



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: Melvin Robert Penney

Heard: April 15, 2009
Moncton, New Brunswick

REASONS FOR DECISION

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Remy Richard	Industry Representative
Karen Smart	Industry Representative

Appearances:

Charles A. Toth)	for Mutual Fund Dealers Association
)	of Canada
Melvin Robert Penney)	in person
)	

1. By Notice of Settlement Hearing, dated April 9, 2009, a Hearing Panel of the Atlantic Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) was convened on April 15, 2009 in Moncton, 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 Melvin Robert Penney (“the Respondent”) on April 8, 2009.

2. At the outset of the proceedings, Staff advised that the Settlement Agreement had been prepared in accordance with Section 24.4 of By-law No. 1. Staff further advised that the Notice of Settlement Hearing had been prepared and publicized in accordance with Rule 15.2(1) of the MFDA Rules of Procedure, with the exception of the 10-day notice provision referred to therein.

3. Staff and the Respondent brought a joint Motion for an Order abridging the time. They relied upon Rules 1.3(1), 1.5(1)(b) and 2.2 of the Rules of Procedure. These provide as follows:

1.3 *General Principles*

- (1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.

1.5 *General Powers of a Panel*

- (1) A Panel may:
(b) waive or vary any of these Rules at any time, on such terms as it considers appropriate.

2.2 *Extension or Abridgement of Time*

- (1) The time for the performance of any obligation under these Rules may be extended or abridged:
(a) by a Panel, at any time on such terms as it considers appropriate;
(b) on consent of the parties prior to the expiration of the prescribed time.

4. After consideration, the Hearing Panel granted the Order abridging the time. Our reasoning for doing so is as follows: On January 22, 2009, the Hearing Panel had issued an Order stating, in part, that the Hearing on the Merits was to be held on April 15 and 16, 2009, “at a location to be determined by the MFDA Hearings Coordinator in Moncton, New Brunswick” and was to commence at 10:00 a.m. (Atlantic) or as soon thereafter as the matter could be heard. Subsequently, on March 24, 2009, the Hearings Coordinator issued a Press Release advising the public of the exact location of the Hearing. Consequently, the public was made aware of the date and location of the Hearing dealing with this matter. Subsequent to that, the parties reached a settlement of all outstanding issues and a Notice of Settlement Hearing, complying with all the Rules, with the exception of the time provision, was issued by the MFDA. In our view, under all of the circumstances, it was appropriate to abridge the time so that the Settlement Agreement could be considered by the Hearing Panel on the first day set for the Hearing on the Merits.

5. We also 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.

6. 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.

7. 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.

8. 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.

9. The Hearing Panel then considered the provisions of the Settlement Agreement. We were advised that the parties wished to amend paragraph 6 of the Settlement Agreement dealing with the registration history of the Respondent to reflect the fact that the Respondent, at the relevant period of time, was only registered in the Province of New Brunswick and not in certain other Provinces stipulated in that paragraph. We granted that amendment.

10. After hearing submissions both as to the applicable law and as to why this particular Settlement Agreement met the appropriate criteria, the Hearing Panel 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 and made an Order to this effect on April 15, 2009. At that time, we advised that written reasons would follow. These are those reasons.

11. The salient portions of the Settlement Agreement, with the amendment to paragraph 6, 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

Registration History

6. The Respondent was registered in New Brunswick as a mutual fund salesperson with Legacy Associates Inc. (“Legacy”) from March 1, 2003 until his termination on December 17, 2007 as a result of the events described below. The Respondent is not currently registered in the securities industry in any capacity.

7. Legacy became a Member of the MFDA on May 16, 2002.

The Respondent’s Dealings with Walton

8. In December 2006, Legacy advised its Approved Persons, including the Respondent, in writing that Legacy did not have a referral arrangement with Walton and Approved Persons were not permitted to refer, sell or recommend purchases of real estate investment products offered by Walton (the “Walton Investments”).

9. On February 27, 2007, the Respondent facilitated the purchase of the Walton Investments by two clients, DS and CL. Collectively, DS and CL purchased 4,103 units of the Walton Investments for \$47,619.42 or \$11.61 per unit.

