Decision and Reasons

File No. 200509

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: STEPHAN HEADLEY

DISCIPLINARY HEARING

Heard: December 14, 2005
Panel Decision: February 21, 2006
Toronto, Ontario

DECISION and REASONS

Hearing Panel of the Ontario Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Sandy Grant	Panel Member
Robert Hovianseian	Panel Member

Appearances:

Shelly Feld	)	for Mutual Fund Dealers Association
	)	of Canada
Stephan Headley	)	Not in attendance personally or by
	)	counsel

1. THE ALLEGATIONS

By Notice of Hearing, dated the 8th day of September, 2005, the following allegations were made against Stephan Headley ("Respondent"):

(a) Between April 2003 and February 2004, the Respondent misappropriated the total amount of approximately $155,000.00 obtained from his clients NL and IB and during that time period he failed to return or truthfully account for these monies, thereby, failing to deal fairly, honestly and in good faith with NL and IB, contrary to Rule 2.1.1 of the Mutual Fund Dealers Association of Canada ("MFDA").

(b) Commencing in or around November 2004, the Respondent failed to produce for inspection and provide copies of documents and information requested by the MFDA for the purpose of investigating a complaint made against the Respondent, contrary to s. 22.1 of MFDA By-Law No. 1.

2. SERVICE

The Notice of Hearing provided for a First Appearance before the Hearing Panel at 121 King Street West, Suite 1000, Toronto, Ontario on Wednesday, October 26, 2005, at 10:00 a.m. At that time, the Respondent did not appear. Further, no one appeared on his behalf.

At the First Appearance, Enforcement Counsel described the attempts that had been made to that date by Staff to serve the Notice of Hearing on the Respondent. The attempts were described in Affidavits of Terri Spence and B. Gordon Collins, which were marked as Exhibits 2 and 3, respectively. At the First Appearance, Enforcement Counsel requested an Order abridging the time for service of the Notice of Hearing on the Respondent pursuant to Rules 2.2(1)(a) and 7.1(2) of the Rules of Procedure of the MFDA.

After hearing submissions from Enforcement Counsel, the Hearing Panel was of the opinion that, in the circumstances, it would not be contrary to the public interest to abridge the time for service of the Notice of Hearing on the Respondent. Accordingly, we issued an Order, which provided, *inter alia*, that the time for service of the Notice of Hearing was abridged, pursuant to Rules 2.2(1)(a) and 7.1(2) of the Rules of Procedure, such that service of the Notice of Hearing on the Respondent by Xpresspost mail, sent on September 27, 2005, constituted good and sufficient service on the Respondent, in accordance with Rules 4.2(1) and 4.4(1) of the Rules of Procedure.

We further ordered that the Hearing on the merits in this matter would take place before the Hearing Panel at 121 King Street West, Suite 1000, Toronto, Ontario, on Wednesday, December 14, 2005, commencing at 10:00 a.m. The Order further directed MFDA Staff to send Notice to the Respondent of the date, time and place of the Hearing on the merits by registered and regular mail personally addressed to the Respondent at a series of addresses listed in Appendix "A" to the Order and also by leaving a voice mail message for the Respondent at the cell phone number of the Respondent that was on record with the MFDA. We, finally, made an Order as to the contents of the Notice which was to be served on the Respondent.

The Respondent did not appear on December 14, 2005. No one appeared on his behalf.

At the commencement of the Hearing on December 14, 2005, Enforcement Counsel filed a further Affidavit of Terri Spence, which was sworn December 8, 2005, describing, *inter alia*, the further attempts at service made pursuant to the October 26, 2005, Order of the Hearing Panel. A copy of this Affidavit was marked as Exhibit 5. Enforcement Counsel also made submissions as to the adequacy of service.

We find that the following steps were taken by Staff to effect service of the Notice of Hearing on the Respondent:

(a) Multiple attempts were made to personally serve the Respondent at 200 Burnhamthorpe Road East, Apt. 809, Mississauga, Ontario, L5A 4L4, which was the residential mailing address for the Respondent that was recorded in the files of both the MFDA and the Ontario Securities Commission ("OSC").

(b) On September 22, 2005, a package containing, *inter alia*, the Notice of Hearing was sent by registered mail and regular mail, addressed to the Respondent at 200 Burnhamthorpe Road East, Apt. 809, Mississauga, Ontario, L5A 4L4.

