



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**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: Patricia Marva Cuthbert

Heard: April 5, 2011, Vancouver, British Columbia
Reasons for Decision: June 8, 2011

DECISION AND REASONS

Hearing Panel of the Pacific Regional Council:

Stephen D. Gill
Darlene Barker
Martha Kane

Chair
Industry Representative
Industry Representative

Appearances:

David Halasz)	For the Mutual Fund Dealers Association of Canada
)	
David Mitchell)	For the Respondent
)	

1. On November 23, 2010 the Mutual Fund Dealers Association of Canada (“MFDA”) issued a Notice of Hearing (Exhibit 1) in respect of disciplinary proceedings commenced by the MFDA against Patricia Marva Cuthbert (the “Respondent”). The Respondent had retained counsel, Mr. Mitchell, and the Notice of Hearing was duly served. (Affidavit of Service, Exhibit 2).

2. The Respondent, through her counsel, filed a Response (Exhibit 3) and an Amended Response (the “Response”) (Exhibit 4) to the Notice of Hearing. In her Response, the Respondent admitted the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing. The Response went on to allege circumstances in mitigation of any penalties to be assessed.

3. The Response, in six numbered paragraphs, set out various facts and circumstances surrounding the two loans referred to the Notice of Hearing. The Respondent did not testify; counsel for the MFDA, in his submissions did not take issue with the facts set forth in the Response. However, he did take issue with the consequences which flowed from the facts and circumstances set forth in the Response.

4. Given the admissions by the Respondent, it is appropriate at this point to set out the violations alleged and particulars given in the Notice of Hearing.

NOTICE is further given that the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between July 2, 2006 and June 2008, the Respondent engaged in personal financial dealings with client EB by borrowing from her on two occasions a total of approximately \$14,300, which the Respondent failed to repay in accordance with the terms of two promissory notes, thereby giving rise to a conflict or potential conflict of interest which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegation #2: Commencing on or about July 2, 2006, the Respondent failed to comply with the policies and procedures of the Member in respect of conflicts of interest and borrowing from clients by borrowing monies from client EB on two occasions, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

PARTICULARS

NOTICE is further given that the following is a summary of the facts alleged and intended to be relied upon by the MFDA at the hearing:

Registration History

1. The Respondent was registered in British Columbia, Alberta and Ontario as a mutual fund salesperson with Professional Investment Services (Canada) Inc. (“PIS”) and worked at a branch located in British Columbia from August 22, 2007 until October 29, 2008, when she was terminated.
2. Prior to being registered as a mutual fund salesperson with PIS, the Respondent was registered as a mutual fund salesperson with:
 - (a) AEGON Dealer Services Canada Inc. from July 2007 to August 2007;
 - (b) Rice Financial Group Inc. (“Rice”) (subsequently MGI Financial Inc.) from June 2001 to June 2007; and
 - (c) two other mutual fund dealers commencing in April 1992.
3. The Respondent is not currently registered in the securities industry in any capacity.
4. PIS has been a member of the MFDA since June 7, 2002. MGI Financial Inc. (formerly Rice) has been a member of the MFDA since January 11, 2002

Allegation #1 – Personal Financial Dealings

5. EB was a long-time friend of the Respondent. Beginning in or about 2001, during the period that the Respondent was registered as a mutual fund salesperson with Rice, EB was a client of Rice and the Respondent was the mutual fund salesperson responsible for servicing her account.
6. On or about July 2, 2006, the Respondent borrowed \$12,000 from EB, who was then a client of Rice. The Respondent claims that EB provided her with monies withdrawn from EB’s line of Credit.
7. The Respondent borrowed the money from EB in order to re-pay money that the Respondent owed to the Respondent’s mother.
8. The Respondent agreed to re-pay EB in \$300 monthly payments. The Respondent provided EB with a “Promissory Note” dated July 2, 2006 (the “First Promissory Note”), which evidenced the Respondent’s agreement to re-pay EB.

