



**Decision and Reasons**

**File No. 200513**

**MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

IN THE MATTER OF A DISCIPLINARY HEARING  
PURSUANT TO SECTIONS 20 and 24 OF BY-LAW NO. 1  
OF THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

**RE: BARRY JAMES COLEMAN**

**DISCIPLINARY HEARING**

Heard: May 29, 2006  
Panel Decision: May 29, 2006  
Written Reasons: July 13, 2006  
Moncton, New Brunswick

**DECISION and REASONS**

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.  
Robert Malcolm  
David Losier

Chair  
Panel Member  
Panel Member

Appearances:

William Donegan	)	for the Mutual Fund Dealers Association
	)	of Canada
Barry James Coleman	)	not in attendance personally or by counsel
	)	

## **DECISION**

### 1. **THE ALLEGATIONS**

By Notice of Hearing, dated December 19, 2005, the following allegations were made against Barry James Coleman ("Respondent"):

(a) **Allegation No. 1:** Between August 2004 and January 2005, the Respondent misappropriated from client AB the sum of \$28,250.00, more or less, and thereby failed to deal fairly, honestly and in good faith with a client, contrary to Rule 2.1.1 of the Mutual Fund Dealers Association of Canada ("MFDA").

(b) **Allegation No. 2:** Between August 2004 and January 2005, the Respondent performed a series of unauthorized redemptions from the account of client AB, totaling \$31,400.00, more or less, and thereby failed to deal fairly, honestly and in good faith with a client, contrary to MFDA Rule 2.1.1

### 2. **SERVICE**

The Notice of Hearing provided for a First Appearance by teleconference before the Hearing Panel at the Barristers Library, 770 Main Street, Room A100, Moncton, New Brunswick, on Wednesday, February 8, 2006, at 11:00 a.m. At that time, the Respondent appeared by way of teleconference.

At the First Appearance, it was agreed by all parties that the Hearing on the Merits would take place on Tuesday, April 18, 2006. This hearing date was subsequently rescheduled, with the consent of all parties, to take place on Monday, May 29, 2006, at 9:00 a.m. in the Hearing Room located at the Crowne Plaza Hotel, Executive Room, 1005 Main Street, Moncton, New Brunswick.

The Respondent did not appear on May 29, 2006. No one appeared on his behalf. Counsel for the MFDA advised the Hearing Panel that on Friday, May 26, 2006, he had been told by the Respondent that he, the Respondent, would not be appearing at the Hearing.

After hearing submissions and reviewing the documentary evidence, we are, unanimously, of the opinion that the Notice of Hearing was served in accordance with Rule 4.2 of the MFDA Rules of Procedure.

### 3. MANNER OF PROCEEDING

Rule 13.5 of the MFDA Rules of Procedure provides as follows:

“(1) Where a Respondent, having been served with a Notice of Hearing, fails to attend the hearing of the proceeding on its merits, the Hearing Panel may proceed in accordance with Rule 7.3.”

Rule 7.3 provides that where a Respondent fails to attend the Hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:

- “(a) proceed with the hearing without further notice to and in the absence of the Respondent; and
- (b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of By-law No. 1.”

Enforcement Counsel advised the Hearing Panel that he wished to proceed with the Hearing in the absence of the Respondent but would seek to prove the allegations by means of admissible evidence. We agreed with that approach.

#### 4. PRESENTATION OF EVIDENCE

Enforcement Counsel presented to the Hearing Panel two Hearing Records. The Hearing Records were identical, except that one had been redacted by removing the name of the client, as well as certain personal details, including bank account and social insurance numbers.

Enforcement Counsel submitted that both Hearing Records should be received by the Hearing Panel as constituting admissible evidence pursuant to Rule 1.6(1) of the MFDA Rules of Procedure but that the un-redacted version of the Hearing Record should be received “in-camera”, pursuant to the provisions of Rule 1.8(2) of the MFDA Rules of Procedure.

Rule 1.6(1) of the MFDA Rules of Procedure provides, in part, that:

“(1) . . . a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.”

Rule 1.8(2) provides as follows:

“A Panel may order that all or part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.”

Rule 1.8(5) provides as follows:

“Exhibits, documents and transcripts relating to that part of a hearing that is held in the absence of the public shall be marked

“Confidential” and shall be kept separate from the public record, and access to this material shall only be by order of the Panel.”

After considering the submissions of counsel, the redacted Hearing Record was marked as Exhibit 3. The un-redacted Hearing Record was marked as Exhibit 4, but was further marked as “Confidential”, pursuant to a combination of Rule 1.8(2) and 1.8(5).

