IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF JAN MICHALIK
APPLICATION FOR REGISTRATION OF TEZNIA FINANCIAL CORP. AS AN INVESTMENT COUNSEL AND PORTFOLIO MANAGER (ICPM) AND JAN S. MICHALIK'S REGISTRATION AS AN ADVISING OFFICER

REASONS AND DECISION

Hearing:	June 19, 2007	
Decision:	July 23, 2007	
Panel:	Lawrence E. Ritchie Harold P. Hands Margot C. Howard	Vice-Chair and Chair of the Panel Commissioner Commissioner
Counsel:	Jane Waechter Charles Piroli	For the Ontario Securities Commission
	Jan Michalik	For himself

REASONS AND DECISION

A. Overview

(i) Background

[1] This is an application (the "Application") to convene a hearing pursuant to subsection 8(2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") for the Ontario Securities Commission (the "Commission") to review a decision of the Director of the Commission, dated August 31, 2005 (the "Director's Decision"). The Director:

(1) Refused to grant Jan Michalik (the "Applicant") registration as an Advising Officer, an individual registered in the category of Investment Counsel and Portfolio Manager ("ICPM"), because he did not fulfill the experience requirement set out in Part 3.2(1)(b)(ii) of *OSC Rule 31-502 – Proficiency Requirements for Registrants* ("Rule 31-502"); and

(2) Refused to grant Teznia Financial Corp. ("Teznia"), the Applicant's company, registration as an ICPM because the company did not have an individual (i.e. a representative, partner or officer) who met the requirements set out in Part 3.2 of Rule 31-502.

[2] In this proceeding, the Applicant is self-represented. He is ultimately seeking registration for Teznia as an ICPM, but this proceeding relates primarily to his pursuit of registration for himself as an Advising Officer for an ICPM. It is noted that the employment of a registered Advising Officer is a precondition for Teznia's registration as an ICPM (as described below). The Applicant is the only candidate proposed to fulfill this requirement.

(ii) The Applicant

[3] The Applicant is the President and Chief Executive Officer of Teznia, a federally incorporated company. The Applicant, together with his wife, Hanna M. Michalik, founded Teznia in February 2002 with the objective of becoming an ICPM firm and contemplated that the

Applicant would become its Advising Officer. Currently, Teznia has two employees, the Applicant and Hanna M. Michalik, and the company does not have an Advising Officer (an individual registered in the category of ICPM). As a result, Teznia has not been granted registration under the Act as an ICPM.

(iii) History of Proceedings

[4] On June 12, 2005, the Applicant applied for registration as an Advising Officer, sponsored by Teznia. Shortly thereafter, on June 24, 2005, the Applicant also applied for an exemption from the requirements in Rule 31-502 because he did not meet the proficiency requirements set out in Part 3.2(1)(b) of Rule 31-502. Staff of the Commission ("Staff") informed the Applicant on July 22, 2005, by way of registered mail that the request for registration was refused and that the exemption was denied.

[5] As a result of Staff's decision, the Applicant gave notice, which Staff received on July 25, 2005, that the Applicant intended to exercise his right to be heard pursuant to subsection 26(3) of the Act. On August 8, 2005, the Applicant was afforded an opportunity to be heard, and on August 31, 2005, the Director refused to grant the Applicant registration as an Advising Officer for ICPM on the basis that the Applicant had no prior work experience in the securities industry.

(iv) Reasons for the Director's Decision to Refuse Registration as an Advising Officer for ICPM

[6] In determining whether the Applicant was eligible for registration as an Advising Officer for ICPM, the Director considered the proficiency requirements set out in Part 3.2 of Rule 31-502 and the Companion Policy to Rule 31-502 (the "Companion Policy"), which provides

guidance with respect to the applicability of an exemption to these requirements in Part 3.2 of Rule 31-502.

[7] The Director found that the Applicant did not have all the educational courses required by Part 3.2(1)(b)(i) of Rule 31-502. That Part requires that an individual complete either: (1) the Canadian Investment Manager Program and Level 1 of the Chartered Financial Analyst Program; or (2) the Chartered Financial Analyst Program.

[8] However, the Director held that the Applicant's actual educational background could be seen as an effective substitute for the statutory educational requirements and thus, the Applicant could benefit from an exemption for the educational requirements. As stated by the Director:

> Mr. Michalik does not have all the educational courses required by the rule. He has not completed the first year of the CFA. Mr. Michalik submits that his educational background and work experience make the CFA redundant. I agree that based on his education and his work experience as the senior economist at TD Bank, Mr. Michalik meets the educational requirements of the Rule and I would grant the exemption. (*In the Matter of an Application for Registration of Jan Michalik – Opportunity to be Heard by the Director under Subsection 26(3) of the Securities Act* (2005) 28 O.S.C.B. 7657 ("*Michalik*") at para. 17)

[9] With respect to Part 3.2(1)(b)(ii) of Rule 31-502, the Director found that the Applicant did not possess the requisite work experience in the securities industry and that an exemption was not appropriate in those circumstances. The Director explained in his reasons that:

> Mr. Michalik has had no work experience in the securities industry whatsoever. I do not find that his work experience at TD Bank, VFS and Teznia is equivalent to the experience required in the Rule nor do I find his experience more appropriate for this type of registration. (*Michalik, supra* at para. 19)

[10] As a result, the Applicant's request for registration as an Advising Officer for ICPM and qualification for an exemption were refused (*Michalik, supra* at para. 20).