(c) Staff had evidence that the Respondent was associated with a company called "Laers Inc.", the business office address of which is 960A, The Queensway, Toronto, Ontario. Multiple attempts were made to personally serve the Respondent at that location.

(d) On September 22, 2005, a package containing, *inter alia*, the Notice of Hearing, was sent by Federal Express courier, registered mail and regular mail, addressed to the Respondent at 960A The Queensway, Toronto, Ontario.

(e) A voice mail message was left for the Respondent on his cell phone. The Respondent responded to the message and instructed the process server of the MFDA to leave the materials on the marquee at the entrance to the 200 Burnhamthorpe Road East apartment building, where he indicated he would pick them up at a convenient time. On September 23, 2005, the Federal Express courier advised the MFDA Staff that he was not granted access to the building at 200 Burnhamthorpe Road East and, consequently, could not deliver the package. MFDA Staff provided the Federal Express courier with the cell phone

number of the Respondent and were later advised that the Respondent told the courier company that he no longer resided at that address.

(f) On September 26, 2005, Enforcement Counsel left a message on the Respondent's cell phone advising him, *inter alia*, that a Disciplinary Hearing would be commenced against him on Wednesday, October 26, 2005, at 10:00 a.m. at 121 King Street West, Suite 1000, Toronto, Ontario. Enforcement Counsel, subsequently, received a call from the Respondent advising him that he no longer lived at the 200 Burnhamthorpe Road East address. The Respondent provided Enforcement Counsel with an address in Vancouver, British Columbia. During the course of that discussion, Enforcement Counsel, again, orally advised the Respondent that a Disciplinary Hearing had been commenced against him. He, further, advised him of the date, time and place of the First Appearance.

(g) On September 27, 2005, a package was sent by registered and Express Post to the Respondent at the Vancouver address provided by him. This package contained, *inter alia*, a copy of the Notice of Hearing and the MFDA Rules of Procedure. The package also contained a letter from Enforcement Counsel, dated September 27, 2005, advising the Respondent that, at the First Appearance, Enforcement Counsel would be bringing a Motion seeking an abridgement of the time required for service of the Notice of Hearing as a result of the difficulties which the MFDA Staff had experienced in attempting to serve the Respondent with the Notice of Hearing.

(h) The October 26, 2005, Order of the Hearing Panel required the MFDA Staff to send Notice to the Respondent of the date, time and place of the Hearing on the merits by registered and regular mail, personally addressed to the Respondent at each of four (4) addresses listed in Appendix "A" to the Order and also by leaving a voicemail message for the Respondent by calling the cell phone number of the Respondent that was on record with the MFDA.

(i) On October 27, 2005, Enforcement Counsel sent letters by registered and regular mail to three (3) of the addresses specified in Appendix "A" to the October 26, 2005, Order of the Hearing Panel. On October 27, 2005, Enforcement Counsel, further, sent a letter by regular mail and courier to the Yonge Street address of Liquid Capital Corporation in Toronto, which was the fourth address listed in Appendix "A" to the October 26, 2005, Order. That letter was delivered on October 28, 2005. Enforcement Staff were, subsequently, advised by a representative of Liquid Capital Corporation that they had been requested by the Respondent to forward the letter to him at a specified Vancouver address. Enforcement Staff were advised that this was done.

(j) On November 14, 2005, Enforcement Counsel attempted to contact the Respondent on the cell phone number that the MFDA had on record for the Respondent. Enforcement Counsel advised the Panel that the Respondent answered the phone, identified himself, but hung up as soon as Enforcement Counsel identified himself.

(k) Enforcement Counsel subsequently left a recording on the Respondent's cell phone advising him, *inter alia*, of the time, date and place of the Hearing on the merits.

(l) On November 18, 2005, the corporate secretary of the MFDA forwarded a letter to the Respondent at his Vancouver address enclosing a copy of the October 26, 2005, Order of the Hearing Panel.

(m) On November 22, 2005, Enforcement Counsel sent a letter to the Respondent enclosing a copy of the October 26, 2005, Order and again advising the Respondent of the time, place and date of the Hearing on the merits. The letter was sent by regular mail to each of the addresses listed in Appendix "A" to the October 26, 2005, Order.

After hearing submissions and reviewing the documentary evidence, we are, unanimously, of the opinion that the delivery of the Notice of Hearing, in the manner described above, constitutes good and sufficient service on the Respondent, pursuant to Rule 4.2(1)(d) 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

The main evidence before the Hearing Panel with respect to this matter consisted of an 80 paragraph Affidavit of Ian R. Smith ("Smith Affidavit"), an Investigator with the Enforcement Department of the MFDA. Accompanying and forming part of the Smith Affidavit were 30 separate Exhibits.