9. The First Promissory Note provided, among other things, that:
 - (a) the Respondent promised to repay EB \$12,000 that was borrowed on July 2, 2006 by way of \$300 monthly payments;
 - (b) interest would be calculated based on the “going bank rate” and may change according to fluctuations in bank rates; and
 - (c) in the event the Respondent died prior to the loan being repaid, her husband would pay the amount that remained owing on the loan using the proceeds of the Respondent’s life insurance policy.
10. The Respondent did not disclose to Rice at any time that she had received monies from EB and had provided the First Promissory Note to EB.
11. On August 15, 2007, the Respondent transferred from Rice to PIS and signed a Mutual Fund Sales Representative Agreement with PIS, wherein she agreed to comply with all policies and procedures established by PIS.
12. On October 23, 2007, EB became a client of PIS and the Respondent was the mutual fund salesperson responsible for servicing her account.
13. From August 2006 until November 2007, the Respondent made payments to EB. The Respondent’s November 2007 cheque to EB was returned NSF.
14. EB passed away in June 2008. The Respondent advised RP, who was EB’s son-in-law and executor of EB’s estate, that in addition to the \$12,000 that she had borrowed from EB, the Respondent owed EB an additional two amounts of \$1,500 and \$800 (totalling \$2,300). The Respondent claims that she owed EB these additional monies arising from a trip she and EB had taken together.
15. On July 18, 2008, the Respondent signed a second promissory note (the “Second Promissory Note”), which provided, among other things, that:
 - (a) the Respondent would pay the estate of EB the amounts then owing (approximately \$10,241);
 - (b) the Respondent would pay interest according to a schedule;
 - (c) the Respondent would pay minimum monthly payments of \$350; and
 - (d) the Respondent would discharge the debt to EB’s Estate by no later than December 31, 2008.
16. In or about October 2008, RP asked the Respondent to provide the three remaining post-dated cheques required under the terms of the Second Promissory Note.

The Respondent advised RP that she could no longer meet her commitment to repay the loan by December 31, 2008.

17. On October 29, 2008, the Respondent was terminated by PIS.

18. The Respondent did not disclose to PIS at any time that she had received monies from EB or that she had provided the First Promissory Note to EB and the Second Promissory Note to RP.

19. On or about October 9, 2009, EB's estate commenced a court action against the Respondent claiming \$9,365.15 (including filing and service fees) in respect of the Respondent's outstanding indebtedness to EB's estate. On April 7, 2010, the parties reached a settlement agreement, wherein the Respondent agreed to pay EB's estate consecutive monthly payments of \$500 between May 1, 2010 and January 1, 2012 inclusive.

20. By borrowing monies from client EB on two occasions, which she failed to repay in accordance with the terms of two promissory notes, the Respondent placed her own interests above those of her client, thereby giving rise to an actual or potential conflict of interest which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rule 2.1.4 and MFDA Rule 2.1.1.

Allegation #2 – Breach of Member Policies and Procedures

21. On February 12, 2004, the Respondent signed an "Agreement on Conduct and Confidentiality" for Rice wherein she agreed, among other things, that "*The Agent will not solicit or accept gifts, monetary rewards, payments, services special privileges or loans from any client ...*"

22. On August 15, 2007, the Respondent signed a "Mutual Fund Sales Representative Agreement" with PIS, wherein she agreed to comply with all policies and procedures established by PIS.

23. PIS's policy and procedures manual ("PPM") provided as follows:

Conflict of Interest

"It is important that advisors avoid conflicts and potential conflicts of interest with clients. As a guideline, advisors should avoid personal business actions or inactions that may be perceived as inappropriate ...All conflicts that arise, and any existing or proposed financial dealings with clients, shall be disclosed to the Compliance Officer...Lending funds to a client, regardless of the term, constitutes a conflict of interest and breach of business professionalism and will result in disciplinary actions and/or dismissal."

24. PIS's PPM was updated on or about September 2008. It stated, among other things, that:

Conflict of Interest:

"All conflicts that arise, and any existing or proposed financial dealings with clients, shall be disclosed to the Compliance Office...Advisors are strictly prohibited from borrowing from clients for any reason and under any circumstance."

25. The Respondent's activities as alleged in Allegation #1 constituted a breach of:

(a) Rice's policies and procedures as set out in its "Agreement on Conduct and Confidentiality" when she borrowed monies from EB as described above while registered as a mutual fund salesperson at Rice, and

(b) PIS's policies and procedures in respect of conflicts of interest, in so far as the Respondent failed to disclose to PIS's Compliance Officer the existing loan arrangement she had with EB while she was registered with PIS.

