



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: Alden M. Kaley

Heard: August 21, 2009
Fredericton, New Brunswick

REASONS FOR DECISION

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.	Chair
David Losier	Industry Representative
Scott Kay	Industry Representative

Appearances:

Maria Abate)	for the Mutual Fund Dealers Association of Canada
)	
Alden M. Kaley)	in Person
)	

1. By Notice of Settlement Hearing, dated June 15, 2009, a Hearing Panel of the Atlantic Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) was convened on August 21, 2009, in Fredericton, New Brunswick, to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept a settlement agreement (“Settlement Agreement”) entered into between Staff of the MFDA and Alden M. Kaley (“the Respondent”) on June 19, 2009.

2. The Settlement Agreement was prepared in conformity with Section 24.4 of By-law No. 1 and the Notice of Settlement Hearing had been prepared and publicized in accordance with Rule 15.2(1) of the MFDA Rules of Procedure. Accordingly, the Hearing Panel was in a position to consider whether or not it was appropriate to accept the Settlement Agreement.

3. At the outset of the Settlement Hearing, we considered a joint Motion by Staff and the Respondent to move the proceedings “in camera”. This Motion was brought pursuant to Rule 15.2(2) of the Rules of Procedure, which provides as follows:

“15.2(2) A Hearing Panel may, on its own initiative or at the request of a party, order that all or part of the settlement hearing be held in the absence of the public, having regard to the principles set out in Rule 1.8.”

4. Rule 1.8(2) provides as follows:

“(2) 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.”

5. We granted the Motion on the condition, which was agreeable to both Staff and the Respondent, that, should the Hearing Panel accept the Settlement Agreement, we would provide Reasons for our Decision, which, along with the record of the Settlement Hearing, would be available to the public. This is consistent with Rule 15.2(3) of the Rules of Procedure.

6. At the request of the parties, we allowed two members of the New Brunswick Securities Commission, who had been involved in the underlying investigation, to remain in the Hearing Room throughout the “in camera” portion of the proceedings.

7. The Hearing Panel then considered the provisions of the Settlement Agreement. After hearing submissions, both as to the applicable law and as to why this particular Settlement Agreement, with an amendment agreed to by the parties as to the date of the commencement of the proposed suspension, met the appropriate criteria, we retired to consider whether we were in a position to accept the Settlement Agreement on the basis of the material before us. After consideration, the Hearing Panel unanimously accepted the Settlement Agreement, as amended, and made an Order to this effect on August 21, 2009. At that time, we advised that written Reasons would follow. These are those Reasons.

8. The salient portions of the Settlement Agreement are as follows:

“II. JOINT SETTLEMENT RECOMMENDATION

2. Staff conducted an investigation of the Respondent’s activities. The investigation disclosed that the Respondent had engaged in activity for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel pursuant to s. 24.1 of By-law No. 1.

IV. AGREED FACTS

6. The Respondent has been registered in New Brunswick as a mutual fund salesperson with Investia Financial Services Inc. (“Investia”) since September 5, 2003.

7. Prior to his registration with Investia, the Respondent was registered in New Brunswick as a mutual fund salesperson with Cartier Partners Financial Services Inc. from December 2002 to June 2003.

8. Investia became a Member of the MFDA on June 7, 2002.

9. The Respondent is co-owner (along with 3 other individuals) of a fishing lodge called The Ledges Fishing Corp. (“The Ledges”). The Ledges is a company incorporated pursuant to the laws of New Brunswick.

10. On April 3, 2006, the Respondent became a Director of The Ledges.

11. On May 8, 2006, the Respondent completed and submitted Investia's "Annual Review of Professional Activities" form. The Respondent did not disclose his status as co-owner and Director of The Ledges on his form. .

12. Shortly thereafter, The Ledges offered for sale 18 preferred shares priced at \$150,000 CDN per share. Ownership of a preferred share entitled the shareholder to specified fishing rights at The Ledges.

13. Between February 2007 and August 2007, The Ledges sold 13 of the 18 preferred shares. The Respondent purchased one of the preferred shares and the other twelve were purchased by members of the public. None of the investors was a client of Investia. A total of \$1,950,000 was raised through the sale of the preferred shares. The remaining five preferred shares have yet to be sold.

14. The Respondent, in his role as co-owner and Director of The Ledges, signed at least 8 of the Buy-Sell Agreements completed by investors on behalf of The Ledges.