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."

Accordingly, we marked the Smith Affidavit as Exhibit 4. It formed admissible evidence before us.

Enforcement Counsel advised the Hearing Panel that, in the Smith Affidavit, Staff had removed client names and had used initials. This was to protect client confidentiality. He advised that this was not possible to do with the exhibits to the Smith Affidavit. He, therefore, sought an Order under Rule 1.8(2) of the MFDA Rules of Procedure.

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 following portions of Exhibit 4 were marked as "Confidential", pursuant to a combination of Rule 1.8(2) and (5):

1. The copies of personal cheque No. 249 drawn on the account of the Respondent's former client, IB, which were attached to the Smith Affidavit at Tabs 4 and 23;

2. The copies of personal cheques, dated April 22, 2003, and June 19, 2003, which were drawn on the account of the Respondent's former client, NL, which were attached to the Smith Affidavit at Tab 5 and as Exhibits 1 and 2 to the transcript of the interview between MFDA Staff and NL at Tab 17; and

3. The client documentation attached to the Smith Affidavit at Tabs 18 and 22.

5. THE EVIDENCE

The Smith Affidavit revealed the following:

Between July 9, 1997, and February 25, 2004, the Respondent was registered as a mutual fund salesperson with the OSC. From July 9, 1997, to September 16, 2002, the Respondent worked at two mutual fund dealers in succession.

From September 16, 2002, to February 25, 2004, the Respondent was a mutual fund salesperson affiliated with a branch of Worldsource Financial Management Inc. ("Worldsource"), located at 5045 Orbitor Drive, Building No. 11, Suite 200 in Mississauga, Ontario. Although the Respondent's Branch Manager worked from the Orbitor Drive address, the Respondent maintained a separate

office at 960A The Queensway, Suite 10, Toronto, Ontario, where he often met with clients.

Worldsource has been a member of the MFDA since June 20, 2002.

On August 30, 2002, the Respondent signed an Agreement of Approved Person, acknowledging, among other things, his agreement to "be bound by, observe and comply with the MFDA Rules as they are from time to time amended or supplemented."

On September 30, 2002, the Respondent signed a further Agreement with Worldsource in which, among other things, he agreed to comply in all respects with the By-Laws, Rules and Policies of the MFDA.

On February 25, 2004, the Respondent was terminated for cause by Worldsource as a result of the conduct which was the subject matter of this proceeding. Since February 25, 2004, the Respondent has not been registered in the securities industry in any capacity.

Between April 2003 and February 2004, the Respondent obtained approximately $155,000.00 from his clients, NL and IB He led these clients to believe that these funds would be invested on their behalf. Instead, he misappropriated the funds, which he had received from these clients, by depositing same into bank accounts which he controlled. He did not deposit the funds into the Worldsource trust account or credit the mutual fund accounts of the clients. Further, he did not use the money to purchase any investments on behalf of the clients.

MISAPPROPRIATION OF $147,000.00 from NL

NL was born in January of 1970. The Respondent became her investment advisor on March 17, 2003. On that date, she executed a Change of Dealer/Representative form. In the Investment Objective portion of the "Know Your Client" section of the documentation, NL stated that she wanted 100% of her money invested for growth.

She provided to the Respondent a cheque, dated April 22, 2003, in the amount of $77,000.00, which was drawn on her personal bank account. The cheque was made payable to Laers Inc. at the direction of the Respondent. At the time, NL did not know what Laers Inc. was but she thought that she had seen the name on the Respondent's business cards. The memo line on the cheque contained a notation "to invest on my behalf". The money comprised part of an inheritance which NL had received. She gave the cheque to the Respondent to be invested on her behalf in mutual funds.

On April 23, 2003, the cheque was deposited into a Bank of Nova Scotia account rather than the Worldsource trust account. The Respondent declined to provide the MFDA Investigator with the requested bank statements from the said Nova Scotia bank account. The MFDA Investigator was unable to find any evidence that the Respondent had used the $77,000.00 to purchase investments for the benefit of NL.

A corporate search (Tab 19 of Exhibit 4) revealed that Laers Inc. was incorporated on June 14, 2002, and that the Respondent, as of the date of the search, namely March 5, 2004, was the President and a Director of Laers Inc. and had held such positions since its incorporation in June of 2002.

