

Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 Jan Michalik

**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**

Date: August 31, 2005

Director: David M. Gilkes
Manager, Registrant Regulation
Capital Markets Branch

Appearances: Charles Piroli For Ontario Securities Commission staff
Jan Michalik In person

Overview

1. This decision relates to the application of Mr. Michalik (also referred to as the **Applicant**) for registration as an Investment Counsel and Portfolio Manager (**ICPM**) sponsored by Teznia Financial Corp. (**Teznia**). Staff of the Ontario Securities Commission (**OSC**) has recommended that the Director refuse to grant registration.

Background

2. Mr. Michalik is the President and Chief Executive Officer of Teznia. Teznia was incorporated in February 2002 with the aim of becoming an Investment Counsel and Portfolio Management firm. Teznia does not have an Advising Officer (an individual registered in the category of ICPM) which is a requirement for a firm to receive ICPM registration under Ontario securities legislation. Teznia has not been granted registration under the *Securities Act* (**Act**).

3. Mr. Michalik applied for registration as an ICPM sponsored by Teznia on June 12, 2005. As Mr. Michalik did not meet the proficiency requirements for an ICPM, he also submitted an application for an exemption from these requirements on June 24, 2005.

4. On July 22, 2005 OSC staff sent Mr. Michalik a letter by way of registered mail, notifying him of Staff's recommendation that the exemption be denied and that the Director refuse to grant registration.

5. On July 25, 2005 staff received notice from Mr. Michalik indicating that he wished to exercise his right for an Opportunity to be Heard (**OTBH**) by the Director. Subsection 26(3) of the Act states:

(3) Refusal – 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.

6. The OTBH was conducted in person on August 8, 2005.

Submissions

7. OSC staff submitted that there are three fundamental criteria for registration: proficiency, integrity and financial solvency. In this case the reason for staff recommending that the application for registration be refused is due to a lack of proficiency. There are no issues surrounding integrity or financial solvency.

8. The prescribed educational requirements for the category of ICPM are found in OSC Rule 31-502, Part 3.2 (**Rule**), which states:

(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

...

(b) has

(i) completed either

(A) the Canadian Investment Manager Program and the first year of the Chartered Financial Analysts Examination Program; or

(B) the Chartered Financial Analyst Examination Program, and

9. OSC staff noted that Mr. Michalik does not have the required courses and in particular he has not completed the first year of the Chartered Financial Analysts Examination Program (**CFA**). Mr. Michalik had requested an exemption from this requirement of the Rule.

10. Mr. Michalik worked as an economist and then senior economist at TD Bank from 1984 to 1993. He performed country and market analysis, published reports and gave advice relating to the economy and financial markets to staff at TD. Mr. Michalik noted in a submission to OSC staff that he did not research securities nor did he conduct the valuation of specific companies. His analysis was for industrial analysis and assessment of credit risk.

11. From 1994 to 2000, Mr. Michalik worked for Volvo Financial Services (**VFS**) in Poland. He assisted in preparing a bond issue for the company as it was investing in Poland and building a new plant. In 1998, Mr. Michalik was promoted to President and CEO of VFS in Poland. He transferred to the Canadian subsidiary of VFS in 2000. He left VFS in 2002.

12. Mr. Michalik was a successful manager for VFS and the company in Poland prospered under his leadership. His experience at VFS primarily related to sales, promotion, and assessing credit risk and operating a company. He gained no experience in providing investment advice to others.

13. Mr. Michalik has managed his own stock portfolio and his wife's portfolio. The combined value of these portfolios is approximately \$120,000. Mr. Michalik said these portfolios have outperformed the U.S. S&P over the last three years.

Suitability for Registration

14. A registrant is in a position to perform valuable services to the public, both in the form of direct services to individual investors and as part of the larger system that provides the public benefits of fair and efficient capital markets. A registrant also has a corresponding capacity to do material harm to individual investors and the public at large. This is particularly true where the registrant has discretionary management over client funds. For this reason, the proficiency requirements for an ICPM are set at a high level, involving both education and industry experience.

15. As noted in the submissions from OSC staff, the standard for suitability for registration is based on three well established criteria that have been articulated by the OSC over time:

The [Registrant Regulation] section administers a registration system which is intended to ensure that all Applicants under the Securities Act and the Commodity Futures Act meet appropriate standards of integrity, competence and financial soundness ...

Ontario Securities Commission, Annual Report 1991, Page 16

Competence means the prescribed proficiency and knowledge of the requirements of Ontario securities law. In this case, the proficiency requirements are specified in Part 3.2 of OSC Rule 31-502.

16. The Director can grant relief from the competence requirement in certain circumstances. The Companion Policy to the Rule provides some guidance in considering a request for an exemption:

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.

17. 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.

18. Part 3.2 of the Rule also has detailed work experience requirements for investment counsel and portfolio managers, specifically:

(b) has

...

(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;

(c) has established that

(i) the individual has

(A) had three years experience as an associate representative, associate partner or associate officer of an investment counsel or portfolio manager;

(B) had three years experience as a registered salesperson of a broker, investment dealer or securities dealer and two years experience as an associate representative, associate partner or associate officer of an investment counsel or portfolio manager;

(C) had three years experience as a research analyst for a broker or investment dealer and two years experience as an associate representative, associate partner or associate officer of an investment counsel or portfolio manager; or

(D) been responsible for the management or supervision of investment portfolios on a discretionary basis having an aggregate value of not less than \$5,000,000 for a period of five years while employed by a Canadian financial institution or a pension fund; and

(ii) the individual has, at the time of application for registration, and has had for a period of one year prior to the time of application, under his or her direct administration on a discretionary basis investment portfolios having an aggregate value of not less than \$5,000,000;

19. 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.

Decision

20. As a result of his lack of work experience in the securities industry, I find that the Applicant does not meet the qualifications to be an investment counsel and portfolio manager. Therefore, the application for registration is refused.

August 31, 2005

“David M. Gilkes”