(v) The Application for a Hearing

[11] By letter dated September 12, 2005 (the "September Letter" or the "Application"), the Applicant requested a "Hearing and Review" of the Director's Decision pursuant to subsection 8(2) of the Act. In the view of the Applicant, the Director failed to consider important facts regarding the Applicant's education and experience.

[12] The Applicant alleged in the September Letter that the Director should have applied the "spirit of the law" rather than the "letter of the law" in determining whether the Applicant should benefit from an exemption to the proficiency requirements in Rule 31-502. Furthermore, the Applicant alleged that it was an error on the part of the Director to determine that the Applicant has no securities industry experience. On this basis, the Applicant requests that the Director's Decision be reviewed, that the Applicant be granted registration as an Advising Officer, and that Teznia be granted registration as an ICPM.

[13] In response to his Application, Staff of the Commission request that: (1) the Commission not exempt the Applicant from the proficiency requirements of Part 3.2(1)(b) of Rule 31-502 because the Applicant does not possess the requisite work experience; and (2) the Commission deny the Applicant's Application.

B. The Issues

[14] The issues raised by the Applicant's request are:

(1) whether the Applicant meets the suitability criteria set out in Part 3.2(1)(b) of Rule 31-502, to be granted registration as an Advising Officer for ICPM (which will facilitate Teznia being granted registration as ICPM); and

(2) if not, whether an exemption should be granted pursuant to Part 4.1 of Rule 31-502 from complying with the proficiency requirements set out in Part 3.2(1)(b) of Rule 31-502.

C. The Legal Framework for the Requested Registration

[15] Subsection 25(1)(c) of the Act requires that all advisers, whether they are individuals or companies, be registered. Specifically, this subsection states:

> **25.** (1) No person or company shall,
>
> […]
>
> (c) act as an adviser unless the person or company is registered as an adviser, or is registered as a representative or as a partner or as an officer of a registered adviser and is acting on behalf of the adviser,
>
> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[16] Section 26 of the Act specifies the test that must be applied when determining whether to grant registration. Section 26 of the Act states:

> Granting of registration
>
> **26.** (1) Unless it appears to the Director that the applicant is not suitable for registration, renewal of registration or reinstatement of registration or that the proposed registration, renewal of registration, reinstatement of registration or amendment to registration is objectionable, the Director shall grant registration, renewal of registration, reinstatement of registration or amendment to registration to an applicant.
>
> Terms and conditions
>
> (2) The Director may in his or her discretion restrict a registration by imposing terms and conditions thereon and, without limiting the generality of the foregoing, may restrict the duration of a registration and may restrict the registration to trades in certain securities or a certain class of securities.
>
> Refusal

> (3) The Director shall not refuse to grant, renew, reinstate or amend registration or impose terms and conditions thereon without giving the applicant an opportunity to be heard.

[17] The different types of registration available are set out in sections 98 to 101 of the *General Regulation*, R.R.O. 1990, Regulation 1015 ("Ont. Reg. 1015"). Specifically, section 99 of Ont. Reg. 1015 deals with the registration of advisers. The relevant parts of section 99 of Ont. Reg. 1015 are reproduced below:

> **99.** Every person or company that is required to register as an adviser shall be registered and classified into one or more of the following categories:
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> […]
>
> 2. Investment counsel, being persons or companies that engage in or hold themselves out as engaging in the business of advising others as to the investing in or the buying or selling of specific securities or that are primarily engaged in giving continuous advice as to the investment of funds on the basis of the particular objectives of each client.
>
> 3. Portfolio managers, being persons or companies that are registered for the purpose of managing the investment portfolio of clients through discretionary authority granted by one or more clients.

[18] The combined effect of subsection 25(1)(c) of the Act (the registration requirement), and section 99 of Ont. Reg. 1015 (which defines the categories of advisers) is that a company (such as Teznia) needs to be registered to act as an adviser (i.e. ICPM), and such a company cannot act as an adviser unless the company has, a registered individual who satisfies the registration requirements (i.e. an individual accountable for the actions of the company), within its employ. Therefore, subsection 25(1)(c) of the Act and section 99 of Ont. Reg. 1015 read together require a company registered as an adviser (i.e. ICPM) to have an accountable registered individual.

