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

**IN THE MATTER OF A DISCIPLINARY HEARING**
**PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1**
**OF THE MUTUAL FUND DEARLERS ASSOCIATION OF CANADA**

## Re: Gary Alan Price

Motion Heard: October 13, 2009 in Toronto, Ontario
Panel Decision: October 30, 2009

# DECISION AND REASONS

(Motion to Declare Decision on Misconduct Null and Void)

Hearing Panel of the Central Regional Council:

| | |
|---|---|
| The Hon. Fred Kaufman, C.M., Q.C., | Chair |
| Selwyn Kossuth | Industry Representative |

Appearances:

| | | |
|---|---|---|
| Michelle Pong | ) | For the Mutual Fund Dealers Association |
| | ) | of Canada |
| Gary A. Price | ) | Attended Personally |
| | ) | |

1. We are seized of a motion, brought by the Mutual Funds Dealers Association of Canada (the "MFDA"), for an Order that:

i. The Decision and Reasons (Misconduct) *In The Matter of Gary Alan Price* dated June 12, 2009 be declared null and void and removed from the MFDA website;

ii. The Hearing Panel be struck; and

iii. The disciplinary proceedings against the Respondent be remitted for a new hearing before a reconstituted Panel.

2. Argument on the motion was heard on October 13, 2009 and the Panel took the matter under advisement.

**Background**

3. By Notice of Hearing (as amended), dated June 23, 2008, Gary Alan Price (the "Respondent") was charged by the MFDA that he violated the following By-laws, Rules or Policies of the MFDA:

**Allegation #1:** Between April 2003 and May 2007, the Respondent failed to observe high standards of ethics and engaged in business conduct or practice that was unbecoming by obtaining and possessing pre-signed forms, contrary to MFDA Rules 2.1.1(b) and 2.1.1(c).

**Allegation #2:** Between April 2003 and May 2007, the Respondent failed to observe high standards of ethics and conduct in the transaction of business by using pre-signed forms to execute trades, contrary to MFDA Rule 2.1.1(b).

**Allegation #3:** Between April 2003 and May 2007, the Respondent engaged in discretionary trading by selecting mutual funds for purchase without the necessary instructions from clients RH and LH and completing sections of pre-signed forms to process such trades for clients RH and LH, contrary to MFDA Rule 2.3.4 and the terms of his registration as a mutual fund salesperson.

**Allegation #4:** Between January 2004 and May 2007, the Respondent failed to comply with the Member's directive~~s~~ to destroy all pre-signed blank investment forms, contrary to MFDA Rules 2.1.1(b), 1.1.2 and 2.5.1.

4. The particulars, as given in the Notice of Hearing, are as follows:

**Registration History**

1. The Respondent has been registered in Ontario as a mutual fund salesperson since February 6, 1991 and as a Branch Manager since December 31, 2004 with Select Financial Services Inc. ("Select"), a Member of the MFDA .

2. Select is registered as a mutual fund dealer, a limited market dealer and a scholarship plan dealer in Ontario. Select has been a Member of the MFDA since July 11, 2002.

**Pre-Signed Forms Found During Compliance Examination**

3. Commencing April 2003, the MFDA conducted a compliance examination of Select (the "First Examination"), the results of which were summarized and delivered to Select in a report dated December 10, 2003. In the First Examination, the MFDA found that the Respondent was in possession of blank investment instruction forms on which the signatures of clients LA and RW had been completed, hereinafter referred to generically as pre-signed forms. Select was asked to state what action it proposed to take to address this contravention and to confirm that all pre-signed forms had been destroyed.

4. On January 13, 2004, Select distributed an email to all of its Approved Persons, which stated that "NO pre-signed, blank investment instruction forms are to be held in client files. All such forms are to be destroyed immediately." All Approved Persons were required to confirm that they were going to abide with this rule by returning a signed copy of the email to Select.

5. The Respondent signed and returned the email to Select on January 14, 2004.

6. Commencing September 2006, the MFDA conducted a second compliance examination of Select (the "Second Examination"), the results of which were summarized and delivered to Select in a report dated January 3, 2007. In the Second Examination, the MFDA found that the Respondent was in possession of several photocopies of a blank investment instruction form on which the signature of client JS had been completed.

