



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

**IN THE MATTER OF A SETTLEMENT HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: David William John Irwin

Heard: April 14, 2010 in Toronto, Ontario
Reasons for Decision: April 28, 2010

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. John B. Webber, Q.C.	Chair
Cheryl Hamilton	Industry Representative
Christopher Marrese	Industry Representative

Appearances:

Charles Toth)	For the Mutual Fund Dealers Association of
)	Canada
Randy Bennett)	For the Respondent
)	

1. The Panel originally ordered a three-day hearing in this matter for April 12, 2010. Later in the day, on April 7, 2010, the Panel was advised that the parties had agreed to a Settlement Agreement. This Agreement would not be ready until April 14, 2010, with the Panel and counsel for the parties, to confirm that the matter had been resolved. This conference call also confirmed that the appropriate Settlement Agreement would be available on April 14, 2010. On April 14, 2010, the Settlement Agreement was available and the matter proceeded as a settlement hearing.

2. The Panel was required to consider whether, pursuant to sections 20 and 24.1.1 of the MFDA By-law No.1, the Panel should accept this Settlement Agreement entered into by Staff of the MFDA and the Respondent through his counsel Randy Bennett. At the outset of the proceedings, we considered a joint motion by Staff and counsel for the Respondent to move the proceedings “in camera”. We granted the motion. We then considered, in detail, the provisions of the Settlement Agreement itself. We heard submissions as to the acceptable law that should guide this Panel in determining whether to accept or reject the Settlement Agreement. We next heard submissions as to why this particular Settlement Agreement met the appropriate criteria. We then retired to consider both the Settlement Agreement and the applicable legal principles. After deliberation, we unanimously concluded that it was appropriate to accept the Settlement Agreement.

3. The allegations contained in the original Notice of Hearing are as follows:

Allegation #1: In or about June 2004, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by recommending, selling or facilitating the sale of Lighthouse Pointe Limited Partnership units (“Lighthouse LPs”) to 24 clients, contrary to MFDA Rule 1.1.1.

Allegation #2: In or about June 2004, the Respondent engaged in another gainful occupation, which was not properly disclosed to and approved by the Member, by recommending, selling or facilitating the sale of Lighthouse LPs to 24 clients, contrary to MFDA Rule 1.2.1(d).

Allegation #3: In or about June 2004, the Respondent recommended, sold or facilitated the sale of Lighthouse LPs to 24 clients without ensuring that:

- a) the clients qualified as accredited investors in accordance with Ontario Securities Commission Rule 45-501 and subsequently National Instrument 45-106, thereby engaging the jurisdiction of the Hearing Panel to impose a penalty on the Respondent pursuant to s. 24.1.1.(h) of MFDA By-law No. 1; and
- b) the investments were suitable for the clients and in keeping with their investment objectives, contrary to MFDA Rule 2.2.1.

Allegation #4: Between June 2004 and September 2005, the Respondent failed to comply with the Member's policies and procedures with respect to securities related business, referral arrangements and the disclosure and approval of outside business activities, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

4. The Respondent admitted to the following contraventions of the By-laws, Rules and Policies of the MFDA:

- a) in or about June 2004, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by making referrals in respect of the sale of Lighthouse LPs to 24 clients, contrary to MFDA Rules 2.4.2 and 1.1.1; and
- b) between June 2004 and September 2005, the Respondent failed to comply with the Member's policies and procedures with respect to securities related business, referral arrangements, and the disclosure and approval of outside business activities, contrary to MFDA Rules 1.1.2 and 2.5.1.

5. As a Panel, we are obviously concerned with the type of conduct which is reflected in the Settlement Agreement, particularly when the Member had given notice on previous occasions that the Respondent was not permitted to make referrals with reference to securities. Not only did the Member distribute a policy on high risk investment products in May 2001, but a further e-mail in 2004 clearly telling the Respondent that referral arrangements were inappropriate. The Respondent did not disclose the referral arrangements but he now acknowledged that he was required to disclose such arrangements. We believe that the Settlement Agreement fairly addresses the concerns that we have, including the public interest, reasonableness, specific and

general deterrence and prevention of this type of conduct in the future. We believe that the Settlement Agreement also will foster confidence in the integrity of the Canadian capital markets, the MFDA and the regulatory process itself. We believe that each and every one of these factors was dealt with in an appropriate fashion by the Settlement Agreement.

6. In addition, we have carefully reviewed the MFDA Penalty Guidelines and the effect of these Penalty Guidelines on this type of conduct. The proposed penalty in the amount of \$40,000.00 by way of a fine is entirely within a reasonable amount for matters of this nature and should not be disturbed.

7. There is no evidence that the Respondent engaged in any other activities involving the sale or referral of securities outside of the Member, or failed to comply with other policies of the Member. The investigation by the MFDA did not reveal any client complaint or harm. The Respondent continues in the securities industry with a different company with the approval of the Ontario Securities Commission, subject to close supervision for a period of one year. We are advised that the one year period of close supervision was completed without incident. The Respondent has accepted his responsibility for his misconduct and avoided the necessity of the MFDA incurring the additional time and expense of a full hearing.

8. As noted above, we had set a period of three days for the hearing of this matter. The resolution by way of a Settlement Agreement saved considerable time and expense to all parties. As this is a long-standing matter, which commenced in 2004, it is our view that, under all of the circumstances, it is in the public interest to accept the proposed settlement. In that regard, we refer to the words of the District Council in the decision of *Re Milewski*, [1991] I.D.A.C.D. No 17, decided on July 28, 1999. In that case, the Panel made these comments at page 9:

Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District council considering a settlement agreement will tend not to alter a penalty that it

considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlement.

9. For all of the above reasons, we accepted the Settlement Agreement and signed the appropriate Order as presented to us at the hearing.

DATED this 28th day of April, 2010.

“John B. Webber”

The Hon. John B. Webber, Q.C.,
Chair

“Cheryl Hamilton”

Cheryl Hamilton,
Industry Representative

“Christopher Marrese”

Christopher Marrese,
Industry Representative