[19] As mentioned above, subsections 99(2) and (3) of Ont. Reg. 1015 define the terms "Investment Counsel" and "Portfolio Manager". The requirements that an individual must fulfill

to be registered as an "Investment Counsel" or "Portfolio Manager" are set out in Part 3.2 of Rule 31-502. These requirements apply to an individual who seeks to be registered as: (1) an ICPM; or (2) a representative, partner or officer of an ICPM. This is a mandatory requirement. The relevant text of Rule 31-502 is provided below:

> **3.2 Investment Counsel and Portfolio Managers and their Representatives, Partners, Officers, Branch Managers and Compliance Officers**
>
> (1) An individual shall not be granted registration as an investment counsel or portfolio manager or as a representative, partner or officer of an investment counsel or portfolio manager unless the individual
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> […]
>
> (b) has
>
> (i) completed either
>
> (A) the Canadian Investment Manager Program and the first year of the Chartered Financial Analysts Examination Program; or
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> (B) the Chartered Financial Analyst Examination Program, and
>
> (ii) established that the individual has been employed for five years performing research involving the financial analysis of investments, and that three of the five years have been under the supervision of a registered adviser having the responsibility on a discretionary basis for the management or supervision of investment portfolios having an aggregate value of not less than $5,000,000;
>
> […]
>
> [Emphasis added]

[20] Therefore, in order to qualify for registration as an ICPM, the criteria set out in Part 3.2(1)(b) of Rule 32-105 must be fulfilled (subject to exemptions described below). It follows that a company cannot be registered as an ICPM unless an individual within the company can satisfy the requirements in Part 3.2(1)(b). Such requirement is necessary to ensure that each registered entity has a qualified and accountable individual for the company's decisions, advice

and the exercise of discretionary authority. Compliance with the proficiency requirements in Part 3.2(1)(b) of Rule 31-502 cannot be avoided, except as permitted by the Rule.

[21] Part 4.1 of Rule 31-502 provides that an exemption may be granted with respect to the proficiency requirements set out in Rule 31-502. Part 4.1 of Rule 31-502 states:

> **Part 4 Exemption**
>
> **4.1 Exemption** - The Director may grant an exemption to this Rule, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

[22] Moreover, the Companion Policy to Rule 31-502 states at Part 1.2 that the Director has the discretion to grant an exemption to the requirements in Part 3.2 of Rule 31-502. This discretion should be exercised only if the Director (or the Commission where it is acting in the Director's place) is satisfied that the person has the qualifications or experience that are equivalent to, or are more appropriate in the circumstances than, the qualifications or experience required under Part 3.2 of Rule 31-502. Specifically, Part 1.2 of the Companion Policy states:

> **Part 1 Proficiency Requirements for Registrants**
>
> **1.2 Alternative Qualifications –** The Director will consider granting an exemption to any of sections 2.1 to 2.5 and 3.1 to 3.3 of the Rule to any person or company if the Director is satisfied that the person or company has qualifications or experience that are equivalent to, or more appropriate in the circumstances than, the qualifications or experience required under the section.

[23] It is also important to note, that in carrying out their functions, an ICPM, and therefore an Advising Officer, has discretionary authority over investments of others, and needs to apply the "know your client" and "suitability" standards (the "KYC Rule"). It is therefore essential that a person registered as an Advising Officer meet all of the qualifications for that registration category. The requirement for an adviser to comply with the KYC Rule is set out in Part 1.5 of

OSC Rule 31-505 – Conditions of Registration ("Rule 31-505"). The text of Part 1.5 of Rule 31-505 is provided below:

> **1.5 Know your Client and Suitability**
>
> (1) A person or company that is registered as a dealer or adviser and an individual that is registered as a salesperson, officer or partner of a registered dealer or as an officer or partner of a registered adviser shall make such enquiries about each client of that registrant as
>
> > (a) subject to section 1.6, enable the registrant to establish the identity and the creditworthiness of the client, and the reputation of the client if information known to the registrant causes doubt as to whether the client is of good reputation; and
> >
> > (b) subject to section 1.7, are appropriate, in view of the nature of the client's investments and of the type of transaction being effected for the client's account, to ascertain the general investment needs and objectives of the client and the suitability of a proposed purchase or sale of a security for the client.
>
> (2) Despite paragraph (1)(a) a registrant is not required to make enquiries as to the creditworthiness of a client if the registrant is not financing the acquisition of securities by the client.

D. The Evidence

[24] During the Hearing of this matter, the Applicant testified on his own behalf and provided documentary evidence regarding his education and work experience. No evidence was adduced at this Hearing from any other witnesses. The following is a summary of the Applicant's evidence and submissions.

(i) The Applicant's Education

[25] The evidence adduced by the Applicant demonstrates that the Applicant has completed the following courses and educational programs:

- The Canadian Investment Funds Course, the Canadian Securities Course, Investment Management techniques, Portfolio Management Techniques, Partners, Directors and Senior Officers Qualifying Examination and has received a Canadian Investment Manager designation; and

- A Masters degree in Economics at a foreign university (Poland).

[26] The Applicant also did some work towards a Ph.D. in economics at a foreign university and had written a thesis. However, he did not complete his Ph.D. program (the Applicant advised that he moved to North America for a job before he had the opportunity to defend his thesis). According to the Applicant in his testimony, his former employer "TD Bank took [the Applicant] as a Ph.D. qualified individual". However, to be clear, he does not possess a Ph.D. designation.

[27] The evidence also revealed that the Applicant did not complete the following courses:

- The first year of the Chartered Financial Analyst Program; or

- The full three-year Chartered Financial Analyst Examination Program.

