



**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: Donald James Cunningham**

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**SETTLEMENT AGREEMENT**

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**I. INTRODUCTION**

1. By Notice of Settlement Hearing, the Mutual Fund Dealers Association of Canada (the “MFDA”) will announce that it proposes to hold a hearing to consider whether, pursuant to section 24.4 of By-law No. 1, a hearing panel of the Central Regional Council (the “Hearing Panel”) of the MFDA should accept the settlement agreement (the “Settlement Agreement”) entered into between Staff of the MFDA (“Staff”) and the Respondent, Donald James Cunningham (the “Respondent”).

**II. JOINT SETTLEMENT RECOMMENDATION**

2. Staff conducted an investigation of the Respondent’s activities. The investigation disclosed that the Respondent had, as a result of a lack of experience and knowledge, failed to discharge his supervisory obligations to the extent that 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.

3. Staff and the Respondent recommend settlement of the matters disclosed by the investigation in accordance with the terms and conditions set out below. The Respondent

agrees to the settlement on the basis of the facts set out in Part IV herein and consents to the making of an Order in the form attached as Schedule “A”.

4. Staff and the Respondent agree that the terms of this Settlement Agreement, including the attached Schedule “A”, will be released to the public only if and when the Settlement Agreement is accepted by the Hearing Panel.

### **III. ACKNOWLEDGEMENT**

5. Staff and the Respondent agree with the facts set out in Part IV herein for the purposes of this Settlement Agreement only and further agree that this agreement of facts is without prejudice to the Respondent or Staff in any other proceeding of any kind including, but without limiting the generality of the foregoing, any proceedings brought by the MFDA (subject to Part IX) or any civil or other proceedings which may be brought by any other person or agency, whether or not this Settlement Agreement is approved by the MFDA.

### **IV. AGREED FACTS**

#### **Registration History**

6. The Respondent was registered in Ontario as a mutual fund salesperson with Desjardins from June 2003 to December 31, 2005, when his registration expired. From June 2003 to September 2005, the Respondent was also registered as the branch manager of the branch office of Desjardins Financial Security Investments Inc. (formerly known as “Optifund Investments Inc.”) (“Desjardins”) located in London, Ontario (the “London Branch”).

7. Previously, from January 1994 to May 2003, the Respondent was registered as a mutual fund salesperson and branch manager with other mutual fund dealers. The Respondent, however, did not perform any supervisory functions with those previous dealers.

8. Desjardins became a Member of the MFDA on November 15, 2002.

## **Failure to Fulfill Supervisory Responsibilities of a Branch Manager**

9. In June 2003, the Respondent purchased from Desjardins, the right to open, own and operate the London Branch and was granted the title of Managing Director of the London Branch (a non-registered position). In accordance with MFDA Rule 2.5.3(a), Desjardins also designated the Respondent as the branch manager of the London Branch (a registered position).

10. Due to his lack of skills, knowledge and experience with respect to the sale of mutual funds and the regulatory responsibilities of a branch manager, the Respondent recruited an individual whom he believed was an experienced branch manager, Anthony McPhail (“McPhail”), to take his place as the designated branch manager.

11. In August 2003, McPhail agreed to accept the position of branch manager of the London Branch. Desjardins and McPhail submitted an application to the Ontario Securities Commission (“OSC”) to transfer McPhail’s registration from his former Member to Desjardins (the “Application”). Although McPhail had agreed to become the branch manager, the OSC ultimately did not approve the transfer of his registration to Desjardins due to regulatory concerns arising from on-going investigations into his conduct at his former Member.<sup>1</sup> Consequently, the Respondent continued as the designated branch manager of the London Branch.

12. The Respondent did not fulfill his supervisory obligations and responsibilities as branch manager of the London Branch, contrary to MFDA Rules 2.5.3, 2.5.5 and MFDA Policy No. 2. In particular, the Respondent:

- (a) did not familiarize himself with the policies and procedures of Desjardins and the regulatory obligations of a designated branch manager;
- (b) improperly delegated most of his supervisory responsibilities for trade review and new account approval to an unregistered office administrator at the London Branch who had not fulfilled the proficiency requirements for a branch manager

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<sup>1</sup>The MFDA and McPhail’s former Member were investigating McPhail’s conduct. See also: note 3.

set out in MFDA Rule 1.2.2, contrary to MFDA Rule 2.5.5 and MFDA Policy No. 2; and

- (c) failed to ensure that an alternate branch manager had been designated to perform and did perform his duties as branch manager on the occasions when he was absent from the office because of business commitments or vacations, contrary to MFDA Rule 2.5.3(c).