26. By failing to comply with the policies and procedures of Rice and of PIS, the Respondent engaged in conduct contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

5. The Respondent, in her Response, alleges the following circumstances in mitigation of any penalty to be assessed:

a) Ms. Cuthbert and EB were very close friends. It was through that friendship that EB made the loan to Ms. Cuthbert, not through any business relationship. Indeed, the two went on holidays together.

b) The loan was not made through any pressure or undue influence on Ms. Cuthbert's part. The loan was at all times documented, and the initial loan agreement was witnessed by EB's daughter. There was no attempt to hide the loan from anyone.

c) Ms. Cuthbert had not read and did not know of the policies that prohibited this undisclosed loan. She did not intend to violate those policies. She did not turn her

mind to whether she should borrow from a client because, at all times, she treated this as a loan from a close friend.

- d) Paragraphs 16 and 17 of the Notice of Hearing do not set out the chronology with respect to Ms. Cuthbert's default in the repayment schedule. Ms. Cuthbert maintained repayments before and after EB's death. In the fall of 2008, relations with EB's son and executor became strained. In October 2008, he informed her employer of the loan. She was promptly terminated. After her termination, and because of her termination, she informed EB's son that she was now forced to default.
- e) After EB's son, as executor, commenced an action in Small Claims Court, he and Ms. Cuthbert reached a settlement, including a payment schedule for repayment of the loan, at a court-ordered mediation. Ms. Cuthbert continues to comply with that payment schedule.
- f) Despite now being able to comply with the payment schedule, Ms. Cuthbert remains in a difficult position financially. She does not have the resources to pay a penalty to the MFDA.

Finding of Misconduct

6. The Panel, having considered the Respondent's admissions and having heard submissions from counsel for the MFDA, and for the Respondent, determined that the MFDA had proven Allegation No. 1 and Allegation No. 2. We then proceeded to hear submissions with respect to penalty.

Submissions

7. Counsel for the MFDA reviewed the registration history of the Respondent, including the fact that she had been a representative since 1992, and pointed out that given her experience in the industry, she should have known, and been well aware of, the conflict rules. He noted that the

Respondent is not currently working in the industry. He also noted the somewhat unusual circumstances of this case, namely the fact that the Respondent and EB were long time friends, and that EB was also a client. He submitted that both loans were well documented, payment schedules were in evidence, along with other proceedings which had been taken after the death of EB, by the Estate, to collect the loan. The loan has not been repaid in full, but arrangements are in place to effect that.

8. Counsel for the MFDA submitted that the following penalty would be appropriate:

- a) A fine of \$5,000 to \$10,000;
- b) A prohibition from conducting securities business for 2 years from the date of the order;
- c) At the end of the aforesaid prohibition if the client has not been repaid, then a permanent prohibition;
- d) That the Respondent complete an ethics course within one year of the order;
- e) The Respondent pay costs of \$2,500.

9. Counsel for the MFDA also reviewed the relevant Penalty Guidelines and a number of cases including:

- a) *Pezim v. British Columbia (Superintendent of Brokers)* [1994] S.C.J. 58 at paras. 59 and 68, per Iacobucci J;
- b) *In Re Arnold Tonnie*s [2005], MFDA Prairie Regional Council, MFDA File No. 200503, Hearing Panel Decision dated June 25, 2005;
- c) *In Re Luigi Ciardullo* [2011] MFDA Central Regional Council, MFDA File No. 201603, Hearing Panel Decision February 17, 2011;
- d) *In Re Zenon Smiechowski* [2010] MFDA Pacific Regional Council, MFDA File No. 201007 Hearing Panel Decision dated December 31, 2010;
- e) *In Re Raymond Brown-John* [2005] MFDA Pacific Regional Council, MFDA File No. 200502, Hearing Panel Decision dated June 27, 2005;

- f) *In Re Glenn Murray Greyeyes* [2006] MFDA Prairie Regional Council, MFDA File No. 200510, Hearing Panel Decision dated June 5, 2006;
- g) *In Re Christopher Philip Jones* [2011] MFDA Central Regional Council, MFDA File No. 201008, Hearing Panel Decision dated February 7, 2011;
- h) *In Re Ronald Freynet* [2007], MFDA Prairie Regional Council, MFDA File No. 200704, Hearing Panel Decision dated August 14, 2007;
- i) *In Re Marlene Legare* [2010], MFDA Pacific Regional Council, MFDA File No. 200813, Hearing Panel Decision dated October 29, 2010;
- j) *In Re Carmen G. Moerike* [2010], MFDA Prairie Regional Council, MFDA File No. 200912, Hearing Panel Decision July 28, 2010.