(ii) The Applicant's Work Experience

[28] In the September Letter and in his oral testimony, the Applicant described his work experience acquired since 1984, as follows:

(1) TD Bank

[29] According to the evidence, from 1984-1993, the Applicant worked at TD Bank in the capacity of Senior Economist. As set out in the Applicant's September Letter his work at the Bank "[…] included financial markets research, advisory role, commodity price projections, industry valuations, forecasting of interest rates, exchange rates, inflation and economic growth […]". The Applicant wrote and edited numerous reports, which were presented to a number of

committees at TD Bank. Samples of the Applicant's work at TD were provided to us during the hearing.

[30] With respect to his work responsibilities at TD Bank, the Applicant explained in the September Letter that:

> Jan S. Michalik's activities at the Bank included financial markets research, advisory role, commodity price projections, industry valuations, forecasting of interest rates, exchange rates, inflation and economic growth and were done in a similar way as done by the securities dealers. […] The advising given by Jan S. Michalik to key TD personnel and TD bond and currency traders was the same as would have been in the securities industry and standards were higher than average in the securities industry. The portfolio weightings advice provided by Jan S. Michalik at the TD Bank was based on in-depth research of the industries, commodities, economic and financial trends, and global financial markets.

[31] Further, the Applicant gave testimony that while he was at TD Bank, he was supervised and mentored by Mr. Doug Peters ("Mr. Peters"), the Chief Economist and Senior Vice-President at TD Bank at the relevant time. During testimony, the Applicant explained that Staff was given Mr. Peters' name as a reference, and Staff did not object to this evidence. However, the Applicant did not provide a letter or any documentation directly from Mr. Peters, nor was Mr. Peters called as a witness.

[32] The Applicant testified that during the relevant period, Mr. Peters was responsible for managing part of TD Bank's bond portfolio, its foreign exchange exposure, and that Mr. Peters was involved in investment decisions on behalf of TD Bank. In the words of the Applicant, Mr. Peters "[…] managed loans, foreign loans, investment portfolio, the risk, foreign exchange risk on those portfolios". According to the Applicant, his experience working with Mr. Peters is evidence that the Applicant gained and had experience managing a portfolio. The Applicant, while acknowledging that Mr. Peters was not registered under the Act, emphasized that Mr.

Peters functioned as a registrant, but did not have to be registered since chartered Banks benefit from an exemption pursuant to section 34(a) of the Act.

[33] It was noted that for nearly the entire time the Applicant was employed with TD Bank, TD Bank did not directly own a securities dealer and the Applicant did not work directly with securities. The Applicant pointed out that TD Greenline, the Bank's first brokerage arm, came into existence in 1992, and TD Greenline allowed customers to purchase securities online but did not provide any advisory services to customers.

(2) Volvo

[34] From 1994 to 2002, the Applicant worked for Volvo Financial Services ("Volvo") in Poland. Initially, as a Managing Director of Sales, the Applicant performed company valuations for the purposes of granting credit to customers. In 2000, the Applicant became the President of Volvo. The Applicant provided us with oral and documentary evidence regarding his job description as President at Volvo, which entailed the general management of the company, stimulation of business development, achieving the company's targets, presiding over the Ordinary Credit Committee, presiding over the Management Team, and creating quality policies and goals for the company.

[35] In addition, while acting as a Board member for Volvo, the Applicant asserted that he had fiduciary duties to investors, customer and employees. As well, the Applicant stated in the September Letter, that he participated in "the preparation of a prospectus for a bond issue".

[36] Notwithstanding this experience, the Applicant acknowledged that during his employment at Volvo the Applicant did not work in the securities industry and did not work with retail clients.

[37] The Applicant also explained in the September Letter that while at Volvo, the Applicant applied the KYC Rule when analyzing companies for credit purposes. Specifically:

> […] Jan S. Michalik collected and managed KYC information at Volvo. The KYC information collected included customers investment objectives in Volvo equipment, investment restrictions, investment time frame, annual income, net worth, credit reports, and any information deemed necessary to assess suitability of an investment for a client.

(3) Teznia

[38] From 2002 to present, the Applicant worked at Teznia, which he founded. The Applicant provided documentary evidence and gave testimony relating to financial records and practices of Teznia to demonstrate how the company manages a portfolio. The value of Teznia's portfolio as of March 31, 2007, was $ 30, 268.72 USD.

[39] In addition to managing an investment portfolio for Teznia, from 1990 to 1993 and 2001 to 2005, Staff advised in its factum that the Applicant disclosed to Staff that he managed a small investment portfolio for himself and his wife:

- The individual portfolios managed had values between $10,000 CAD and $45,000 USD.
- The total cash that the Applicant managed at any given time did not exceed a maximum aggregate value of $120,000 CAD.

[40] While there was no direct or specific evidence to support these facts, no issue was raised by the parties as to their accuracy.

[41] At any given time, Teznia's portfolio was invested in no more than four or five equity securities from the period between November 30, 2002 and March 31, 2007.

E. Analysis

(i) This Hearing and Review is a Hearing *De Novo*

[42] The Applicant has applied for a Hearing and Review of the Director's Decision pursuant to subsection 8(2) of the Act. For clarity, section 8 of the Act states as follows:

> Review of Director's decision
>
> **8.** (1) Within 30 days after a decision of the Director, the Commission may notify the Director and any person or company directly affected of its intention to convene a hearing to review the decision.
>
> Same
>
> (2) Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.
>
> Power on review
>
> (3) Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.
>
> Stay
>
> (4) Despite the fact that a person or company requests a hearing and review under subsection (2), the decision under review takes effect immediately, but the Commission may grant a stay until disposition of the hearing and review.