NL subsequently provided to the Respondent a further cheque, dated June 19, 2003, in the amount of $70,000.00. This cheque was drawn on NL's personal line of credit. The cheque was made payable to "CMG in Trust" – probably referring to Capital Management Group or CMG – Worldsource Financial Services Inc., the former name of the Member. NL stated that the Respondent had told her that there were tax benefits associated with borrowing money to invest and assured her that the rate of return that she would earn from the investment would exceed the cost of borrowing the additional funds to invest. NL, consequently, obtained a personal line of credit from her bank which was secured by a mortgage on her home. The memo line of the cheque included the notation "to invest on my behalf".

This $70,000.00 cheque was deposited on July 2, 2003, into a Toronto Dominion bank account rather than the Worldsource trust account. Evidence from Worldsource indicated that this was the personal bank account into which the Respondent's commission income was deposited. The MFDA Investigator was unable to find any evidence which suggested that the Respondent used the $70,000.00 to purchase investments for the benefit of NL.

NL advised the MFDA that in October of 2003, she began to express concerns to the Respondent about the fact that she had not received any trade confirmations, account statements or other notification concerning the status of her investments. The Respondent apparently advised her that the money had been deposited with Transamerica Life Canada. NL inquired as to why she had not received a letter from Transamerica Life Canada acknowledging receipt of her money. The Respondent allegedly advised her that Transamerica Life Canada only sent out annual statements but assured her that her investment would be reflected on the annual statement which she would receive later in the year. NL advised the Respondent that she was not comfortable waiting for the annual statement.

In November of 2003, NL received an unsigned letter, dated November 3, 2003, on the letterhead of Transamerica Life Canada, purporting to confirm receipt of two deposits from NL on July 3, 2003. This letter is found at Exhibit 4, Tab 17, subtab 3.

NL became suspicious following receipt of the letter as it indicated, *inter alia*, receipt of deposits on July 3, 2003, for two amounts of $70,000.00. This was inconsistent with both the date and the amount of the investments. NL also noted that the letter was unsigned, although it purported to come from a "Laila Ajani". Ms. Ajani, in a letter dated April 19, 2004, (see Exhibit 4, Tab 20) stated that she did not compose or mail this letter to NL.

Shortly after receiving the November 3, 2003, letter, NL asked the Respondent to return her funds (see Exhibit 4, Tab 17, pages 17 and 18). The Respondent sought to discourage NL from pursuing her request to obtain her money back. However, his various explanations did not satisfy her.

In January or February of 2004, NL informed the Respondent that she was contemplating the possibility of filing a formal Complaint concerning his conduct, as well as the commencement of legal proceedings against him to recover her money (see Exhibit 4, Tab 17, pages 18 to 19 and 22).

Between February 9, 2004, and March 3, 2004, the Respondent gave NL the following:

(a) a bank draft from the Toronto-Dominion Bank, dated February 9, 2004, in the amount of $100,000.00;
(b) a bank draft from the Toronto-Dominion Bank, dated February 26, 2004, in the amount of $50,000.00;

(c) a personal cheque, dated March 3, 2004, in the amount of $1,930.00, drawn on a personal account which the Respondent had at TD-Canada Trust.

In total, NL received $151,930.00 from the Respondent, which was to reimburse her for the amount which she had provided to the Respondent to invest plus an amount equal to the minimum rate of return of 6%, which he had, apparently, promised that she would obtain from the investment.

NL feared that she would not recover her money from the Respondent if she filed a formal Complaint against him. Consequently, as soon as she had received her money back, she filed a Complaint with the MFDA, dated March 21, 2004 (see Exhibit 4, Tab 5). A copy of this Complaint was forwarded to the Respondent for his review and response.

The Respondent retained counsel, who replied to the Letter of Complaint by letter, dated May 26, 2004 (see Exhibit 4, Tab 8). In this response, counsel indicated that the Respondent had advised NL that he was renovating an investment property for which he intended to purchase new appliances. It was his position that NL insisted that since she worked for an appliance company, she would make these arrangements for him. The Respondent also stated that NL wanted to loan him money to renovate his property and insisted that he borrow a total of $147,060.00 from NL for a period of two months. It was his position that this was paid back in full with interest.

It was the Respondent's position to the MFDA that NL used the excuses of the appliances and the loan to pursue the Respondent aggressively. It was his position that NL became irate and threatened the Respondent on several occasions that she would have his licence removed. It was the Respondent's position that NL "manipulated him" and "sought to tarnish" his reputation.

