advised the complainants that the registrant had reached a settlement agreement with the commission. The settlement agreement outlined that the registrant had placed some of his clients in investments that were outside of their risk tolerance and that he was unable to produce know-your-client forms for those clients. The settlement agreement also detailed that since 2004, the registrant had been under strict supervision restrictions, carried out by the firm which employed him, including the following:

3. [Registrant] did not execute any transactions in any accounts until the full and correct documentation was in place including a current KYC.

9. All articles, promotional materials and advertisements had to be approved by the Compliance Officer prior to dissemination. Promotion of leverage was not communicated verbally or in writing and was reviewed and approved by Compliance.

15. No blank forms could be signed to facilitate transactions.

The complainants searched the Canadian Securities Administrators website on December 29, 2011, and confirmed that the registrant was subject to supervisory terms and conditions.

The complainants are of the view that the commission should have disclosed that the registrant was under supervisory terms and conditions in the response of November 25, 2011, rather than telling them that the commission had not taken action against the registrant, and that there was no public information available other than his registration with the commission.

In the course of our investigation, the commission has acknowledged that the registrant's supervisory terms and conditions were in fact public information in November 2011 and could have been shared with the complainants in the November 25, 2011, email. The commission explains that two factors led their investigator to deny the complainants the information.

First, our office was advised that the investigator interpreted the complainants request for information about the registrant in the context of an enforcement or disciplinary action. The commission distinguishes between penalties imposed as a result of enforcement actions and supervisory terms and conditions which can be imposed in a variety of circumstances.

The commission described the nature of supervisory terms and conditions in more detail in a letter to the complainants dated January 31, 2012:

The Director can place terms and conditions on a registration in situations where there has been no finding of misconduct by a registrant. Terms and conditions can be placed on a registrant as a precautionary measure. Examples of where terms and conditions may be added include when a complaint is received by the Commission, or when a registrant declares bankruptcy or becomes the subject of a court proceeding outside of the jurisdiction of the Commission. In each of these cases the terms and conditions are not evidence of any misconduct of the registrant, they are simply a mechanism to provide for increased supervision of that individual pending a full review of the matter.

Our office notes that the distinction between supervisory terms and conditions and enforcement actions is common across the provincial and territorial securities commissions.

At the time the complainants requested information from the commission, the investigator was aware that the registrant had been investigated and was in negotiations to reach a settlement agreement with the commission respecting previous complaints made against the registrant by others in past years. Subsection 24(1) of *The Securities Act* requires that information related to an ongoing investigation, including the fact that an investigation is occurring, be kept confidential:

Non-disclosure

24(1) No person or company shall disclose at any time, except to the person or company's counsel,

(a) the nature or content of an order made under section 22 [investigation ordered by commission] or 23 [investigation ordered by minister]; or

(b) the name of any person examined or sought to be examined under section 22 or 23, any testimony given under section 22 or 23, any information obtained under section 22 or 23, the nature or content of any questions asked under section 22 or 23, the nature or content of any demands for the production of

any document or other thing under section 22 or 23, or the fact that any document or other thing was produced under section 22 or 23.

The investigator believed that the information he had with respect to enforcement actions against the registrant could not be disclosed. Once the settlement agreement had been approved and became part of the public record, the investigator forwarded a copy of the agreement to the complainants.

The second reason the investigator did not provide the information to the complainants in November 2011 is that he incorrectly believed that supervisory terms and conditions were not public information. Historically, the commission has not considered supervisory terms and conditions to be public information. Only in early 2011 did the supervisory terms and conditions become part of the public record. In a letter dated May 4, 2012, the commission explained to our office that:

In the past supervisory terms and conditions were not part of the public record. However, when the Commission, along with other members of the Canadian Securities Administrators, established a single public portal for searches of registration information, it was determined that the Commission would in fact allow the public to view supervisory terms and conditions.

The commission transitioned the search function from its own website to the Canadian Securities Administrators website in early 2011. Our office was advised that the investigator was not involved in the transition and was not aware that supervisory terms and conditions were made public information. He learned of the change in the commission's practices in the course of his interactions with the complainants.

While the commission explained why the registrant's supervisory terms and conditions were not shared with the complainants, our office is of the view that the public has a right to expect more from the commission. As a senior investigator with the commission whose duties included providing information to the public, the investigator should have been aware that the registrant's supervisory terms and conditions were public information.

Our office concludes that the supervisory terms and conditions attached to the investment advisor's registration were part of the public record and should have been shared with the complainants when they made inquiries with the commission in November 2011.

3. Is the information that is available to the public regarding registrants of the Manitoba Securities Commission consistent with legislation and policy?

The Manitoba Securities Commission is a member of the Canadian Securities Administrators, an umbrella organization of Canada's provincial and territorial securities regulators whose objective is to improve, coordinate and harmonize regulation of the Canadian capital markets. Complementing the activities of the provincial and territorial securities commissions, one function of the Canadian Securities Administrators is to provide information through its website for investors, financial advisors and others in the securities industry in Canada.