[43] It is well established that a review of this kind is a hearing *de novo*, which involves a fresh consideration of the matter, as if it had not been heard before and no decision had been previously rendered. (*Re Biocapital Biotechnology* (2001), 24 O.S.C.B. 2843 at p. 8 of 12; and *Re JDS Uniphase Ltd.* (1999), 22 O.S.C.B. 5303 at page 3 of 13). A Commission Panel can

substitute its own decision for that of the Director: "[…] when conducting a review of the Director's decision pursuant to section 8 of the Act, [the Commission is] not bound in any way by the Director's determination" (See *Re Triax Growth Fund Inc.* (2005), 28 O.S.C.B. 10139 at para. 25).

(ii) Public Interest Jurisdiction

[44] When exercising its discretion to review the decision of a Director, the Commission is required to act in the public interest with due regard to its mandate/purpose under the Act, set out in section 1.1 of the Act. This has been articulated in the decision *Re BioCapital Biotechnology*:

> We are required to exercise our discretion in the public interest. In determining the public interest the purposes of the Act are relevant. They are set out in section 1.1 of the Act. The first purpose is to provide protection to investors from unfair, improper or fraudulent practices. The second purpose is to foster fair and efficient capital markets and confidence in capital markets. (*Re BioCapital Biotechnology* (2001), 24 O.S.C.B. 2843 ("*BioCapital*") at page 8 of 12)

[45] While in the context of a proceeding under section 127 of the Act, the Supreme Court of Canada described the Commission's public interest jurisdiction in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*:

> The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. The past conduct of offending market participants is relevant but only to assessing whether their future conduct is likely to harm the integrity of the capital markets." [Emphasis added] (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (2001), 199 D.L.R. (4th) 577 (S.C.C) at para. 36)

[46] As previously mentioned in paragraph 44 above, one of the paramount objectives of the Act is to protect the public (*Gregory & Co. v. Quebec (Securities Commission),* [1961] S.C.R. 584 at para. 11). The Commission exercises its discretion in the public interest prospectively to protect

the public and the integrity of the capital markets to prevent future harm. This was clearly articulated in *Mithras Management Ltd*. ("*Mithras*"), where the Commission stated that:

> […] the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. [Emphasis added] (*Mithras*, (1990), 13 O.S.C.B. 1600 at 1610 and 1611)

[47] The principle enunciated in *Mithras*, that the Commission has the mandate to restrain future harmful conduct in the capital markets was also emphasized and cited in *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 (at para 23).

[48] In pursuing the purposes of the Act, including protecting the investing public, the Commission is required to have regard to certain fundamental principles, such as the requirements to maintain high standards of fitness and business conduct to ensure honest and reputable conduct by registrants. Registrants have a very important function in the capital markets and they are also in a position where they may potentially harm the public. Regulating conduct of registrants is a matter of public interest. Consequently, proficiency requirements have been put in place by the Commission to ensure that the public deal with qualified registrants.

[49] Proficiency requirements for registrants support, promote and enhance these objectives. In the case of an ICPM, that proficiency includes both expertise in securities trading and also in the analysis that is required to manage a securities portfolio for others on a discretionary basis.

Proficiency requirements also contribute to ensure regulatory compliance and enhance the efficiency of the capital markets.

[50] Strict adherence to defined proficiency requirements, subject to well articulated exceptions, are necessary and desirable: they permit both applicants and members of the investing public to know precisely and with certainty that registrants will meet reasonable, well-defined standards, which will be consistently applied. As stated in *Re Oxford Investments Holdings Inc.* (2007), ABASC 150 (Alta Sec. Comm.): "[t]he advisor registration requirements are intended to ensure that investors receive sound investment advice by setting education and conduct standards for registered advisors and by providing ongoing monitoring and compliance obligations" (*Re Oxford Investments Holdings Inc., supra* at para. 57). The well-defined proficiency standards are mandatory (subject to clearly articulated exceptions). We are of the view that it is in the public interest that they be strictly and consistently construed.

(iii) Registration Under the Securities Act

(1) General Principles

[51] Registration is a privilege that is granted to individuals and entities that have demonstrated suitability. No person has a right to be registered (*Re Kippax* (2003), 26 O.S.C.B. 8205 at para. 2). This was emphasized by this Commission in *Re Trend Capital Services Inc.*:

> The regime of securities regulation established by the Act and the Regulations, and discussed in decisions of the Commission and the Courts makes it clear that obtaining registration entitling persons to deal with the public is a privilege and not a right and that this must constantly be borne in mind. (*Re Trend Capital Services Inc.* (1992), 15 O.S.C.B. 1711 at pp. 1764 and 1765)

[52] As previously mentioned, a registrant has the capacity to do material harm to individual investors, other market intermediaries, and the public at large. The ICPM category of

registration involves the most onerous requirements for registration under the Act, reflective of the extent of discretion that the ICPM exercises over investor assets.