Exhibits 3 and 4 contained the following three Affidavits:

1. An Affidavit of Tom Cooney, the Regional Director for Investors Group Financial Services Inc. (“IG”);
2. An Affidavit of the client, described as “AB” in the Notice of Hearing; and
3. An Affidavit of Ian Smith, an investigator employed by the MFDA.

The three Affidavits, with their respective Exhibits, formed admissible evidence before us. It should be noted that all three deponents were present in the Hearing Room during the course of the Hearing, and were available if the Hearing Panel had required clarification of any of the substantive matters.

## 5. THE EVIDENCE

The admissible evidence revealed the following:

On November 12, 2001, the Respondent executed an “Agreement of Approved Person” in the form prescribed by the MFDA. Commencing on December 27, 2001, the Respondent became registered with the New Brunswick Securities Commission as a mutual fund sales person for IG.

The client, AB, had known the Respondent since 1993. AB had become a mutual fund client of the Respondent when he began to work in the industry in December of 2001. Commencing on or about May 5, 2004, and continuing, initially, until on or about August 24, 2004, the Respondent made four redemptions from the IG mutual fund account of AB in the total amount of \$14,599.98. These four redemptions were made by the Respondent using IG redemption forms, dated, respectively, May 5, 2004, June 30, 2004, August 3, 2004 and August 20, 2004. On each of these redemption forms, the signature of AB had been forged. AB had no knowledge of the redemptions. The redemptions were paid into a bank account which, at that time, was under the effective control and direction of the Respondent.

In the summer of 2004, AB received a statement from IG. AB noticed that the balance in the account had declined by approximately \$6,000.00. AB contacted the Respondent and asked him why the account had declined. The Respondent advised AB that, in fact, the account had not decreased and said words to the effect "I just moved some stuff around and it's nothing."

Subsequent to this representation by the Respondent to AB, the Respondent made a further series of nine redemptions from the IG mutual fund account of AB, totaling \$13,700.00. These redemptions occurred between on or about the 13<sup>th</sup> day of October, 2004, and the 21<sup>st</sup> day of January, 2005. These redemptions were made by the Respondent using an IG redemption form, dated October 13, 2004, upon which the signature of AB had been forged. AB had no knowledge of the redemptions.

These redemptions were paid into a different bank account from the previous redemptions. This bank account was, likewise, under the effective control and direction of the Respondent. It was the bank account which the Respondent had requested IG to use for payroll purposes and, in particular, for the purpose of the deposit by IG of the Respondent's earned commissions.

In February of 2005, AB met with the Respondent for a “year end” discussion of AB’s RRSP account. During that discussion, the Respondent advised AB that he had taken approximately \$30,000.00 from AB’s RRSP account. He requested AB to borrow \$30,000.00 and pay the borrowed funds into the RRSP account. The Respondent told AB that he would personally make the required payments on the loan. The Respondent urged AB not to tell IG that he had taken money from the account.

AB subsequently discussed the matter with another IG mutual fund salesperson, who, in turn, advised AB that he was obliged to disclose the information to IG. AB subsequently met with senior representatives of IG. On or about February 28, 2005, the Respondent, without advising anyone at IG, paid \$30,000.00 into AB’s RRSP account at IG.

On or about March 1, 2005, representatives of IG met with the Respondent, who admitted that he had taken money from AB’s account. The Respondent was immediately terminated by IG.

## 6. AMENDMENT OF ALLEGATIONS

During the course of the Hearing, it was pointed out to Enforcement Counsel that the particulars provided to the Respondent in the Notice of Hearing and to the Hearing Panel by way of admissible evidence, showed that the alleged misappropriations and unauthorized redemptions started on or about May 5, 2004, and not August of 2004, as alleged in Allegations No. 1 and No. 2. Enforcement Counsel, thereupon, made a Motion to amend the Allegations. After consideration, this Motion was granted as it was felt by the Hearing Panel that the Respondent had received full particulars and that the amendment requested was more of form than substance.

## 7. APPLICABLE RULES

Allegations No. 1 and No. 2, in the Notice of Hearing, allege a breach of MFDA Rule 2.1.1. This Rule states:

“Each Member and each Approved Person of a Member shall:

- (a) deal fairly, honestly and in good faith with its clients;
- (b) observe high standards of ethics and conduct in the transaction of business;
- (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
- (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.”