### **Failure To Detect and Prevent Unregistered (“Stealth”) Advising**

13. In August 2003, McPhail was formally introduced to Approved Persons and unregistered staff in the London Branch as the branch manager, even though the Application had not yet been approved by the OSC.

14. The Respondent (with the permission of Desjardins) authorized McPhail to open a sub-branch of the London Branch in Chatham, Ontario (the “Chatham sub-branch”).

15. Pending the approval of the Application, the Respondent permitted McPhail to access and regularly attend at the London Branch and Chatham sub-branch. McPhail claimed that he would be working at the Chatham sub-branch for the purpose of providing insurance and tax planning advice which he was approved and licensed to do. No internal controls or supervisory procedures were established or implemented to prevent McPhail from engaging in securities related business with clients of Desjardins.

16. The OSC did not approve the Application and in May, 2004, it was withdrawn by Desjardins. Consequently, McPhail was never registered as an Approved Person of Desjardins. Most of the Approved Persons and unregistered staff of Desjardins were not aware and were not informed by the Respondent that McPhail was not registered.

17. Commencing in the fall of 2003, McPhail arranged for the transfer of client accounts from his former Member to Desjardins (the “Clients” and the “Accounts”). As McPhail was not registered, the Accounts were assigned to another Approved Person, AP#1 and any trades in the Accounts were processed under AP#1’s representative code. The Respondent, McPhail and AP#1 anticipated that upon approval of the Application

the Clients and the Accounts would be reassigned to McPhail. Most of the Clients believed (incorrectly) that McPhail was the Approved Person responsible for their Accounts. Most Clients did not question AP#1's involvement with their accounts because she had been McPhail's registered administrative assistant at his former Member and the Clients were accustomed to dealing with her.

18. In December 2003, AP#1 resigned from Desjardins. The Application still had not been approved so the Accounts were re-assigned to another Approved Person, CE. Again, it was anticipated that upon approval of the Application, the Clients and the Accounts would be reassigned to McPhail. Most of the Clients continued to believe that McPhail was the Approved Person responsible for their Accounts.

19. Between December 2003 and October 2005, McPhail and CE carried on a "stealth advising" arrangement whereby CE permitted McPhail to process account related activities under CE's representative code, thereby permitting McPhail to service the Accounts and engage in securities related business directly with the Clients while he was not registered. Among other things, McPhail:

- (a) provided advice and made investment recommendations to Clients at the Chatham sub-branch and elsewhere;
- (b) collected information required to open new accounts for the Clients; and
- (c) received trading instructions from the Clients and arranged for their trades to be processed by Desjardins.

### **Failure To Conduct A Reasonable Supervisory Investigation**

20. Between January and November 2004, information was communicated to the Respondent on several occasions that alerted him or ought to have alerted him to the fact that McPhail was engaging in securities related business with clients while unregistered. In particular:

- (a) In January 2004, the Respondent was informed about a complaint from a Client who objected to the fact that his account statements identified AP#1 as his Approved Person rather than McPhail;
- (b) In April 2004, following a visit to the Chatham sub-branch by the branch administrator and the alternate branch manager from the London Branch, the Respondent was informed that they had observed McPhail meeting with people who appeared to be clients of Desjardins;
- (c) On multiple occasions in April and May 2004, the Respondent was advised that the receptionist at the Chatham sub-branch regularly observed McPhail meeting with clients of Desjardins;
- (d) In April-May 2004, the branch administrator at the London Branch reported to the Respondent that she had observed McPhail's handwriting on mutual fund transaction forms received from the Chatham sub-branch;
- (e) On April 23, 2004, the Respondent received an e-mail from the Chief Compliance Officer of Desjardins notifying the Respondent that:
  - (i) McPhail was the subject of an MFDA investigation;
  - (ii) MFDA Staff were concerned that McPhail was engaging in securities related business while unregistered; and that
  - (iii) Desjardins intended to withdraw the Application;<sup>2</sup>
- (f) On July 21, 2004, the Respondent received another e-mail from the Chief Compliance Officer of Desjardins informing him that the MFDA remained concerned that McPhail was engaging in securities related business with clients;
- (g) By letter to Desjardins dated August 25, 2004, MFDA Staff requested that the Respondent provide a written statement to the MFDA disclosing whether he was aware of any way in which McPhail had engaged in the process of providing investment advice to clients of Desjardins, selling mutual fund products, or receiving any financial benefit from mutual fund sales activity while unregistered.