[53] As set out above, section 26 of the Act grants the Director the authority to refuse to grant registration if the applicant is not suitable or if the "proposed registration [is otherwise] objectionable". Further, subsection 26(2) of the Act authorizes the Director to impose terms and conditions, including terms and conditions that restrict the duration of registration, where appropriate. Needless to say, terms and conditions ought to be imposed only where an applicant otherwise meets the standard for registration but circumstances are deemed to require additional safeguards. As counsel for Staff pointed out, the imposition of conditions on registration in order to grant registration should not be used in an attempt to fix a deficient application: the power should be used sparingly. Specifically, counsel for Staff referred us to the following passage from *Re Jaynes*:

> While terms and conditions restricting registration may be appropriate in a wide variety of circumstances, they should not be used to "shore up" a fundamentally objectionable registration. To do so would be to create the very real risk that a client's interests cannot be effectively served due to the severity and extent of the restrictions imposed. (*Re Jaynes* (2000), 23 O.S.C.B. 1543 at page 9 of 12).

(2) Application of Registration Criteria in This Case

[54] At the outset, it should be emphasized that the determination as to whether an applicant is suitable for registration is a fact-based enquiry, and depends on all of the specific circumstances of the Applicant.

[55] There are three criteria for determining suitability for registration: integrity, proficiency and financial solvency (see *Re Goldman Sachs Asset Management L.P.* (2006), 29 O.S.C.B. 4349 at para. 6; and *Re Hansberger Global Investors Inc.* (2005), 28 O.S.C.B. 6899 at para. 6). In this

case, Staff takes no issue with the Applicant's integrity and financial solvency, nor did the Director in making the Director's Decision.

[56] The determination of "proficiency" for the purposes of this analysis involves a consideration of the sufficiency of the Applicant's education and experience (see David Johnston and Kathleen Doyle Rockwell, *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis Canada Inc., 2006) at 375. Proficiency requirements directly relate to "educational and/or apprenticeship requirements"). The applicable proficiency requirements in this matter are established in Part 3.2(b) of Rule 31-502 (set out above).

[57] Staff also emphasized that the requirements set out in Part 3.2(1)(b) of Rule 31-502 are mandatory (subject to the Director's power to exempt, as set out in Part 4.1 of Rule 31-502). This is evident from the wording "[a]n individual shall not be granted registration" used in Part 3.2(1) of Rule 31-502 [emphasis added]. The mandatory use of the words "shall not", read together with Part 4, suggest a strong imperative against the use of the Part 4 exemptive powers and when used, it ought to be used sparingly and in a manner which ensures that the overall objective of the proficiency requirements are met.

[58] Staff counsel submitted, exemptions to Part 3.2(1)(b) of Rule 31-502 should be made available and applied on a principled basis. We agree. This principle is reflected in the Companion Policy. Part 1.2 of the Companion Policy 31-502 states that an exemption will only be granted if the Applicant has qualifications or experience that is equivalent to or more appropriate in the circumstances than, the qualifications or experience required under Part 3.2 of Rule 31-502. As the matter is before us as a hearing "de novo", this is a matter of discretion left to us, as the Hearing panel.

(3) The Applicant's Position

[59] The Applicant asserts that he does in fact have the requisite work experience to qualify as an Advising Officer for ICPM. He emphasizes that he:

- Gained experience in the securities industry during the past three and a half years by working for Teznia, which has been reporting its operations to CRA as portfolio management activities and the Applicant has been acting as the Portfolio Manager;
- Prepared Teznia's Operating Manual and other such materials;
- Completed the Portfolio Management Techniques, Partners, Directors and Senior Officers Qualifying Examination and has received a Canadian Investment Manager designation;
- Has more than twenty years of experience in the financial services industry at the senior management level, and his qualifications and experience are equivalent to, or more appropriate than the qualifications and experience required by the Rule;
- While working at Volvo for 7 years, performed company valuations using fundamental quantitative and qualitative analyses, which are the same as valuations performed in the securities industry;
- Collected and managed KYC information at Volvo;
- Acted as a Board member at Volvo, having fiduciary duties to investors, customers and employees;
- Prepared a prospectus for a bond issue while working for Volvo;
- Has over 8 years of experience at TD Bank, and the Applicant contends that this work experience is very similar to that gained in the securities industry (i.e. financial markets research, commodity price projections, industry valuations…etc.);
- The Applicant takes the position that his experience founding Teznia is also relevant securities industry work; and
- The Applicant undertakes to report all transactions of Teznia to the OSC for as along as necessary to prove that it has the capacity to function as ICPM.

[60] The Applicant considers himself to be qualified for registration, and takes issue with the suggested distinction made between what an adviser to an ICPM does, and his work experience

acquired at either TD or Volvo, both of which were outside of the securities industry. He emphasizes that valuation for credit is the same as valuation in the securities industry – he submits that the only difference is how the business is administered. The Applicant takes the position that the KYC Rule is known, understood and applied in the same way in both the credit context and the securities context – the Applicant submits that in the credit environment, like securities, he was making investments.

[61] Lastly, the Applicant argues that Staff, and the Director, are improperly trying to apply the "strict letter of the law", rather than the spirit or underlying principles of Ontario securities law. He submits that it is the latter that should govern, and if this is applied, his registration should be granted.