7. On May 4, 2007, Select distributed a memorandum to all of its Approved Persons, which stated that "ALL pre-signed client forms are to be destroyed immediately."

8. During an unscheduled inspection by the MFDA on May 3, 2007, the Respondent was found to have in his possession 81 blank investment instruction forms on which the signatures of the clients had been completed (the "Pre-signed Forms"):

| | Client(s) | Form(s) | Date |
|---|---|---|---|
| **1** | JH & MM | Letter from the Respondent instructing clients to simply sign at each 'X'.<br>(2) Pre-signed Select Redemption Forms | Not Dated |
| **2** | JH | (1) Pre-signed Select Redemption Form | Not Dated |
| **3** | JA | (2) Pre-signed Select Exchange Forms<br>(1) Pre-signed MRS Trade Ticket | Not Dated |
| **4** | SA | (1) Pre-signed Select Redemption Form | Feb. 6, 1998 |
| | | (1) Pre-signed Select Redemption Form | Not Dated |
| **5** | LA | (1) Pre-signed Select Redemption Form | Not Dated |
| **6** | MB | (1) Pre-signed Select Order Form | Not Dated |
| **7** | SB | (5) Pre-signed Select Redemption Forms | Not Dated |
| **8** | NB | (1) Pre-signed Select Redemption Form | Not Dated |
| **9** | JB | (1) Pre-signed Select Redemption Form | Not Dated |
| **11** | WC | (2) Pre-signed MRS Trade Tickets | Not Dated |
| **12** | HD | Email from HD instructing the Respondent to use the pre-signed redemption forms being held by the Respondent to redeem money. | Feb. 3, 2006 |
| | | (1) Pre-signed Select Redemption Form | Feb. 6, 2006 |
| | | (1) Pre-signed Select Redemption Form<br>(2) Pre-signed Select Exchange Forms | Not Dated |
| **13** | KD | (1) Pre-signed Select Exchange Form | Not Dated |
| **14** | JE | (1) Pre-signed MRS Trade Ticket | Not Dated |
| **15** | SE | (2) Pre-signed Select Redemption Forms | Not Dated |
| **16** | SE | (4) Pre-signed Select Redemption Forms | Not Dated |
| **17** | RE | (3) Pre-signed Select Financial Redemption Forms | Not Dated |
| **18** | EE | (3) Pre-signed Select Order Form<br>(1) Pre-signed Fidelity Application<br>(1) Pre-signed Fidelity Transfer Document | Not Dated |
| **19** | JF | (1) Pre-signed Select Exchange Form | Not Dated |
| **20** | PG | (1) Pre-signed MRS Trade Ticket | Not Dated |
| **21** | MG | (2) Pre-signed Select Order Forms<br>(2) Pre-signed MRS Trade Tickets | Not Dated |
| **22** | MG | (2) Pre-signed Select Redemption Forms<br>(2) Pre-signed Select Exchange Forms | Not Dated |
| **23** | WH | (3) Pre-signed Select Redemption Forms | Not Dated |
| **24** | LH | (1) Pre-signed Select Redemption Form | Not Dated |

| | Client(s) | Form(s) | Date |
|---|---|---|---|
| **25** | RH | (1) Pre-signed MRS Trade Ticket | Jan. 18, 2006 |
| **26** | SB | (2) Pre-signed Select Order Forms<br>(2) Pre-signed Select Redemption Forms | Not Dated |
| **27** | JB | (1) Pre-signed Select Redemption Form | Not Dated |
| **28** | NLB | Note from the Respondent instructing NLB to sign each form at the 'X' and return with a void cheque. | Mar. 30, 2004 |
| | | (2) Pre-signed Select Redemption Forms | Not Dated |
| **29** | RC | (1) Pre-signed Select Order Form<br>(3) Pre-signed Select Exchange Forms | Not Dated |
| **30** | GC | (1) Pre-signed Select Redemption Form | Not Dated |
| **31** | BC | (1) Pre-signed Select Redemption Form | Not Dated |
| **32** | LC | (1) Pre-signed Select Redemption Form | Not Dated |
| **36** | BJC | (1) Pre-signed MRS Systematic Instruction Form | Not Dated |
| **37** | SC | (2) Pre-signed Select Redemption Forms | Not Dated |
| **38** | DM | (1) Pre-signed Select Order Form<br>(1) Pre-signed BPI Application | Not Dated |
| **39** | MM | (2) Pre-signed Select Exchange Forms | Not Dated |
| **40** | LC | (1) Pre-signed Select Exchange Form | Not Dated |
| **41** | DC | (3) Pre-signed Select Redemption Forms<br>(2) Pre-signed Select Exchange Forms | Not Dated |

9. By obtaining and possessing the Pre-signed Forms, the Respondent failed to observe high standards of ethics and engaged in business conduct or practice that was unbecoming, contrary to MFDA Rules 2.1.1(b) and 2.1.1(c).