15. The preferred shares of The Ledges were not an investment product known to or approved for sale by Investia.

16. The preferred shares were offered for sale pursuant to exemptions from the prospectus and registration requirements of the *Securities Act* (New Brunswick) and, as such, the distribution of the preferred shares was required to be reported by The Ledges to the New Brunswick Securities Commission ("NBSC"). The Respondent, on behalf of The Ledges and in his capacity as co-owner and Director, signed the Exempt Distribution Form (Form 45-106F1) required to be filed by The Ledges with the NBSC in respect of the distribution of the preferred shares.

17. Upon receipt of the Form 45-106F1 filed by The Ledges, NBSC Staff advised Investia by letter dated May 28, 2007 of the Respondent's involvement in the distribution of the preferred shares. Prior to receiving this notification from NBSC Staff, Investia had been made aware of the Respondent's status as a co-owner of The Ledges, but the Respondent did not inform Investia of his participation in the sale of the preferred shares either before or after the event.

18. On August 9, 2007, the Respondent completed and submitted an Investia "Outside Business Activity Approval Form". On the form, the Respondent disclosed his ownership of 1 preferred share and 25% of the common shares of The Ledges but did not disclose his position as a Director of The Ledges. The Respondent also did not disclose on his "Outside Business Activity Approval Form" that The Ledges had sold preferred shares to members of the public.

V. CONTRAVENTIONS

19. The Respondent admits that his participation in the sale of the 13 preferred shares of The Ledges to the public constituted securities related business that was not carried on

for the account of Investia and through the facilities of Investia, contrary to MFDA Rule 1.1.1(a).

20. The Respondent admits that from at least April 3, 2006 to August 2007, he carried on another gainful occupation that was not properly disclosed to and approved by the Member in his role as co-owner and Director of The Ledges, contrary to MFDA Rule 1.2.1(d).

VI. TERMS OF SETTLEMENT

21. The Respondent agrees to the following terms of settlement:

- (a) a fine in the amount of \$10,000;
- (b) a suspension from acting as a mutual fund salesperson for a period of 6 months;
- (c) legal costs in the amount of \$2,500.00; and
- (d) the Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations made thereunder, including MFDA Rules 1.1.1(a) and 1.2.1(d).

VII. STAFF COMMITMENT

22. If this Settlement Agreement is accepted by the Hearing Panel, Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent in respect of any conduct or alleged conduct of the Respondent in relation to the facts set out in Part IV of this Settlement Agreement, subject to the provisions of paragraph 27 below.

27. If this Settlement is accepted by the Hearing Panel and, at any subsequent time, the Respondent fails to honour any of the Terms of Settlement set out herein, Staff reserves the right to bring proceedings under the By-laws of the MFDA against the Respondent based on, but not limited to, the facts set out in Part IV of the Settlement Agreement, as well as the breach of the Settlement Agreement.”

9. The Hearing Panel was concerned that, prior to the proposed suspension, the Respondent might have to take certain administrative steps to protect the interests of his clients during the period of the suspension. After a discussion, it was jointly recommended by Staff and the Respondent that the Settlement Agreement should be amended to provide that the period of the proposed suspension should commence on September 15, 2009.

FACTORS CONCERNING ACCEPTANCE OF A SETTLEMENT AGREEMENT

10. Previous MFDA Hearing Panels have taken into account the following considerations when determining whether a proposed Settlement Agreement should be accepted:

- a) Whether acceptance of the Settlement Agreement would be in the public interest and whether the penalty imposed will protect investors;
- b) Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement;
- c) Whether the Settlement Agreement addresses the issues of both specific and general deterrence;
- d) Whether the proposed settlement will prevent the type of conduct described in the Settlement Agreement from occurring again in the future;
- e) Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets;
- f) Whether the Settlement Agreement will foster confidence in the integrity of the MFDA;
- g) Whether the Settlement Agreement will foster confidence in the regulatory process itself.

Re: *Investors Group Financial Services (Re)*, [2005] MFDA Ontario Regional Council, File No. 200401, Hearing Panel Decision dated December 16, 2004, at pp. 2-3.

Re: *Evangeline Securities Limited (Re)*, [2008] MFDA Atlantic Regional Council, File No. 200816, Hearing Panel Decision dated September 21, 2008, at pp. 2-3.

Re: *Professional Investments (Kingston) Inc. (Re)*, [2009] MFDA Central Regional Council, File 200836, Hearing Panel Decision dated March 24, 2009, at pp. 9-10.