An Approved Person is defined in Section 1 of By-law No. 1 of the MFDA as follows:

“**Approved Person**” means, in respect of a Member, an individual who is a partner, director, officer, compliance officer, branch manager, or alternate branch manager, employee or agent of the Member who conducts or participates in the dealer business of the Member and who (i) is registered, licensed or approved in the appropriate category, where required by applicable securities legislation, by the securities commission having jurisdiction, and (ii) is designated and qualified as such in accordance with the Rules, or (iii) is otherwise subject to the jurisdiction of the Corporation;”

## 8. CONCLUSION

After consideration of the admissible evidence and the applicable Rules, we concluded that, during the material time, the Respondent was an Approved Person and that between on or about May 5, 2004, and January of 2005, he misappropriated, from client AB, the sum of \$28,250.00, more or less. We also

unanimously concluded that in the same time frame, the Respondent performed a series of unauthorized redemptions from the account of AB, totaling \$31,400.00, more or less.

9. THE LAW

Enforcement Counsel presented the Hearing Panel with written submissions as well as a very extensive Casebook, for which we are indebted.

In our view, both misappropriation of client funds and performing a series of unauthorized redemptions from the account of a client by an Approved Person is dishonest conduct which is inconsistent with the standard of conduct set out in MFDA Rule 2.1.1. In this regard see:

1. In the Matter of Raymond Brown-John [2005] Hearing Panel of the Pacific Regional Council, MFDA File No. 200502;
2. In the Matter of Robin Andersen [2006] Hearing Panel of the Prairie Regional Council, MFDA File No. 200508; and
3. In the Matter of Stephan Headley [2006] Hearing Panel of the Ontario Regional Council, MFDA File No. 200509.

As indicated above, the evidence clearly establishes that between May 5, 2004, and on or about August 26, 2004, the Respondent made a series of four unauthorized redemptions from the mutual fund account of AB in a total amount of \$14,599.98. The redemptions were made by the Respondent using forged instruments. The redemptions were paid into bank accounts which, at the time, were under the effective control and direction of the Respondent.

In the summer of 2004, AB contacted the Respondent with respect to the decrease in value in the account. The Respondent lied to AB about the true status of the account. Subsequent to that date, the Respondent made a further

nine unauthorized redemptions from the account of AB in a further amount of \$13,700.00. These redemptions were put into a bank account, which was under the effective control of the Respondent.

In February of 2005, the Respondent made restitution to AB. In our view, this does not diminish the gravity of the misconduct but is a significant factor to be taken into account with respect to the determination of the appropriate penalty.

It is clear that the Respondent did not deal fairly, honestly and in good faith with AB as is alleged in Allegations No. 1 and 2. It is also clear to us that he did not observe the high standards of ethics and conduct in the transaction of business, which is required by MFDA Rule 2.1.1(b). He further breached Rule 2.1.1(c), as he failed to refrain from engaging in business conduct or practice which is unbecoming or detrimental to the public interest.

We unanimously find that subparagraphs (a), (b) and (c) of Rule 2.1.1 have been breached by the Respondent and that both Allegations No. 1 and No. 2 have been established.

#### 10. PENALTY

Enforcement Counsel, in his written and oral submissions, sought the following sanctions:

- (a) A permanent prohibition on the authority of the Respondent to conduct securities related business;
- (b) A fine in the amount of \$25,000.00;
- (c) Costs in the amount of \$7,500.00.

## 11. FACTORS TO BE CONSIDERED

The Supreme Court of Canada, in the case of *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. 58, at paragraph 59, held that the primary goal of securities regulation is the protection of the investor. The Supreme Court also found that other goals included:

“ . . . ensuring public confidence in the system.”

The *Pezim* decision was recently cited with approval in two MFDA decisions, namely *Robert Roy Parkinson* and *Arnold Tonnies*.

*In the Matter of Robert Roy Parkinson*, [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200501, at page 13.

*In the Matter of Arnold Tonnies*, [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, at page 21.

Any sanctions which we impose should be preventative, protective and prospective in nature. One of the main objectives of securities regulation is to prevent harm to investors and the capital markets. In this regard, the Supreme Court of Canada recently found that the role of the OSC, under its public interest jurisdiction, is:

“ . . . to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.”

*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] S.C. J. 38.

*In the Matter of Mithras Management Ltd. et al* (1990), 13 O.S.C.B. 1600.

*Parkinson, supra*, at page 13.

*Tonnies, supra*, at page 22.

We believe that, in the circumstances of this case, this succinctly reflects the role of this Hearing Panel.