10. By failing to comply with his Member's directives to destroy all pre-signed blank investment forms, the Respondent engaged in conduct contrary to MFDA Rules 2.1.1(b), 1.1.2 and 2.5.1.

11. The Respondent used the Pre-signed Forms to process trades for clients. To effect these trades, the Respondent generally received verbal instructions by telephone from the client and then proceeded to:

    a. enter all necessary elements of the trade on a Pre-signed Form;
    b. execute and date the form as the signature guarantee; and
    c. submit the form for trade execution.

12. By using the Pre-signed Forms to execute trades, the Respondent failed to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1(b).

13. On multiple occasions, the Respondent received cheques from clients RH and LH by mail for the purpose of purchasing mutual funds for their accounts. RH and LH provided the Respondent with instructions as to the accounts in which the investments were to be held but the Respondent determined which mutual funds were to be purchased. RH and LH were not informed of the mutual funds that the Respondent purchased on their behalf until they received their trade confirmation forms.

14. By completing the section of the Pre-signed Form concerning which mutual funds were to be purchased for the accounts of RH and LH without their instructions, the Respondent engaged in discretionary trading, contrary to MFDA Rule 2.3.4 and the terms of his registration as a mutual fund salesperson.

[It is relevant to point out that, at the time of the hearing, the Respondent no longer was a branch manager.]

5. The matter was heard on May 11-12, 2009 by a Panel constituted of three members which, in addition to the two members now present, included John Armstrong, an Industry Representative.

6. By Decision and Reasons (Misconduct) given on June 12, 2009, the Panel held "that the Association has not made out a case against the Respondent on Allegations 1 to 3, and that these charges are hereby dismissed." The Panel also held that the Respondent "failed to comply with instructions given by the Member," and that Allegation #4 has been proven.

7. After consultation with the parties, the Panel ordered that argument on the penalty be heard in Toronto, Ontario on July 23, 2009.

8. On July 22, 2009 John Armstrong, a member of the Panel, sent the following message to the Chair: "I would like to inform you I feel it necessary to withdraw from the case."

9. As a result, the Chair ruled that "The Hearing Panel shall proceed as a two-member Hearing Panel, pursuant to section 19.9(b) of MFDA By-law No. 1."

10. On July 23, 2009, rather than proceed to argument on the penalty, MFDA Staff moved to adjourn the hearing to a later date, indicating that it had "received information in relation to a member of the Hearing Panel that may raise issues related to conflict of interest," and that Staff required "time to fully consider the information and determine what position MFDA Staff will take in relation to the hearing." Staff added that this new information had come to its knowledge only on July 16, 2009 and that it had therefore "acted expeditiously."

11. After hearing from both parties, the Panel granted the adjournment, and the matter was put over to October 13, 2009.

12. On October 8, 2009 (a Thursday before a long weekend and one business day before the date fixed for the hearing) members of the Panel and the Respondent were served with the present motion.

13. Although offered more time by the Panel to respond to the motion, the Respondent declared himself ready to proceed, and argument on the motion took place on October 13, 2009.

**Grounds for Motion**

14. The grounds, as stated in the Motion, are as follows:

1. On July 23, 2009, Staff advised the Respondent and the Hearing Panel that a member of the Hearing Panel was found by MFDA Compliance Staff to be in possession of 63 pre-signed forms on June 16, 2009.

2. On September 30, 2009, Staff advised the Respondent of Staff's position in respect of this motion.

3. The possession and use of pre-signed forms was the central issue before the Hearing Panel in this matter and constituted the grounds for three of the four allegations against the Respondent.

4. The fact that a member of the Hearing Panel was found in possession of pre-signed forms has raised a reasonable apprehension that the member of the Hearing Panel was biased in his determination of the allegations in the hearing of this matter.