Re: *Melvin Robert Penney (Re)*, [2009] MFDA Atlantic Regional Council, File No. 200831, Hearing Panel Decision dated May 13, 2009, at p. 8.

11. We also reviewed the factors that previous Hearing Panels have indicated should be considered when determining whether a penalty is appropriate. These factors include the following:

- a) the seriousness of the allegations proved against the Respondent;
- b) the Respondent's past conduct, including prior sanctions;

- c) the Respondent's experience and level of activity in the capital markets;
- d) whether the Respondent recognizes the seriousness of the improper activity;
- e) the harm suffered by investors as a result of the Respondent's activities;
- f) the benefits received by the Respondent as a result of the improper activity;
- g) the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- h) the damage caused to the integrity of the capital markets;
- i) 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;
- j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- k) previous decisions made in similar circumstances.

Re: *Lamoureux (Re)*, [2002] A.S.C.D. No. 125 at para. 11.

Re: *In the Matter of Robert Roy Parkinson* [2005] MFDA Ontario Regional Council, File No. 200501, Hearing Panel Decision dated April 29, 2005, at p. 22.

Re: *In the Matter of Stephan Headley*, [2006] MFDA Ontario Regional Council, File No. 200509, Hearing Panel Decision dated February 21, 2006, at pp. 25-26.

Re: *Melvin Robert Penney (Re)*, [2009] MFDA Atlantic Regional Council, File No. 200831, Hearing Panel Decision dated May 13, 2009, at pp. 8-9.

12. We also considered the MFDA Penalty Guidelines ("Guidelines"), recognizing, as stated in the introduction, that

"Range Is Guideline Only

The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel."

13. The Guidelines recommend a minimum fine of \$10,000.00 and a variety of other penalties in cases where there is a securities-related business activity outside the facilities of the Member, contrary to MFDA Rule 1.1.1(a). The other penalties range from periods of increased supervision and suspension to permanent prohibition in egregious cases.

14. The Guidelines recommend the same fine and range of penalties for non-securities related outside business activities and continuing in an undisclosed, dual occupation contrary to MFDA Rule 1.2.1(d).

CONSIDERATIONS IN THE PRESENT CASE

15. It was submitted to us that we should accept the Settlement Agreement and the proposed penalties, as amended, for, *inter alia*, the following reasons:

- a) The nature of the agreed upon misconduct.
- b) The Respondent has no past disciplinary history with the MFDA.
- c) The Respondent has never been the subject of a client complaint made to the MFDA.
- d) The Respondent's admission to the misconduct described in the Settlement Agreement indicates that he recognizes the seriousness of the misconduct.
- e) By entering into the Settlement Agreement, the Respondent has accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring further time and expense conducting a Hearing.
- f) There is no evidence of client harm.
- g) None of the investors in The Ledges was a client of Investia.
- h) There is no evidence that the Respondent benefited personally from the sale of the preferred shares (i.e. through commissions, fees, etc.), although the proceeds from the sales of the preferred shares were used to finance a venture in which the Respondent was a co-owner.
- i) The Respondent co-operated with the MFDA in the investigation and resolution of this matter.
- j) The penalties proposed in the Settlement Agreement are consistent with previous decisions made in similar circumstances.

Re: *Robert Michael Smylski (Re)*, [2007] MFDA Prairie Regional Council, File No. 200707, Hearing Panel Decision dated July 13, 2007, at p. 6.

Re: *Melvin Robert Penney (Re)*, [2009] MFDA Atlantic Regional Council, File No. 200831, Hearing Panel Decision dated May 13, 2009, at pp. 9-11.

16. In addition, we believe that the Settlement Agreement and the proposed penalties are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian Mutual Fund industry by ensuring high standards of conduct by its Members and Approved Persons.

17. We also believe that the proposed penalties will deter misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by Mutual Fund industry participants and foster public confidence in the Mutual Fund industry.

18. We considered the nature of these proceedings, the fact that they are public and the effect that this has had, and will have, on the Respondent.

19. Finally, we also considered that this was a Settlement Agreement that was reached by the parties after significant discussions and negotiations. It represents what they feel, with their knowledge and experience, is an appropriate resolution.

20. Taking all these factors into consideration, we unanimously concluded that the Settlement Agreement was reasonable and in the public interest and should be accepted by this Hearing Panel.

DATED this 28th day of September, 2009.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C., Chair

“David Losier”

David Losier, Industry Representative

“Scott Kay”

Scott Kay, Industry Representative