NL disputed the Respondent's version of events, although she did say that she agreed to assist with the purchase of appliances through her company so that the Respondent could benefit from her employee discount. She noted, however, that if the monies had been provided to the Respondent as a loan, she would have written "loan" on the memo line rather than the notation "to invest on my behalf".

We do not accept the explanation proffered to the MFDA by the Respondent, through his counsel, and find that he did, indeed, misappropriate the sum of $147,000.00 from NL

MISAPPROPRIATION OF $8,000.00 from IB

IB was born in April of 1942. She became a client of the Respondent in September of 2002. She was referred to the Respondent by her daughter. She typically met with the Respondent at the Queensway office but, on one occasion, did meet with him at the Worldsource branch office on Orbitor Drive.

IB advised that she provided an undated cheque to the Respondent, in the amount of $8,000.00 on October 28, 2003. The Respondent, apparently, advised her to invest the money in a Guaranteed Investment Certificate ("GIC"), which he claimed would generate an annual rate of return of 8%. IB instructed the Respondent to purchase the GIC on her behalf on the first of November 2003.

The $8,000.00 cheque, drawn on IB's account, was deposited on November 5, 2003, into the same Toronto-Dominion bank account that NL's June 19, 2003, cheque was deposited into. As indicated above, this was the account into which the Respondent's commission payments were deposited by Worldsource.

The MFDA Investigator could find no evidence that the Respondent ever used the $8,000.00 to purchase a GIC or any other investment for the benefit of IB.

Between November 2003 and February 2004, IB made multiple inquiries of the Respondent concerning the status of her $8,000.00 investment. In December of 2003, she began to express concern to the Respondent about the fact that she had not received any type of receipt, account statement or other notification concerning the status of her investment. A copy of an e-mail from IB to the Respondent is found at Exhibit 4, Tab 26.

IB eventually took steps to contact her bank to obtain a copy of the $8,000.00 cheque so that she could find out whether it had been deposited. On February 18, 2004, when IB still had not received any documentation from the Respondent about the status of her investment, she notified both the Respondent and Worldsource about the fact that her $8,000.00 was missing and demanded return of her money (see Exhibit 4, Tabs 27 and 28).

On February 20, 2004, after IB's Complaint had been received by Worldsource, the Respondent made a direct deposit of $8,040.00 into her account for the purpose of repaying the investment funds plus interest.

On February 25, 2004, the Respondent was terminated for cause by Worldsource. Subsequently, by letter, dated March 15, 2004, the OSC requested a written explanation from the Respondent of the circumstances that gave rise to his termination. On April 5, 2004, the Respondent submitted a Statutory Declaration to the OSC in which he claimed that the funds of IB had been deposited into his personal business account in error by an administrative assistant who worked in his office. The Respondent alleged that a "misunderstanding of instructions had occurred" which, he speculated, may have

resulted from the administrative assistant's hearing impairment (see Exhibit 4, Tab 6).

In our view, the explanation, offered under oath by the Respondent to the OSC, is not credible. The cheque was made payable to "WFM in Trust" and yet was deposited into his personal account. We have little hesitation in concluding that the Respondent misappropriated the sum of $8,000.00 from IB.

Allegation No. 2

On November 3, 2004, Ian Smith ("Smith"), the MFDA Investigator, forwarded a letter to the Respondent's counsel requesting additional documentation relevant to the allegations that had been made against the Respondent by both NL and IB. He requested production of the documentation by no later than November 17, 2004. He advised that the Respondent was required to produce the documentation as the request was being made pursuant to Section 22 of MFDA By-Law No. 1. A copy of the request is found at Exhibit 4, Tab 9.

On November 17, 2004, Smith received a call from the Respondent's counsel requesting an extension of time for production of the documentation. This was granted until December 2, 2004.

On December 1, 2004, Smith received a telephone call from the Respondent informing him that he was seeking new counsel. He requested an additional extension of time to produce the documents sought in the November 3, 2004, letter. Smith requested the Respondent to contact him when he had retained new counsel and, in any event, no later than December 10, 2004.

On December 9, 2004, Smith received a letter from the Respondent, dated December 8, 2004, indicating that he was still attempting to obtain new counsel and requested a further extension until mid-January, 2005. A copy of the Respondent's letter is found at Exhibit 4, Tab 12. Smith granted an extension until January 14, 2005, but indicated that no further extensions would be granted.

