



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 DEALERS ASSOCIATION OF CANADA**

Re: James Woloshen

Heard: June 9, 2011 in Toronto, Ontario
Decision and Reasons: June 20, 2011

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.
Selwyn Kossuth
Vas Pachapurkar

Chair
Industry Representative
Industry Representative

Appearances:

Charles A. Toth)
)
)

For the Mutual Fund Dealers Association of
Canada

James Woloshen)
)
)

In attendance by teleconference; not represented
by counsel

Background

1. James Woloshen, the Respondent, was a mutual fund salesperson with Independent Planning Group Inc. (IPG). IPG is an Ottawa-based member of the Mutual Fund Dealers Association of Canada (MFDA). The Respondent joined IPG in 2001, having been a registered salesperson with other firms since 1994.

2. His employment with IPG was terminated in December 2008 as a result of a complaint to IPG in July 2008 by the daughter of Mr. and Mrs. RE and JE (who, for convenience we will call the “E”s). The complaint involved a questionable charitable donation program and an unpaid loan made by the Es to the Respondent. Mr. RE was 76 years old at the time of the complaint and Mrs. JE 68.

3. In January 2009, a further complaint about the Respondent was made to IPG by the son-in-law of Mr. GB and Mrs. JB (the “B”s), who were at the time of the complaint 77 and 75 years old. The complaint involved the same charitable donation program. It also concerned funds given to the Respondent that had allegedly been misappropriated by him.

4. The MFDA were informed of these complaints and commenced an investigation. An MFDA investigator interviewed the above clients, the Respondent, and others, and brought a Notice of Hearing, dated September 10, 2010, containing the following four allegations:

Allegation #1: Between February 8, 2002 and December 2007, the Respondent engaged in personal financial dealings with clients GB and JB by borrowing a total of \$50,000 from them and thereafter misappropriating the moneys, thereby giving rise to a potential or actual conflict of interest which was not address by the exercise of responsible business judgment influenced only by the best interests of clients GB and JB and failing to deal fairly, honestly and in good faith with clients GB and JB, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegation #2: Between about September 2005 and December 2008, the Respondent engaged in personal financial dealings with clients RE and JE by borrowing \$20,000 from them which he failed to fully repay, thereby giving rise to a potential or actual conflict of interest that was not addressed by the exercise of responsible business judgment influenced only by the best interests of clients RE and JE and failing to deal fairly, honestly and in good faith with clients RE and JE, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegation #3: Between about February 2004 and December 2006, the Respondent referred clients to a charitable donation program and received \$93,600 in referral fees for doing so, thereby:

- (a) having and continuing in another gainful occupation that was not disclosed to and approved by the Member, contrary to MFDA Rule 1.2.1(d) [now numbered 1.2.1(c)]; and
- (b) participating in a referral arrangement, contrary to MFDA Rule 2.4.2.

Allegation #4: Commencing in about September 2009, the Respondent failed to cooperate with an investigation of his conduct, contrary to section 22.1 of MFDA By-law No. 1.

5. The Respondent did not deliver a Reply to the Notice of Hearing, as he was required to do and as ordered to do by the Hearing Panel in two earlier conference call proceedings. The Respondent claimed that he did not have the funds to come to Toronto for a hearing. The Panel could have proceeded in his absence (Rule 7.3 of the MFDA Rules of Procedure), but we allowed him to participate through a conference call, permitted him to ask the investigator for clarification of her evidence, and gave him the opportunity to make a final statement concerning the evidence presented at the hearing and the penalty proposed by the MFDA. Counsel for the MFDA supported this procedure in the particular circumstances of this case. The procedure worked well and helped the panel clarify a number of matters.

Allegation #1: Borrowing from the Bs

6. The Respondent borrowed \$44,000 from Bs in 1999. At that time, the Respondent was with another dealer, who is now deceased. The Bs had been clients of the Respondent for many years. The allegation by the MFDA is not dated 1999, but rather 2002, at a time when the Respondent and the Member came under the jurisdiction of the MFDA.

7. The circumstances surrounding the loan are not entirely clear. It is clear, however, that the Bs gave the Respondent a cheque on December 1, 1999 for \$44,000 and a few days later the Respondent gave the Bs a signed receipt stating:

The undersigned, James Woloshen & Associates, of 300 Earl Grey Dr., Suite 442, Kanata, Ontario, K2T 1C1 hereby acknowledges receipt of a cheque, in the amount of \$44,000.00, in lawful money of Canada, representing a personal deposit for business purposes, bearing zero interest, for the period of One Year commencing December 1, 1999 and payable November 30, 2000 from [the Bs].

Dated in Kanata, Ontario, this sixth day of December, 1999.