All the provincial and territorial securities commissions, apart from Quebec, make information about their registrants available through the Canadian Securities Administrators website. The public can confirm if financial advisors are currently registered with a securities commission, the category under which they have registered, the name of the firm with which they are registered, if there are current terms and conditions attached to the registration, whether any enforcement proceeding have been conducted, and the result of that enforcement action. The same level of disclosure is available on the website for all provincial and territorial registrants.

When the complainants conducted a search of the registrant on the Canadian Securities Administrators website in January 2012, no terms and conditions were attached to his registration. However, when they had previously conducted the same search on December 29, 2011, the website showed the following supervisory term and condition: “Individual is under monthly supervision reports.”

Our office discussed the apparent discrepancy of the information provided in December and then January with the commission, which advised that only active supervisory terms and conditions are available on the CSA website. In the letter to the complainants dated January 31, 2012, the commission wrote:

Terms and conditions added as a precaution are routinely removed once the outcome of the situation that lead to the imposition of the terms and conditions is determined. As an example, if a registrant is discharged from bankruptcy without additional conditions attached to that discharge the terms and conditions are removed following the end of the bankruptcy. Also, if terms and conditions are added pending a review or investigation once that matter is completed the terms and conditions can generally be removed either because it is found there is no basis for enforcement proceedings against an individual or because another form of penalty or restriction has been assessed against the registrant following an enforcement action.

In the case of the complainants’ searches in December 2011 and January 2012, the information that was available on the Canadian Securities Administrators website changed because of the settlement agreement dated December 15, 2011. The settlement agreement now appears when a search for enforcement action is conducted. The commission further noted that terms and conditions applied as a result of an enforcement action will appear on a search of a registrant’s enforcement history, whether they are active or not.

The complainants are of the opinion that information about current and inactive terms and conditions is relevant and should be available to the public.

In a letter to our office dated May 4, 2012, the commission explained that historically supervisory terms and conditions, whether current or inactive, were not available to the public. Current supervisory terms and conditions are now available to the public because of coordination on the Canadian Securities Administrators website. However, inactive terms and conditions remain unavailable.

Our office reviewed *The Securities Act*, the commission's policy on the public availability of material filed under *The Securities Act* (Local Policy 3.16) and asked the commission to explain and define the information about registrants that is made available to the public. Subsection 143(2) of *The Securities Act* provides that the public can obtain copies of documents open to public inspection:

Copies of public documents

143(2) Any person or company may obtain from the Director, on payment of the prescribed fee, a plain or certified copy of any order of the commission or of any other document in his custody which is open to public inspection.

However, the act does not provide a comprehensive list of the types of information that are open to public inspection. Notably, it does not specify the information that must be made available to the public about registrants with the commission. While Local Policy 3.16 elaborates on the types of documents the commission considers open to public inspection when the act is silent on this issue, it does not address the availability of information such as supervisory terms and conditions.

In the May 4, 2102 letter, the commission further explained:

Information is available to the public with respect to the name of the registrant, category of registration, the name of the dealer or advisor of which they are registered. In addition enforcement hearings and notices of court prosecutions are also available to the public on the Commission's website. In this way a member of the public can confirm whether an individual continues to be registered, and whether there has been a disciplinary action taken against that individual.

What the public registry will not contain is an indication whether an individual is or was under investigation (unless that investigation has resulted in enforcement action). An investigation is a fact finding exercise which is intended to determine if there is a basis to proceed with disciplinary or enforcement action. The decision to make an investigation is not a finding that a registrant has done anything wrong, and often investigations are concluded on the basis that there is no evidence of wrongdoing by an individual under investigation. Section 24 of The Securities Act also provides that investigations are confidential, even the parties that are either subject or witnesses interviewed as part of an investigation are under legislative restrictions with respect to disclosure of information. These confidentiality provisions also apply to staff at the Commission.

The complainants noted that the information available to them about their registrant did not include inactive terms and conditions. As a result of the complaint, the commission raised the issue with the Canadian Securities Administrators:

I have raised the matter with my colleagues at the Canadian Securities Administrators. What has been agreed is that a notice will be added to the public registration website to advise the public of this situation so that the public will be

aware of the treatment of supervisory terms and conditions when conducting a search.

The commission notified the complainants of the change to the Canadian Securities Administrators website in a letter dated June 12, 2012:

I can confirm that as a result of your inquiries with respect to the availability of historical terms and conditions when searching the database of securities registrants additional information has now been posted on the search page. The search page of the Canadian Securities Administrators national registration search now states the following:

Inactive historical registration conditions for companies and individuals are not available through the national registration search.

Thank you for bringing this matter to our attention.

While our office appreciates the complainants' perspective that information about terms and conditions is important and relevant to the public, we also acknowledge the commission's position that no information about terms and conditions was available to the public until the commission coordinated with other securities commissions on the Canadian Securities Administrators website. Our office concludes that the commission's level of disclosure with respect to registrants is consistent with legislation and policy as well as with other Canadian securities commissions.

FINDINGS AND RECOMMENDATIONS

The complainants turned to the Manitoba Securities Commission because they were concerned with the actions of their investment advisor. However, the commission did not provide them with the information or assistance they requested. The complainants were frustrated and felt the commission was failing in its mandate to protect the public.