(4) Application of the Law

[62] We have considered the thorough submissions from Staff counsel and the Applicant. In particular, we have carefully heard and considered the Applicant's submissions and his responses to questions regarding his qualifications. We agree with Staff counsel that there is no reason for us to conclude that the Applicant is anything but intelligent, well-educated and well-meaning. We find nothing in the evidence to suggest that the Applicant has not acted, is not acting and will not continue to act in good faith. However, we find that the specific registration requirements set out in Part 3.2(1)(b) of Rule 31-502, which relate to relevant education and work experience in the securities industry, and Part 1.2 the Companion Policy, which deals with the circumstances that merit an exemption, have not been met, both in accordance with the "letter" and in the "spirit of the law".

[63] In the matter before us, we note that the Applicant's educational qualifications are somewhat short of the requirements to quality for an Advising Officer for ICPM (which are set out above). Notwithstanding this, counsel for Staff emphasized (as did the Director in the Director's Decision) that the educational requirements could be deemed to be met if equivalent educational experience existed. Staff counsel also pointed out that the Director did find that the education requirements were met and that the Applicant could benefit from an exemption from the education requirements.

[64] The evidence also establishes that the Applicant does not fulfill the requisite work requirements under Part 3.2(1)(b)(ii) of Rule 31-502. First, as part of the economics department of TD Bank, we note that although the Applicant had performed extensive economic research for more than 5 years, such work seemed to be limited to providing the work to individuals and committees, who in turn used it in their credit and investment decisions. There is no evidence that this work involved research and analysis relating to securities for investment or managing portfolios on a discretionary basis, or otherwise. Secondly, the Applicant has never been involved in the management of investment portfolios under the supervision of a registered adviser having responsibility for the management or supervision of investment portfolios with an aggregate value of not less than $5,000,000, on a discretionary basis or otherwise. We do not find that managing an investment portfolio for Teznia, funded from contributed capital, and a portfolio for himself and his wife (which we were advised totaled a maximum of $120,000) is sufficient experience to meet the second part of the test. Lastly, while the Applicant's experience at Volvo may have involved extensive operational and credit experience, we again do not understand this to have involved the management of investment portfolios, and certainly not discretionary decision making on behalf of investor clients in managing such investor portfolios.

[65] We have carefully considered the Applicant's submissions and we are unable to find that the Applicant's work experience is sufficient to establish proficiencies for the registration sought to be granted. While employed at TD Bank, TD Bank was not involved in the securities business; the Applicant's testimony revealed that TD Bank only got involved in the securities business in 1992 with the inception of TD Greenline, and at this time TD Greenline did not provide advisory services to clients. We also note that the Applicant left his employment at TD Bank in 1993, shortly after TD Greenline came into existence. Further, while the Applicant may have consulted to the investment committees at TD Bank, he did not serve on them.

[66] Moreover, we are not satisfied that while working at TD Bank he had adequate exposure to the relevant securities regulatory framework, through his supervisors or otherwise. During this time, his supervisor, Mr. Peters, was not employed as a portfolio manager nor as a registrant under the Act. We recognize that as an employee of a chartered bank, Mr. Peters would have been exempt from registration. However, our concern is that the Applicant's supervisor was not employed in a position even analogous to a registrant under the Act. Further, while the Applicant may have had a knowledgeable and able mentor, the Applicant's work for this mentor dealt with analysis and not the actual investing in securities and managing a portfolio. We, as a Panel, have to determine whether this is relevant supervision and mentoring for an ICPM, and we agree with Staff counsel's submission that the mentoring requirement has not been met. We share Staff's concerns that: (1) notwithstanding the successful career that the Applicant has had, his success is not in the securities industry and the Applicant never benefited from direct mentoring of a portfolio manager; and (2) it is in the public interest to uphold and abide by the mentoring requirement in Part 3.2(1)(b)(ii) as not doing so would create an unfavorable precedent.

[67] In addition, the Applicant has never acted in an advisory capacity to retail investors. While the Applicant does have impressive experience at TD Bank and Volvo, we do not accept that he has appropriate experience in interpreting and applying the KYC Rule, and in particular, any relevant experience within a discretionary investment management context. We accept that the information gathered in making a decision to extend credit may often encompass information required under the KYC Rule. However, we emphasize that there is a significant substantive difference between the application of the information gathered in the credit and in the investment management contexts. In the credit context, the customer has already decided to buy and it is simply a matter of evaluating whether the customer can or cannot pay. In contrast, in the investment management context, the information is used to determine the appropriate investments for a portfolio, as well as the interplay of those investments in assessing and pursuing the client's investment objectives.

[68] The Applicant argues that work experience gained in a credit context and a securities context is the same. In the context of gaining proficiency for registration, we respectfully disagree. Analysis of a company for credit is not the same as analysis for investment purposes because the interests, concerns and exercise is markedly different. Analysis for investment purposes requires a full understanding and appreciation of the risks to the investors and is a backbone for the proper fulfillment of fiduciary obligations to one's client, which is absent in the credit environment.