10. Mr. Mitchell, counsel for the Respondent, submitted that the Respondent's position in respect of the loans was consistent, namely that she did not view the loans as client/advisor loans, but loans as between two close friends. He submitted that the Respondent's "evidence", that she did not know that she was breaking the Rules or policies of the Members for whom she was employed, was consistent with this belief that the loan was an arrangement between close friends.

11. Respondent's counsel acknowledged that the Respondent had signed a number of documents, throughout her employment, indicating she knew and understood the Rules and policies, and submitted her "evidence" was that these policies were never brought home to her. In his submissions he agreed that she ought to have known of the various Rules and policies because of the documentation that she received and signed.

12. In summary, the principal submission in respect of mitigation was that the Respondent felt she was borrowing from a friend, and not from a client.

13. Counsel for the Respondent reviewed a number of the cases in the Authorities binder (*Smiechowski, Ciardullo, Greyeyes, Freynet*) and submitted that in general the cases were distinguishable from the Respondent's case, principally because there is no evidence here of the need to protect investors, or indication that the markets were in peril. Further, he pointed out that

the loan funds were not withdrawn from the friend's account, or from the capital markets; the first loan came from the line of credit of the friend.

14. Counsel for the Respondent submitted that there was no attempt by the Respondent to hide the loan in that EB's family knew of the loan, and her daughter had witnessed the Promissory Note in security of the loan. Further, the loan was secured by the Respondent's life insurance, and her husband had guaranteed repayment.

15. Counsel for the Respondent submitted the Respondent had no history of loans, and this was an isolated case, again emphasizing the fact that it was a loan between friends.

16. Counsel for the Respondent submitted that the penalty suggested by the Association would prevent the Respondent from complying with the repayment of the loan to the Estate. He pointed out that because of the complaint made to the Respondent's employer, she lost her job, and she has been without employment for two years. She has not been active in the business since 2008.

17. With respect to what has been referred to as the second loan, Counsel for the Respondent pointed out that these two sums were on account of holidays taken by the Respondent and her friend EB, and that she was simply repaying her portion of the cost of the holidays. This again was evidence of a personal loan relationship, and not a business-client type relationship.

18. Counsel for the Respondent submitted that the Respondent has not repaid the loan to date because of the loss of her job and her career. He submitted that any penalty that was imposed should follow on the repayment in full of the loan. He submitted that the Respondent has made all payments to date with respect to the repayment and that the Respondent would like to return to the business. He stated that at one point she had 60 clients and over \$8 million invested, but that she had lost her business when she lost her employment.

19. Counsel for the Respondent submitted that an appropriate penalty would be a three month suspension; a permanent prohibition if the Respondent does not repay the loan; the Respondent

take an ethics course before recommencing employment; a \$2,500 fine; and \$2,500 on account of costs, payable within two years of the order.

Discussion

20. The primary goal of securities regulation is the protection of the investor.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 SCR 557, per Iacobucci J. at paras. 59, 68.

In the matter of *Robert Lloyd Parkinson* (2005) MFDA file no. 200501, Panel Decision dated April 29, 2005.

21. Further, one of the main objectives of securities regulation is to prevent harm to investors and capital markets. (*Re: Greyeyes*, supra. p. 11)

22. We agree that in this case there is no evidence of damage to the capital markets, and there is no evidence of deceit or exploitation of clients as there has been in some of the cases that were cited to us. This does not appear to be a case of the financial advisor preying upon an unsophisticated or vulnerable client.

23. On the contrary, the evidence in this case confirms that the Respondent did acknowledge the loans, and documented them appropriately. However, that does not excuse the clear breach of the Rules and policies. The Respondent had been in the industry since 1992, and we have no doubt that she was very aware of the conflict of interest that arises when a financial advisor borrows from a client, and that it was a breach of the Policies to withhold the information from her Member firm. We do not have the benefit of the evidence of the client/investor EB about the loans, and we do not know what caused her to agree to make the loans. There is evidence before us that the Respondent assisted EB in restructuring her debt, so obviously the Respondent had significant information about EB's finances. The fact that a client is or becomes a good friend does not explain or condone the actions of the Respondent in this case. Further, the client did not have available cash to make the original loan: she used her line of credit so that the Respondent could repay her mother.