10. The Respondent received referral fees of approximately \$2,300.00 with respect to the purchase of the Walton Investments by DS and CL.

11. In October 2007, Legacy was notified by the New Brunswick Securities Commission that the Respondent had been paid referral fees for referring two clients to Walton. Legacy was not previously aware of the Respondent’s dealings with Walton.

12. On October 24, 2007, the Respondent admitted to Legacy that he had referred two clients to Walton and had received referral fees. Legacy placed the Respondent on close supervision for 6 months commencing October 31, 2007. During this period, the Respondent conducted only one trade through Legacy. The Respondent was subsequently terminated by Legacy on December 17, 2007.

13. By engaging in the conduct described above, the Respondent admits that he engaged in securities related business that was not carried on for the account of Legacy or through the facilities of Legacy, contrary to MFDA Rules 1.1.1(a) and 2.1.1.

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

- (a) a fine in the amount of \$5,000.00 payable by the Respondent as follows:
 - i. \$2,500 payable immediately; and
 - ii. \$2,500 payable on or before January 15, 2010.

- (b) if the Respondent complies with subparagraph (a), a 2 year suspension on the authority on the Respondent to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(c) of MFDA By-law No. 1, commencing on the date this Settlement Agreement is accepted by the Hearing Panel;

- (c) if the Respondent fails to comply with subparagraph (a), a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1.

VII. STAFF COMMITMENT

15. If the 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 23 [sic] below.

20. If this Settlement Agreement 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.

FACTORS CONCERNING ACCEPTANCE OF A SETTLEMENT AGREEMENT

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

- (i) Whether acceptance of the Settlement Agreement would be in the public interest and whether the penalty imposed will protect investors;
- (ii) Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement;
- (iii) Whether the Settlement Agreement addresses the issues of both specific and general deterrence;
- (iv) Whether the proposed settlement will prevent the type of conduct described in the Settlement Agreement from occurring again in the future;
- (v) Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets;

- (vi) Whether the Settlement Agreement will foster confidence in the integrity of the MFDA; and
- (vii) 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.

13. 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 File No. 200501, Panel Decision dated April 29, 2005, at p. 22.

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

14. We also considered the MFDA Penalty Guidelines (“Guidelines”). These Guidelines recommend a minimum fine of \$10,000.00 and suspension with respect to engaging in securities related business contrary to MFDA Rule 1.1.1. However, the introduction to the Guidelines makes it clear that fines which are less than the minimum identified in the Guidelines may be appropriate depending upon the nature of the violation. The introduction provides, in part, as follows:

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.

CONSIDERATIONS IN THE PRESENT CASE

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

- (a) The Respondent’s involvement in the purchase of the Walton Investments by the two clients was an isolated occurrence. There was no evidence of any prior or subsequent referrals to Walton.
- (b) The Respondent has no past disciplinary history with the MFDA.
- (c) The Respondent’s admissions to the misconduct described in the Settlement Agreement indicate that he recognizes the seriousness of the misconduct.
- (d) By entering into a Settlement Agreement, the Respondent has accepted responsibility for his misconduct and avoided the necessity of the MFDA conducting a lengthy Hearing.

- (e) There is no evidence of any client complaint or harm.
- (f) The Respondent received referral fees of approximately \$2,300.00 with respect to the purchase of the Walton Investments by his clients. The \$5,000.00 fine proposed in the Settlement Agreement would result in the Respondent disgorging more than double the benefit he received.
- (g) The Respondent has co-operated fully with the MFDA in the investigation and resolution of this matter.
- (h) 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 Hearing Panel Decision dated July 13, 2007, File No. 200707, at p. 6.

- (i) The two-year suspension (which would become a permanent suspension in the event that the Respondent does not pay the second installment of the fine) is a significant penalty in that it would prevent the Respondent from re-entering the mutual fund industry for a minimum of two years.

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.

21. We also accepted Staff's submission that it did not pursue recovery of costs as part of this Settlement in light of the Respondent's prompt and full co-operation in arriving at a Settlement as well as extenuating family circumstances.

DATED: this 13th day of May, 2009.

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

"Remy Richard"
Remy Richard
Industry Representative

"Karen Smart"
Karen Smart
Industry Representative