Decision not to formally investigate

With respect to the commission's decision not to formally investigate the complaint, Manitoba Ombudsman concludes that the decision of the commission not to launch a formal investigation was not clearly wrong or unreasonable.

While the commission could have communicated more effectively with the complainants and been clearer about the complaint process, it nonetheless took appropriate steps to assess the suitability of the complainants' investment account. It was also appropriate for the commission to take into account that other bodies were investigating the complainants' concerns with their know-your-client forms when the concerns were raised with the commission. As such, we make no recommendations respecting the commission's decision not to formally investigate.

Manitoba Ombudsman discussed the issue of communication with the commission and the commission informed our office that there is now an intake team that handles inquiries from the

public. In light of this, we have identified the following administrative improvement to enhance the quality of information respecting the complaint process provided to the public:

- The Manitoba Securities Commission intake team should respond to concerns raised about registrants with clear and consistent information about the complaint process, including the role of the commission in the complaint process and with which body the concerns should initially be raised.

Our office also notes that information on the complaint process is now readily available on the commission's website, providing clear directions to investors on the steps to take and where to address their concerns

Decision not to provide information about supervisory terms and conditions

Manitoba Ombudsman concludes that the supervisory terms and conditions associated with the commission registrant were public information and should have been shared with the complainants.

Consequently and pursuant to subclause 36(1)(a)(vii) of *The Ombudsman Act*, we find that the investigator erred in law and fact when he determined that the registrant's supervisory terms and conditions were not public information.

Recommendation 1

In light of this, we make the following recommendation pursuant to clause 36(2)(g):

- The Manitoba Securities Commission intake team should respond to questions about investment advisors and other commission registrants with all available public information, and should clearly explain their terms and definitions such as 'supervisory terms and conditions' and 'enforcement actions' when applicable.

Recommendation 2

In the circumstances of this case, where information about the registrant's supervisory terms and conditions was publicly available, the commission's investigator could have avoided providing incorrect information to the complainants.

We therefore make the following recommendation pursuant to clause 36(2)(g):

- The Manitoba Securities Commission should provide the complainants with a letter of apology for incorrectly informing the complainants about the information available respecting the investment advisor.

Availability of information respecting registrants to the public

Regarding the information available to the public by the commission, including its umbrella organization the Canadian Securities Administrators, our office concludes that the level of disclosure with respect to registrants is consistent with legislation and policy, and with other

provincial and territorial securities commissions. As such, we make no recommendations respecting the information available about registrants.

RESPONSE TO THE RECOMMENDATIONS

The ombudsman's original report with recommendations in this matter was sent to the Manitoba Securities Commission on October 16, 2014. Pursuant to subsection 37(1) of *The Ombudsman Act*, the commission was asked to notify the ombudsman by October 31, 2014, of the steps that it had taken or proposed to take to give effect to the recommendations.

The Manitoba Securities Commission responded by accepting the ombudsman's recommendations in a letter dated October 24, 2014:

We acknowledge receiving the Ombudsman Report concerning a complaint against The Manitoba Securities Commission (the "Commission") in Case 2012-0097 (the "Report"). Staff of the Commission have reviewed the Report and confirm that we accept the findings and recommendations contained in the Report.

We would also like to advise the Ombudsman on the steps that have been taken which we believe address the recommendations and suggested administrative improvement.

In early 2013, Commission Staff implemented a new intake process where all inquiries are now handled by an intake team. The intake team had been provided with specific reference materials and training to provide consistency in the intake of inquiries and in providing public information to persons making inquiries.

We have developed and make available reference materials for the intake staff which includes information concerning the complaint process. In addition we have materials on our website concerning making a complaint and the process generally. We believe this addresses the administrative improvement as suggested by the Ombudsman.

There is an ongoing review of the intake reference materials to update them to reflect changes in commission rules and policies, and to deal with inquiries on events in the capital markets. As part of this process, we have now included specific processes on how to handle inquiries concerning registrants who have terms and conditions on their registration. The intake team is in a position to clearly explain terms and definitions such as "supervisory terms and conditions" and "enforcement actions". We also have a process to escalate inquiries to specific senior staff members who can deal with such inquiries in greater detail if required.

We believe that the intake process satisfies Recommendation 1 in the Report.

With respect to incorrectly informing the complainants about the information available respecting the investment adviser, we regret this shortcoming due to an internal failure to communicate changes in administrative practices. In dealing with the complainants, we were able to achieve improvements to the public registration website as detailed in the Report. We have also instituted regular internal meetings where each area of Commission can share rule changes and ongoing policy development which can impact other areas in their day to day operations.

We will provide the letter of apology as set out in Recommendation 2.

The revised report was sent to the Manitoba Securities Commission on December 8, 2015. In a response dated December 23, 2015, the commission advised that it has complied with the recommendations in the manner set out in its response of October 24, 2014.

In light of the response to our report and recommendations, we consider this matter concluded.

MANITOBA OMBUDSMAN