24. Unfortunately, we do not have the benefit of evidence from the Respondent about the loans, or about her financial circumstances at that time, or at present. As a practice in our view it would be far preferable for the Respondent to take the witness stand, give evidence, and explain all the relevant circumstances, rather than have counsel make submissions based upon the matters alleged in the Response.

25. In *Re: Freynet* (supra), the Panel stated:

“Several previous decisions of industry tribunals, including MFDA tribunals, have found that the following factors should be taken into account in determining the appropriate sanctions to impose:

- a) the protection of the investing public;
- b) the integrity of the securities market;
- c) specific and general deterrence;
- d) the protection of the governing bodies’ membership;
- e) the protection of the integrity of the governing bodies enforcement processes;

The Supreme Court of Canada in *Re: Cartaway Resources Corp.*, [2004] 1 S.C.R. 672, has indicated that general deterrence is an appropriate consideration in making orders that are both protective and preventative. At para. 61 of that case, the court stated:

‘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: Freynet*, page 12)

26. It is clear, on the evidence before us, that the Respondent’s conduct in borrowing money from her client EB, to repay her mother, was a planned and deliberate act. While EB was the Respondent’s friend, she was also a client, and we conclude that the Respondent chose to ignore

her obligations and responsibilities as a mutual fund salesperson. In our view she made a conscious decision to ignore the Rules and policies in order to effect a solution to her personal financial problem. She placed her own interests ahead of her responsibilities to her client.

27. Similarly, in effecting loans for holidays from EB, the Respondent again permitted her personal situation to cloud her judgment, and she again conveniently overlooked the fact that EB was first and foremost her client. So long as she made the payments it was unlikely she would be discovered by the Member firm.

28. As to the submission that the Respondent documented the loans with EB, that pales in contrast to the fact the Respondent committed an ongoing deception upon her Member firm by failing to disclose the existence of the loans. We have no doubt that the Respondent was fully aware of her obligations to disclose any client borrowings to her Member firm. Once again, she did not disclose in order to meet her own financial situation.

Penalty

29. Having considered all of the evidence, the authorities, and the submissions of counsel in this matter, we agree that any penalty we impose should not prevent the Respondent from repaying in full the loans to EB's estate. We are mindful of the fact that the Respondent has no previous disciplinary history, and there is no evidence of any other complaints or infractions. The Respondent also cooperated with the MFDA in its investigation of this matter, and did not dispute the allegations in the Notice of Hearing. The Respondent has evidenced an intention to fully repay the loans.

30. We are also mindful that the funds from the loan were not withdrawn from the client's account or the result of the client cashing in investments. The amount of the loans is not as large as in some of the cases cited to us, but still the Respondent knew, or ought to have known that borrowing from a client was a serious breach. We did not see any evidence of remorse on the part of the Respondent, and Respondent's counsel submitted that she did wish to re-enter the business in the near future.

31. We therefore order that:

- a) the Respondent, Patricia Marva Cuthbert, shall pay a fine of \$5,000;
- b) The Respondent shall pay costs in the amount of \$2,500;
- c) The Respondent is prohibited from conducting any securities related business while in the employ of, or associated with, any MFDA Member until the later of: (a) January 1, 2012; and (b) until the amount owing by the Respondent to EBs Estate is fully repaid; and
- d) We further direct that the Respondent shall write, or re-write and pass, an appropriate industry course on ethics, prior to re-entering the business.

32. In our view, this is an appropriate case in which to grant time for the Respondent to pay the fine and costs set out in paragraph 31 of this Decision and Reasons. It is our intention that the Respondent firstly repay her debt to the estate, and complete all her obligations in that regard. We therefore direct that the Respondent shall have until December 31, 2012 to pay the fine and the costs referred to in this Decision and Reasons.

33. This Decision and Reasons may be signed in counterpart.

DATED this 8th day of June, 2011.

“Stephen Gill”

Stephen D. Gill,
Chair

“Darlene Barker”

Darlene Barker,
Industry Representative

“Martha Kane”

Martha Kane,
Industry Representative