8. The Bs acknowledge that this was a short-term loan to assist the Respondent with his own business, but that it was then to be invested on their behalf. The Respondent said in his

evidence to the MFDA investigator that it was a “business loan”. But if that was the case it is strange that the loan provided for zero interest. The MFDA investigator asked the Respondent: “Is there a reason why the interest was negotiated at a zero percentage?” The Respondent replied: “I’m sure there was at the time. I can’t recall.”

9. A year later, the Respondent sent the Bs a document titled “Term Deposit Confirmation”. It refers to a “GID” and notes that the principal amount is \$44,000 with a “guaranteed interest” of 6.5%, maturing on November 30, 2001, with the total at maturity of \$46,860. It states that “Additional deposits can be made prior to maturity” and that “At maturity, the principle [sic] and interest can be re-invested for the same term.” It adds, however, that “Interest rate and terms/conditions of deposit are subject to change.” The following year the Bs gave the Respondent a cheque for a further \$6,000. The confirmation document for this additional sum had an interest rate of only 2%. Every year the Bs would get a “Term Deposit Confirmation” document. They never received any interest payments.

10. The problem is that the Respondent never invested the money. He made up confirmation slips as if he had done so. He used the funds for his own business expenses. GIDs may seem like a proper investment product to a lay person, but it is apparently not one that the MFDA or the panel has heard of. In his examination by the MFDA investigator the Respondent was asked:

The investigator: “But there was never any institution where the monies were invested?”
Mr. Woloshen: “No.”

The investigator: “I’m not too sure I understood. It appears to be an acronym, GID. I mean, is that correct, is it an acronym?”

Mr. Woloshen: “I guess so.”

The investigator: “And what would it stand for? What would those initials stand for?”

Mr. Woloshen: “What would they stand for? I suppose it would stand for guaranteed investment deposit.”

11. In November 2008, the Bs requested payment. They were making their funeral arrangements and wanted to pay for them in full and put the rest of the money in the bank so that it would be safe. They asked for their money. The Respondent said it was not due yet. Later that month he came to their house and according to Mrs. B’s statement to the MFDA investigator:

Mrs. B: “He came in that day and he was getting out his computer and his papers and I said, ‘Jim, I’ve heard all that, I don’t want to hear it again.’ I said, ‘Where’s my cheque?’ And with a blank look he said, ‘I don’t have it.’”

The investigator: “And what did you do at that point?”

Mrs. B: “Well, I was stunned and I said, ‘What do you mean, you don’t have it?’ And he said, ‘I don’t have it.’ And I said, ‘You spent my money?’ And he said yes. ...And I didn’t sleep from then on. I went for six weeks and I didn’t sleep and I was at the end of my rope.”

12. Mrs. B was admitted to a hospital and contacted a lawyer and the police were called in. The MFDA was informed of the new information and added it to its investigation. Charges were brought by the Pembroke police and on June 10, 2010 the Respondent pleaded guilty in Pembroke provincial court to charges of theft over \$5,000 and fraud over \$5,000. He was sentenced to 15 months of house arrest, which is no doubt a factor in why he chose not to appear at this MFDA hearing.

13. Before the court trial date, the Respondent was able to pay the Bs \$40,000 by selling his house. As part of the sentence, the judge made an order for restitution for \$10,000. This has not yet been paid, but the Respondent says that he is determined to get the money to pay it. Even if that amount is paid, the Bs will not have received interest on their initial \$50,000.

Allegation #2: Borrowing from Mr. and Mrs. E

14. Mr. and Mrs. E were old clients of the Respondent. In September 2005, the Respondent met with the Es and told them that he needed funds to be able to purchase a house in Calabogie, about 100 kilometres west of Ottawa, where he and his parents could live. He had been having financial problems and was unable to get a loan from a financial institution. The Es were willing to make a short-term loan, which the Respondent would repay when he sold the house he then owned. The Es and the Respondent agreed upon an interest rate of 12%. The Es sold \$20,000 worth of mutual funds purchased through IPG to get the cash to give to the Respondent and were given a promissory note setting out the terms of the loan. The note stated, in part:

FOR VALUE RECEIVED, James Woloshen, of 52 Yoho Dr., Kanata, Ontario, K2M 2N1, (the “Debtor”) promises to pay on demand or, if demand has not

earlier been made, on December 16, 2005, to [the Es of Renfrew] (the “Lender”) ... the principal sum of \$20,000.00 in lawful money of Canada with interest payable quarterly, both before and after default, at a rate per annum of 12.00%.

15. The property was never purchased by the Respondent, who claimed that there was a problem with the title. The Respondent used the funds for his own business expenses. The Es wanted to be repaid. In early January 2006, the Respondent paid them \$5,000 plus interest and gave them a new demand promissory note for \$15,000 at 12 % interest.