[69] In addition, his experience at TD Bank was dealing with institutional clients; whereas in the investment management context, the Applicant has stated his intention to get involved with retail investors. These are two different categories of clients. The needs and knowledge of retail

investors cannot automatically be equated to that of sophisticated institutional clients. This is where mentoring can play an important role to expose the Applicant to the unique and specific concerns and issues that arise for retail investors in a securities context. We agree with Staff counsel's submission that the mentoring requirement in Part 3.2(1)(b)(ii) of Rule 31-502 is the Commission's way of saying to the world that this is essential to foster fiduciary obligations, which are crucial to a registrant's role and relationship to investors and in the market as a whole.

[70] Specifically, the KYC Rule set out in Part 1.5 of Rule 31-505 contemplates that an adviser will make inquiries beyond the creditworthiness of the client. An adviser, among other things, must make inquiries into the reputation of the client, the client's understanding and familiarity with investing, and the nature of the client's investments in order to ensure that the securities in question are suitable for the client.

[71] In a letter to Staff dated July 6, 2005, the Applicant made the following statements with respect to his work experience at TD Bank:

> (1) I did not advise clients on specific securities while at TD. At the Toronto Dominion Bank, I gave advice to institutional clients of the Bank and the TD management staff; and
>
> (2) I am managing on a discretionary basis equity investment portfolios belonging to Teznia Financial Corp., my wife, and myself. I have not been managing any other investment portfolios involving public or private funds.

[72] When asked about his statements in this letter, the Applicant explained that he stated that he did not research specific securities because he researched companies that issue securities and not the securities themselves. Specifically, the Applicant stated:

> I do not believe in research on specific securities, I believe in research in companies that issue securities. So, I said I did not research on specific securities because I am not interested in speculating […].

[73] Notwithstanding this subsequent explanation, there was no evidence to ground a finding that the Applicant has any experience in advising clients on either specific securities, or the suitability of investments for clients within an investment portfolio.

[74] The Applicant argues that it is necessary that we grant him registration as an Advising Officer in order for him to register Teznia as an ICPM. He notes that he cannot run Teznia as structured without any other registration than that for which he requests. Staff has proposed some alternatives for the Applicant. We agree that alternatives do in fact exist.

[75] For example, as Staff counsel pointed out in their submissions, Teznia could hire an individual who has already been qualified as an Advising Officer for ICPM. Our decision not to grant registration to the Applicant at this time does not preclude the Applicant or Teznia from hiring an individual to fulfill the role of an Advising Officer in order for Teznia to qualify for ICPM registration. In fact, the Applicant acknowledged that Teznia does have the option of hiring a registered advisor, and the Applicant has indicated Teznia intends to hire a registered portfolio manager after the business is set up. However, the Applicant cited business reasons for waiting to do so. We agree with Staff that, in these circumstances, that is not a factor relevant to our consideration of whether the Applicant should be granted registration.

[76] Staff also inquired during the hearing whether the Applicant has tried to go out and work for a registered ICPM and gain experience under the supervision of a registered adviser. The Applicant responded that he would not be able to get employment in this area, either because (1)

no one would hire him because his company Teznia is a potential fledgling competitor "in the wings"; (2) the Director's Decision, dated August 31, 2005, made public, found him not to be qualified and this has prejudiced him; and (3) that he felt that he was sufficiently senior in the industry to not require further mentoring.

[77] In any event, it is our view that these factors do not alter the fact of the shortcomings in the Applicant's proficiency requirements.

F. Conclusion

[78] We find that due to the Applicant's lack of experience in the management of third party discretionary investment portfolios, his lack of experience working directly in the securities industry, and the Applicant's lack of having been mentored in an investment and portfolio management context, he does not fulfill the proficiency requirements set out in Part 3.2(1)(b)(ii) of Rule 31-502. We make this finding notwithstanding our agreement with Staff counsel that the Applicant is "manifestly an accomplished person with many of the attributes needed for the role he wants to play".

[79] With respect to Part 3.2(1)(b)(i) of Rule 31-502, which deals with education requirements, the Director would have granted an exemption with respect to education, and we agree with that view: the Applicant's in-depth education and practical application of economic analysis is sufficient in these circumstances.

[80] However, with respect to Part 3.2(1)(b)(ii) of Rule 31-502, as stated above, we agree with the Director's Decision, and the submissions of Staff, that the Applicant lacks the experience and requisite supervision under a mentor in respect of managing securities investments on behalf of

clients to reflect capable or even satisfactory proficiency to play the role of a registered officer of an ICPM. While the Applicant certainly received supervision and mentoring during the Applicant's employment at TD Bank, that mentoring was not related to managing an investment portfolio.

[81] Further, the Applicant's experience managing investment portfolios is lacking, in that the assets under his management today are limited to: (a) portfolios that he or his spouse have a beneficial interest in; and (b) the size of the assets under management are relatively small compared to the amount of $5,000,000 which is set out in Part 3.2(1)(b)(ii) of Rule 31-502.

[82] As a result, the Applicant's Request for Registration as an Advising Officer for an ICPM is denied.

Dated at Toronto, this 23rd day of July, 2007.

"Lawrence E. Ritchie"
Lawrence E. Ritchie

"Harold P. Hands"
Harold P. Hands

"Margot C. Howard"
Margot C. Howard