On January 14, 2005, Smith received a letter from the Respondent, dated January 11, 2005, stating that the Respondent had decided to leave the investment industry and his practice as a Financial Advisor "as of January 2005". A copy of the letter from the Respondent is found at Exhibit 4, Tab 14.

On January 14, 2005, Smith wrote to the Respondent summarizing the requests made to him for documentation, as well as the numerous extensions that had been granted to him. He advised that, in spite of his decision to leave the investment industry, he was still under MFDA jurisdiction. Smith required the Respondent to produce the documentation requested in his letter of November 3, 2004, by no later than January 24, 2005. He indicated that "Should you fail to do so, the MFDA may consider initiating disciplinary proceedings against you for failure to cooperate." A copy of Smith's letter of January 14, 2005, is found at Exhibit 4, Tab 15.

The January 14, 2005, letter was sent to the Respondent by registered mail. The Respondent signed for the letter on January 17, 2005. At the date of the swearing of the Smith Affidavit, namely December 7, 2005, the Respondent had still not provided the MFDA with the documentation and information that was initially requested in the November 3, 2004, letter.

We are, unanimously, of the opinion that the Respondent has failed to produce for inspection and provide copies of the documents and information requested by the MFDA for the purpose of investigating a Complaint made against the Respondent contrary to Section 22.1 of the MFDA By-Law No. 1.

6. APPLICABLE RULES

Allegation No. 1, in the Notice of Hearing, alleges 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."

Allegation No. 2, in the Notice of Hearing, alleges a breach of section 22.1 of MFDA By-Law No.1. This section states:

"For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

(a) to submit a report in writing with regard to any matter involved in any such investigation;

(b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matter being investigated; and

(c) to attend and give information respecting any such matters;

(d) to make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the Corporation;

and the Member or person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending

before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion, require that any statement given by any Member or person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath."

By letter, dated January 11, 2005, the Respondent informed the MFDA that he had "decided to leave the investment industry and [his] practice as a financial advisor." Consequently, Section 24.1.4 of MFDA By-Law No. 1 becomes apposite. It provides as follows:

"24.1.4 *Jurisdiction*

(a) *Former Members*. For the purposes of Sections 20 to 24 inclusive, any Member, Approved Person or other person subject to the jurisdiction of the Corporation shall remain subject to the jurisdiction of the Corporation notwithstanding that such Member has ceased to be a Member, Approved Person or other person subject to the jurisdiction of the Corporation.

(b) *Limitation*. No proceedings shall be commenced pursuant to Section 20.1 against a former Member or person referred to in Section 24.1.4(a) unless a Notice of Hearing has been served upon such Member or person no later than five years from the date upon which such Member or person ceased to be a Member or held the relevant position with the Member, respectively."

7. THE LAW

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

We have found, as a fact, that between April of 2003 and February of 2004, the Respondent misappropriated a total of $155,000.00 obtained from his clients, NL and IB.

The Respondent, at all material times, was an Approved Person as that term is defined in Section 1 of By-Law No. 1 of the MFDA. There, an Approved Person is defined 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;"

In our view, misappropriation of client funds by an Approved Person is dishonest conduct which is inconsistent with the standard of conduct set out in MFDA Rule 2.1.1.

> *In the Matter of Robert Roy Parkinson* (2005), 28 OSCB 4324 (Ontario Regional Council), MFDA File No. 200501.
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> *In the Matter of Raymond Brown-John*, [2005] Hearing Panel of the Pacific Regional Council, MFDA File No. 200502.
>
> *In the Matter of Earl Crackower*, [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200506.

The Respondent obtained funds from his clients which they thought were going to be invested in legitimate investment products. Instead, the Respondent deposited the funds into bank accounts which he controlled. There was no evidence that the Respondent, at any time, invested these funds as instructed. When pressed by NL, he caused to be forwarded to her a fraudulent letter, dated November 3, 2003, purporting to be from Transamerica Life Canada. Despite numerous requests, he has never accounted for where he placed the funds while they were under his control. Indeed, in our view, he attempted to mislead both the OSC and the MFDA when asked to explain his conduct.

The Respondent has made restitution to both NL and IB. 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.

In our view, it is clear that the Respondent did not deal fairly, honestly and in good faith with his clients, NL and IB, as alleged in the first Allegation. 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 find that subparagraphs (a), (b) and (c) of Rule 2.1.1 have been breached by the Respondent and that Allegation No. 1 has been established.