**The Evidence**

15. Two Affidavits, sworn by Jeffrey Yewer, an MFDA investigator, on July 22, 2009 and October 7, 2009 respectively, set out in detail what documents were found in Mr. Armstrong's office. Since no decision (insofar as we know) has yet been made with respect to these forms, we see no purpose – indeed, it would be unfair – to reproduce the contents of these affidavits, save to say that certain forms were pre-signed, although these forms were not necessarily of a similar nature as the pre-signed forms found in the Respondent's possession nor, necessarily, executed during a similar period of time.

**Discussion**

16. Much has been written about reasonable apprehension of bias. To exist, it must be, as Mr. Justice de Grandprė said in *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369, "a reasonable [apprehension], held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information." Or, as was held by the Federal Court of Appeal in the same case, the test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?"

17. Although Mr. Justice de Grandpré observation was written in dissent, it has since been accepted as a correct statement of the law. (See, for instance, *R. v. R.D.S.*, [1997] 3 S.C.R. 484, *per* Cory J.: "This test has been adopted and applied for the past two decades.") The stress is on the words "reasonable apprehension." It is not, as the Ontario Securities Commission ("OSC") recently re-iterated in *Re: Norshield Asset Management (Canada) Ltd.*, (2009) 32 OSCB 1249, a matter of deciding "whether actual bias exists," but rather of "whether or not a reasonable apprehension of bias exists."

18. It is also worth noting, as the Court of Appeal for Ontario did in *E.A. Manning Ltd. v. OSC*, (1995) 23 O.R. (3d), that

> Securities Commissions, by their very nature, are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. They may have repeated dealings with the same parties in carrying out their statutory duties and obligations. It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case.

19. The same might well be said about MFDA Hearing Panels, consisting, as they do, of an independent, legally-trained chair and at least one industry representative.

20. We accept, in light of the evidence presented, that a reasonable and well-informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, might well conclude that a reasonable apprehension exists that the member of the Panel who has since resigned may, consciously or unconsciously, have been biased. While we, the remaining two members of the Panel, do not harbour such an apprehension, that is not the test. The test is how a member of the public (and that includes the parties) may view the matter.

21. But that is not the end of the story and a broader question must be asked: did the presence of the third member "infect" (if we may use that word) the other members of the Panel. Again, the test must be what a reasonable and well-informed person would think.

22. In this connection, it is well to recall that Hearing Panels are collegial in nature, and while each member must reach his or her decision based on the evidence and arguments presented, judgment is generally given after the Panel has deliberated, be the deliberation short or long. And so it was in this case.

23. We therefore believe that a reasonable and well-informed person might have a legitimate apprehension that the process was tainted, and that the result offended the principles of natural justice.

24. But, once again, that is not the end of the matter: even though we are prepared to say that the proceedings were tainted, do we have jurisdiction to rescind the Decision rendered on June 12, 2009? MFDA Staff submits that we do, because "sanctions have not been dealt with and no formal order has been issued and entered yet."

25. While the Decision rendered on June 12, 2009 was widely publicized, the file remained open because the penalty phase had not yet taken place. No formal order had, therefore, been entered.

26. Yet, despite the lack of formal closure, an interesting question remains: can the three allegations which we had found not proven be severed from the fourth allegation, which we upheld? In other words, are the three acquittals (using that word by analogy to criminal and quasi-criminal proceedings) an acquired right on the part of the Respondent?

27. In *Regina v. Lessard*, (1976) 30 C.C.C. (2d) 70, the Court of Appeal for Ontario held, *per* Martin J.A. (in the words of the headnote), that "A Judge sitting without a jury is not *functus officio* following a finding of guilt until he has imposed sentence or otherwise finally disposed of the case. Accordingly, he may in his discretion, following a finding of guilt, reopen the case, and permit the accused to tender further evidence." The Court went on to say, however, that while "this power should be exercised only in exceptional circumstances and where its exercise is clearly called for", "a Judge has no power to reopen a case following an acquittal since the proceeding has been terminated by such a verdict."

28. The question therefore arises whether the dismissal of the first three allegations is final and not subject to any further order by this Panel.