We believe that the *Parkinson* and *Tonnies* decisions correctly found that in determining the appropriate sanctions, this Hearing Panel should, *inter alia*, take into account the following considerations;

- (a) the protection of the investing public;
- (b) the integrity of the securities markets;
- (c) specific and general deterrence;
- (d) the protection of the MFDA's membership; and
- (e) the protection of the integrity of the MFDA's enforcement processes.

*Parkinson, supra*, at page 14.

*Tonnies, supra*, at page 22.

In the *Cartaway Resources Corp.* decision, the Supreme Court of Canada held that it is appropriate for a Hearing Panel to include general deterrence amongst the factors that it takes into account when determining an appropriate penalty. The Supreme Court stated, at paragraph 61 of that decision, that:

“A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction . . . The respective importance of general deterrence as a

factor will vary according to the breach of the Act and the circumstances of the person charged . . .”

*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 61.

*Tonnies, supra*, at page 22.

Previous Hearing Panels have set out a number of additional factors which should be considered when determining an appropriate penalty. These include;

- (a) The seriousness of the allegations proved against the respondent;
- (b) The respondent’s past conduct, including prior sanctions;
- (c) The respondent’s experience in the capital markets;
- (d) The level of the respondent’s activity in the capital markets;
- (e) Whether the respondent recognizes the seriousness of the improper activity;
- (f) The harm suffered by investors as a result of the respondent’s activities;
- (g) The benefits received by the respondent as a result of the improper activity;
- (h) The risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;
- (i) The damage caused to the integrity of the capital markets in the jurisdiction by the respondent’s improper activities;
- (j) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- (k) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and

- (l) Previous decisions made in similar circumstances.

*Parkinson, supra*, at pages 14 and 15.

*Tonnies, supra*, at page 23.

The actions of the Respondent in misappropriating funds from AB were planned and deliberate. His status as an Approved Person permitted him to gain the trust of his client. He abused this trust in the most fundamental fashion. This abuse continued over an extended period of time. It is clearly an aggravating factor that, after AB contacted him in August of 2004 with inquiries about the diminution in value of the account, he not only lied to AB but, thereafter, committed nine additional misappropriations.

He also engaged in a pattern of deceitful conduct towards his dealer, IG, by repeatedly submitting false documentation to IG for the purpose of appropriating money from a client's account.

While the repayment of the misappropriated funds is a mitigating factor, it does not dispel the fact that the Respondent continually breached his position of trust and took advantage of his client in his role as an Approved Person. In our view, it is incumbent upon this Hearing Panel to communicate to this Respondent, to the public and to the mutual fund industry as a whole, that serious consequences will befall those who are engaged in activities similar to those of the Respondent in the case before us.

The Respondent has demonstrated by his misconduct that he is not a fit person to be entrusted with responsibility for investors' money. Consequently, in our view, there should be a permanent prohibition of the authority of the Respondent to conduct securities related business in any capacity.

## 12. FINE

We have set out above our views as to the principles which should guide us in imposing a fine upon the Respondent. Included amongst the factors to be considered are mitigating circumstances. In our view, there are three mitigating factors present:

1. The Respondent has no disciplinary history;
2. The Respondent has made restitution to his client; and
3. The Respondent made admissions with respect to his conduct when confronted by representatives of IG.

In his submissions, Enforcement Counsel suggested that the amount of money taken from the client's account (\$31,400.00) was also a factor to be taken into consideration. With this we agree. We also feel that weight should be given to the penalty recommendations of Enforcement Counsel. Enforcement Counsel suggested that, taking all of the above factors into consideration, along with the interests of general and specific deterrence and the serious and deceitful nature of the Respondent's conduct, the appropriate fine would be \$25,000.00. We agreed with that submission and made an Order imposing that fine at the conclusion of the Hearing.

## 13. COSTS

Section 24.2 of By-law No. 1 provides that:

"A Hearing Panel may in any case in its discretion require that the . . . Approved Person pay the whole or part of the costs of the proceedings before the Hearing Panel and any investigations relating thereto."

Enforcement Counsel requested an Order for costs in the amount of \$7,500.00. We agreed with that submission and fixed costs in that amount at the conclusion of the Hearing.

14. PENALTIES IMPOSED

1. A permanent prohibition of the authority of the Respondent to conduct securities related business in any capacity;
2. A fine in the amount of \$25,000.00 with respect to Allegations No. 1 and No. 2; and
3. Costs in the amount of \$7,500.00.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C.  
Chair

“Robert Malcolm”

Robert Malcolm  
Panel Member

“David Losier”

David Losier  
Panel Member