Allegation No. 2

It is clear, on the evidence, that commencing in or around November of 2004, the Respondent failed to produce for inspection and provide copies of documents and information requested by the MFDA for the purpose of investigating a Complaint made against him. The MFDA Staff provided the Respondent with numerous extensions of time in which to produce the requested documents and information.

As indicated, at the time in question, the Respondent was an Approved Person as that term is defined in Section 1 of By-Law No. 1 of the MFDA.

Section 24.1.4 of the By-Law, makes it clear that the Respondent is still subject to the jurisdiction of the MFDA despite the expression of his intention to leave the industry and despite the fact that he was dismissed, for cause, by the Member.

In our view, the failure of an Approved Person to comply with repeated requests by an MFDA Investigator, made pursuant to Section 22.1 of the By-Law, is serious misconduct. The actions of the Respondent subverted the ability of the MFDA to perform its regulatory functions by fully investigating this particular matter and determining, in an expeditious manner, all of the relevant facts. The repeated failure to provide the requested information and documentation, in our

view, undermined the integrity of the self-regulatory system and the effectiveness of its operation.

We are unanimously of the view that Allegation No. 2 has been established.

8. 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 between $50,000.00 and $100,000.00 for contravention of MFDA Rule 2.1.1;

(c) A fine in the amount of $50,000.00 for contravention of Section 22.1 of MFDA By-Law No. 1; and

(d) Costs in the amount of $7,500.00.

9. FACTORS TO BE CONSIDERED

The Supreme Court of Canada, in the case of Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 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.

Parkinson, *supra*, at page 13.

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

In our view, 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] 2. S.C.R. 132.

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 has 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 of Canada 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 and Tribunals 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 both NL and IB were planned and deliberate. His status as an Approved Person permitted him to gain the trust of his clients. He abused this trust in the most fundamental fashion. This abuse continued over an extended period of time. In the case of NL, the first misappropriation occurred in April of 2003, the second in June of 2003. In November of 2003, the Respondent caused a fictitious letter from Transamerica Life Canada to be produced and sent to NL in an attempt to allay her concerns about her investment. Only after NL informed the Respondent that she was contemplating the possibility of filing a formal Complaint, did he commence repaying her money to her. His abuse of NL continued for almost a year.

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 clients in his role as an Approved Person. In our view, it is incumbent upon this Hearing Panel to communicate to the 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. In our view, there should be a permanent prohibition of the authority of the Respondent to conduct securities related business in any capacity.

10. FINES

Allegation No. 1

We have set out above our views as to the principles which should guide us in imposing fines upon the Respondent. Included amongst the factors to be considered are mitigating circumstances.

There are two major mitigating factors:

1. The Respondent has no disciplinary history;
2. The Respondent has made full restitution to his clients with interest.

In our view, restitution is a significant factor to be taken into account when a determination is made as to the appropriate penalty to be assessed. In the case before us, the timing of the restitution somewhat lessens its impact. In the case of NL, monies were misappropriated in April and June of 2003. Shortly after receiving the fraudulent November 3, 2003 letter, NL requested the return of her money. The Respondent did not return her money and, in fact, actively discouraged NL from pursuing her request to obtain the money back. Only after NL informed the Respondent that she was contemplating the possibility of filing a formal Complaint and perhaps commencing legal proceedings against him to recover her money, did he commence repayment. This occurred in February of 2004.

In the case of IB, the money was misappropriated in October of 2003. Only after the Member had received a formal Complaint about the Respondent's conduct in February of 2004, were the funds returned. It would not appear that conscience caused the Respondent to embark on his restitution program.

On the aggravating side, we have considered the following:

1. The events took place over a lengthy period of time, namely from April of 2003, to March of 2004, when restitution was finally completed.

2. It was not a single transaction but a series of three transactions. The total amount misappropriated was $155,000.00.

3. There was no evidence of any remorse on the part of the Respondent.

4. The timing of the restitution indicates that only when a client either made or threatened to make a formal Complaint against the Respondent, did he see fit to return their funds.

5. A significant aggravating factor is that, when the Respondent was confronted by the MFDA and the OSC, he sought to actively mislead them - in the case of the OSC by means of a sworn Affidavit. In our view, actively attempting to mislead securities regulators is an aggravating factor that warrants an increased penalty.

6. The Respondent's fraudulent activities caused, in our view, severe damage to the integrity of the Capital Markets, not only in Ontario but also right across the country.