29. In this connection, it is interesting to consider the position taken by the Divisional Court of the Ontario Superior Court of Justice in *SOS-Save Our St. Clair Inc. v. City of Toronto et al.*, 78 O.R. (3d) 331. The case involved an application for judicial review of a decision made by the City of Toronto, which was granted, reasons to follow. However, before the reasons were issued and a formal order entered, the respondent moved that the presiding judge disqualify himself because of apprehended bias, that the judgment given be set aside, and that the application for judicial review be remitted to be heard by a different panel of the Court.

30. While the motion was heard by all three members of the panel, it is the practice in the Divisional Court that only the judge whose disqualification is sought (who happened to be the

presiding judge in the case) rule on the matter. He did and dismissed the motion. His two colleagues, however, while accepting the presiding judge's right to decide, strongly disagreed with his decision, and held that to proceed further would be in breach of the principles of natural justice. They added that while it was not for the rest of them to say what the presiding judge ought to have done, a perception of bias existed, and the appropriate course was for them to step down, which they did. The panel was accordingly struck and a new panel was ordered to be constituted to hear the entire matter *de novo*. It is important to bear in mind, however, that these proceedings were civil in nature.

31. That is similar to what MFDA Staff asks as to do: vacate the proceedings and order that a new hearing be held before a differently constituted Panel.

32. So what to do. On the one hand, we agree, as stated above, that the Decision rendered by the Panel may be considered tainted by reason of apprehended bias. On the other hand, the Respondent was cleared on three of four allegations, and on those three allegations nothing further remains to be done. Yet the case is not complete.

33. We are faced with two competing notions: let the dismissals stand, but vacate the finding on allegation #4 or, as submitted by Enforcement Counsel, strike the entire decision.

34. In the final analysis, we opt for the latter course. All four allegations were contained in one document, and it is not for us to sever them *ex post facto*. That being so, the four allegations must stand or fall together. This is not a criminal case, where stricter procedural rules may apply. Rather, we adopt the course of action taken by the Divisional Court in the *SOS-Save Our St. Clair Inc.* case, cited above, and set aside the Decision rendered on June 12, 2009

35. There is another, more practical, reason why it is opportune to do so. As stated before, we are of the view that apprehended bias exists. Should we adopt the first alternative and declare ourselves *functus* vis-à-vis the first three allegations, the practical outcome would be that the MFDA would be forced to appeal the decision, with the likely result that the original Decision would be set aside by an appellate tribunal which, unlike this Panel, would have the competence to do so. This would entail additional costs and inconvenience, particularly for the Respondent,

who has a right to have this matter determined as speedily as possible.

36. Two final matters must be dealt with. The first concerns the request of MFDA counsel that the motion be heard *in camera*, which it was. This was done in order to meet the privacy concerns of the third member of the Panel as first constituted.

37. We agree that this is a real concern, particularly since the allegations set out in the motion (and greatly expanded in the affidavits filed) have not been proven. It is, therefore, reasonable, that the exhibits be placed under seal and not be accessible to the general public, and we so order. However, the decision now rendered shall be a public document. Furthermore, should the Respondent need access to the documentation placed under seal, he shall be given such access, provided, however, that he undertakes to discuss the contents only with persons whom he consults in connection with this case.

38. The second matter concerns costs. The Respondent asks that costs be assessed against the MFDA. It is not an unreasonable request because, through no fault of his own, he found himself involved in proceedings which put in question the Decision made in the case against him. Regrettably, we are unable to do so. Section 24.2 of By-law No. 1 (as amended) permits a Hearing Panel to order that a Member or Approved Person "pay the whole or part of the costs of the proceedings." But it is silent about costs against the MFDA, and this precludes us from considering the request.

**Disposition**

39. For the reasons set out above, the Decision and Reasons filed by this Panel (as then constituted) on June 12, 2009, is hereby set aside. It is not for us to decree what further action may be taken.

40. The two affidavits referred to in paragraph 15 shall be placed under seal and not be accessible to the general public. Should the Respondent need access to these documents, they shall be made available to him on his undertaking not to discuss the contents with persons other than those he consults in connection with the proceedings against him.

Dated this 30th day of October, 2009.

"Fred Kaufman"
The Hon. Fred Kaufmann, C.M., Q. C., Chair

"Selwyn Kossuth"
Selwyn Kossuth, Industry Representative

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