16. The Es continued to request payment. The Respondent gave them another \$10,000 in May 2008. In July he gave them two cheques: a cheque for \$172 for interest and one for \$8,600 for the remaining amount owing. The cheque for interest was cashed, but the larger cheque could not be cashed and was returned to the Es as “Not Sufficient Funds.” The full amount was eventually repaid, including interest at 12%. This was arranged by IPG through commissions owed to the Respondent at IPG.

Borrowing from Clients

17. Borrowing money from a client has consistently been held by other panels to be a conflict of interest under Rule 2.1.4. (See *Tonnies* in 2005, *Greyeyes* in 2006, *Henry* in 2007, *Smiechowski* in 2010, and *Ryan* in 2011.)

18. The MFDA Member Regulation Notice 0047, dated October 3, 2005, takes a hard line on borrowing from clients, stating:

Borrowing from a client by either the Member or Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of the client. While such activity is not explicitly prohibited under MFDA rules, MFDA staff are unaware of any circumstances where Members or Approved Persons proposing to enter into any such arrangement would be able to demonstrate that the conflict has been properly dealt with.

19. IPG did not know that the Respondent had borrowed money from his clients, the Es, until it was brought to its attention in July 2008. The firm had alerted its Approved Persons about the MFDA rules about borrowing. A compliance bulletin by IPG dated July 2006, for example, dealt with “conflicts of interest” and gave as an example “Borrowing money from a client for any

purpose.” We were shown a copy of an e-mail that the Respondent received from IPG’s head of compliance on February 2, 2006 which stated, in part:

I have attached two very important communications from the MFDA that we want to ensure all associates are aware of: “Personal Financial Dealing with Clients – please read attached and be advised that IPG policies and procedures do not allow associates to engage in lending money or borrowing money from clients under any circumstances.”

The Respondent should have been aware of conflicts of interest by borrowing before then, but even if he was not, he should have done something when he became aware of the prohibition. Yet he continued issuing phony statements about term deposits to the Bs.

Breach of MFDA rules 2.1.4 and 2.1.1

20. The Respondent should have discussed the issue with IPG so that the firm could have tried to resolve the issue. Rule 2.1.4(a) of the MFDA Rules states: “Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.” Subsection (b) then provides that “[i]n the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client.” Not only did the Respondent not tell IPG about borrowing from the Es until after the complaint from the Es daughter in July 2008, the Respondent subsequently assured IPG that he had not borrowed money from anyone else, stating on August 5, 2008: “I have not solicited any personal funding or ask[ed] for money from any client and therefore owe no one in that regard.” On August 22, 2008 he assured the MFDA: “I have not approached any other client regarding borrowed monies.”

21. The Respondent clearly breached MFDA Rules 2.1.4 in creating “the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client” by borrowing from his clients and not alerting the Member about the situation.

22. In the case of the Bs, the Respondent also clearly misled the Bs into thinking that he had invested their funds. Allegation #1 rightly uses the word “misappropriating.” The Respondent

pleaded guilty to theft and fraud.

23. In both cases, the Respondent also breached Rule 2.1.1, setting out the standard of conduct required by Approved Persons. Rule 2.1.1 states:

Standard of Conduct. 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 [MFDA].

The Respondent would appear to have breached each of the subsections in each case, although we have only been asked to make a finding on the first subsection, that is, failing to “deal fairly, honestly and in good faith with its clients.”

Charitable Donations Programs – Allegation #3

24. From February 2004 to December 2006 the Respondent referred about ten clients to a charitable donation program and received referral fees for doing so. The program involved donating cash to a charitable organization, which was able to produce – through some allegedly legally acceptable transactions – a tax receipt which was far higher than the actual sum donated. The Canada Revenue Agency did not accept the validity of the scheme and the clients, including Mr. B and Mr. E were hit with reassessments. The Respondent and his wife, it should be noted, also took part in the scheme and were also reassessed.

25. Apparently there continues to be litigation about this particular donation program. The MFDA does not take the position that it was illegal, but rather asserts that the Respondent should have told IPG about the program and received the Member’s permission to participate in it. IPG was not told about the Respondent’s involvement and did not know about it until it came to its attention in early 2009. If asked for their permission at an earlier time, they were likely to have refused to approve it. In the e-mail dated February 2, 2006, from IPG to its Approved Persons about ethical conduct, discussed above, IPG stated bluntly that Approved Persons should not

engage in such activities, stating: “IPG has not approved any charitable donation programs directly or by referral. Therefore, IPG associates are not permitted to refer or sell these products to clients under any circumstances.” Several of the charitable donation transactions arranged by the Respondent were done after the date of that e-mail.