7. The conduct was planned and deliberate. An example is the fabrication of the November 3, 2003 letter from Transamerica Life Canada. This letter was a deliberate fraudulent attempt by the Respondent to seek to allay the concerns of NL from whom he had misappropriated $147,000.00.

8. There is no clear evidence before us as to the motivation for the Respondent to misappropriate the funds which he did. The funds, however, went into bank accounts over which he exercised control. He clearly had the benefit of the use of those funds, to the detriment of his clients, until the funds were repaid.

9. The Respondent did not co-operate in the investigation. In fact, he actively rebuffed all attempts by the Investigator to obtain access to appropriate books and records.

10. There is no evidence before us that the Respondent appreciates the significance and seriousness of his misconduct. As indicated, the restitution appears to have been motivated largely by self-preservation, not by any sense of guilt. He has not apologized to his victims nor demonstrated any remorse.

In our view, it is important that this Panel convey, both to the investing public and to the Respondent, that conduct of the nature described herein will not be tolerated.

Enforcement Counsel, after due consideration, has suggested a fine, with respect to Allegation No. 1, in a range of $50,000.00 to $100,000.00. It is important that, as a Panel, we take into consideration the submissions of experienced counsel. Accordingly, we impose a fine, with respect to Allegation No. 1, in the amount of $100,000.00. If a higher fine had been sought by Enforcement Counsel, under all of the circumstances of this case, we might have been tempted to impose same.

Allegation No. 2

Enforcement Counsel provided us with a series of Decisions outlining the views of various Panels as to the appropriate fine to be imposed in the case of an individual who refused to produce documents for inspection or provide copies of documents and information requested by an Investigator for the purpose of investigating a Complaint, conduct similar to that which we found to be established against the Respondent in Allegation No. 2 of the current Notice of Hearing.

The Decisions cited were the following:

1. *Parkinson, supra* at pages 16 & 17;
2. *Crackower, supra* at page 9;
3. *In the Matter of Anthony McPhail*, [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200505; and
4. *Tonnies, supra* at page 26.

In each case, the fine imposed was $50,000.00.

Enforcement Counsel pointed out that, in the Crackower case, the MFDA Panel imposed two separate fines of $50,000.00 each – one for misleading the MFDA by knowingly providing a false response to an inquiry from the MFDA and, secondly, for failing to attend an examination at the request of an MFDA Investigator. Counsel submitted that in the case before us, the MFDA did not make a separate allegation of misconduct concerning the false accounts of the facts which the Respondent provided to the MFDA and the OSC when he was asked to respond to the allegations against him. The submission was that it would be appropriate for this Panel to take into account that conduct as an aggravating factor when considering the appropriate penalty for Allegation No. 2.

We do not feel that we are in a position to consider this as an aggravating factor with respect to Allegation No. 2 in that the allegation is very time specific, namely that "Commencing in or around November of 2004, the Respondent failed to produce for inspection and provide copies of documents . . .". The Statutory Declaration was provided to the OSC in April of 2004 and was in the possession of the MFDA the same month. The Respondent's account of his dealings with NL was in the possession of the MFDA commencing in May of 2004, well before the commencement date set out in the Allegation. Under these circumstances, we do not believe that this conduct can be considered as an aggravating factor with respect to Allegation No. 2 but, as already indicated, it is clearly an aggravating factor with respect to Allegation No. 1.

Accordingly, with respect to Allegation No. 2, we believe it is appropriate to follow the consistent lead of previous Hearing Panels and impose a fine in the amount of $50,000.00.

11. 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."

Staff of the MFDA requested that an Order for Costs be made against the Respondent in the amount of $7,500.00, representing ". . . a portion of the costs attributable to conducting the investigation into the Respondent's conduct and this Hearing, such that these costs do not have to be borne by the MFDA or subsidized by those Members and Approved Persons of the MFDA who do not engage in this type of activity."

We believe that the imposition of costs in the circumstances of this case is appropriate and order costs to be fixed in the amount of $7,500.00.

12. 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 $100,000.00 with respect to Allegation No. 1;
3. A fine in the amount of $50,000.00 with respect to Allegation No. 2; and
4. Costs in the amount of $7,500.00.

"Thomas J. Lockwood"
Thomas J. Lockwood, Q.C.
Chair

"Sandy Grant"
Sandy Grant
Panel Member

"Robert Hovianseian"
Robert Hovianseian
Panel Member