26. MFDA Rule 1.2.1(d) – now numbered (c) – states: under the heading “Dual Occupations” that “an Approved Person may have, and continue in, another gainful occupation, provided that ... [t]he Member for which the Approved Person carries on business either as an employee or agent is aware and approves of the Approved Person engaging in such other gainful occupation.” The Respondent filled out a questionnaire in November 2004 in which he was asked: “Do you provide any financial services or products not offered by Independent Planning Group to any of your clients? IE: tax planning, financial plans, insurance etc. If yes, please provide details.” The Respondent replied in writing: “Insurance and General Tax discussion re: RSPs etc.” There was no mention by the Respondent of the charitable donation programs here or in other documents.

27. The Respondent was therefore in breach of Dual Occupations Rule 1.2.1. He was also in breach of MFDA Rule 2.4.2 relating to “Referral Arrangements.” The arrangement was that the Respondent referred clients to another agent who handled such matters and the Respondent received a fee of 18% of the sum donated. Allegation #3 stated that the Respondent received a total of \$93,600, but it was, in fact, a little over \$25,000. The referral fee was based on the amount contributed, not the tax credits received, as the MFDA had originally claimed in its Notice of Hearing.

28. In November 2004 – after a number of referrals had been made – the Respondent filled out questions relating to referral arrangements in the previously mentioned IPG questionnaire. He was asked: “Do you currently have any referral arrangements in place for which compensation is received for the referrals?” The Respondent’s handwritten answer was: “No such affiliations.”

29. There are many specific rules that have to be followed in a proper Referral Arrangements. Rule 2.4.2 requires, for example, that a referral arrangement can only be entered into by the Member, not by an Approved Person, and compensation has to be recorded on the

books and records of the Member. The Member had obviously not participated in the scheme. It did not know about the Respondent's involvement in it

Failure to Cooperate – Allegation #4

30. The MFDA alleges that the Respondent failed to cooperate with the MFDA, as required by section 22.1 of By-law No. 1. The Respondent did cooperate by participating in an interview in Ottawa with MFDA investigators on July 21, 2009, but he did not follow up on a number of undertakings that he gave during that interview. There were repeated requests for the Respondent to answer his undertakings. The MFDA states that the Respondent's conduct "has prevented MFDA Staff from determining the full nature and extent of the Respondent's misconduct as described in Allegations #1 to #3." The MFDA was not completely hampered, however, by the Respondent's failure to cooperate – although it was clearly frustrated by it – because it had access to IPG records, which also contained relevant documents that the Respondent had given to the IPG during their investigation of his conduct.

31. The panel therefore finds that with the substitution of the sum "about \$25,000" for the sum "\$93,600" in Allegation 3, all four allegations have been proven to our full satisfaction.

Penalty

32. We turn now to the question of the proper penalty in this case. We agree with the MFDA that the Respondent should not be allowed to return to the profession of selling securities. The misappropriation of the Bs' \$50,000 was egregious conduct. A Provincial Court Judge convicted Respondent of theft over \$5,000 and fraud over \$5,000 for that conduct. Moreover, the Respondent has not yet made full restitution to the Bs of \$10,000 of the \$50,000 borrowed and has not paid them interest on most of the sum misappropriated. By his misconduct, the Respondent has demonstrated that he would pose a risk to investors and the capital markets were he to continue to operate in the capital markets. We should add that in June 2009 the Respondent's life insurance license was revoked by the Financial Services Commission of Ontario and the Respondent agreed not to reapply for a license for a period of five years, as a result of the events at issue in this proceeding.

33. The amount of the fine has given us some difficulty. The MFDA originally suggested a fine “in the range of \$150,000 to \$175,000,” but two factors have influenced us to reduce that sum. One is that the sum suggested was on the assumption that the Respondent had received \$93,600 in referral fees, but the MFDA now accepts that the amount of the referral fees was around \$25,000. A fine should reflect to some extent the benefits received by the Respondent and that amount is significantly less than the MFDA thought before the hearing began.

34. Another factor is the serious criminal penalty that was handed down by the criminal court. The Respondent now has to live with a criminal record, with all the consequences that these convictions involve. He has been given a significant punishment which will serve as a deterrent to others. Deterrence of others is not therefore as necessary in this case as in others. The MFDA disciplinary cases that were cited to us did not indicate that there had been a prior criminal conviction.

35. We have chosen to fine the Respondent \$100,000. His conduct was serious and caused great emotional and, indeed, physical harm to the two elderly couples involved in the Respondent’s wrongdoing.

36. We accept the MFDA’s suggestion that \$7,500 for costs under section 24.2 of By-law No. 1 would be appropriate in this case.

DATED this 20th day of June, 2011.

“Martin Friedland”

Martin L. Friedland, C.C., Q.C.,
Chair

“Selwyn Kossuth”

Selwyn Kossuth,
Industry Representative

“Vas Pachapurkar”

Vas Pachapurkar,
Industry Representative