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<sup>2</sup> On May 13, 2004, Desjardins withdrew the Application and the Respondent was informed that McPhail's registration would not be transferred to Desjardins.

- On August 27, 2004, the Respondent signed a statement which asserted that he was not aware of any such conduct by McPhail and would report to Desjardins if he became aware of McPhail's involvement in any such conduct in the future; and
- (h) In the fall of 2004, the Respondent received complaints from two individuals that appeared to indicate that McPhail was engaging in securities related business with clients.

21. On October 24, 2004, the Respondent and Desjardins' Vice-President Sales met with an Approved Person and an unregistered employee from the Chatham sub-branch who announced their resignations and reported to the Respondent that:

- (i) McPhail was holding himself out to clients as an Approved Person;
- (ii) McPhail was meeting with clients, arranging for trading documentation to be signed by the clients on the basis of advice that he provided and then CE was signing the trading documentation as the Approved Person responsible for the client account and allowing it to be processed under CE's representative code;
- (iii) Clients were complaining about McPhail.
- (iv) The Chatham sub-branch was in financial distress; and
- (v) McPhail and CE were rarely in the office and were not returning client calls.

22. The following day, on October 25, 2004, based on the first hand accounts of the facts as described in the previous paragraph, the Respondent presented CE and McPhail with the option to either resign or be terminated. McPhail and CE elected to immediately resign.

23. Between January and October 2004, the Respondent, as a result of his lack of knowledge and experience in respect of his supervisory obligations, disregarded and failed to take adequate supervisory and disciplinary action in response to the information that he received that alerted, or should have alerted him to the fact that McPhail was engaging in securities related business with clients while unregistered. During this period, the Respondent:

- (a) dismissed the reports that McPhail was engaging in securities related business with clients as unsubstantiated rumours;
- (b) failed to conduct a reasonable supervisory investigation to determine whether CE and McPhail were engaging in a stealth advising arrangement and if so, the nature and extent of their activity;
- (c) permitted McPhail to continue working from the Chatham sub-branch office;
- (d) did not inform the Approved Persons and unregistered staff in the London Branch and the Chatham sub-branch that the Application had not been approved and therefore McPhail was not authorized to conduct securities related business;
- (e) did not send written notification to Clients clarifying that CE was the Approved Person responsible for their Accounts;
- (f) failed to implement any internal controls to prevent McPhail from engaging in securities related business with clients pending the approval of the Application and following its withdrawal; and
- (g) did not subject CE to heightened supervision or take any disciplinary action against him.

24. On November 8, 2004, a complaint was submitted to the OSC concerning the same allegations that had been communicated to the Respondent on October 24, 2004.

25. Desjardins was informed about the complaint by the OSC and commenced an investigation. On February 18, 2005, Desjardins completed its investigation and concluded that McPhail and CE had been carrying on a stealth advising arrangement prior to CE's resignation in October 2004.

26. In November 2004, CE's registration was transferred to another MFDA Member where CE and McPhail continued their stealth advising arrangement.



27. In March 2005, the MFDA commenced disciplinary proceedings against McPhail<sup>3</sup> and thereafter the new Member with whom CE was registered terminated McPhail's access to the premises. On June 7, 2006, CE passed away.

28. Following the commencement of the MFDA investigation into his conduct, the Respondent voluntarily resigned from his positions as an Approved Person and Branch Manager. Since that time he has not reapplied for registration in the securities industry. However, he remains owner and Managing Director of the London Branch.

## **V. CONTRAVENTIONS**

29. The Respondent admits that between June 2003 and September 2005, the Respondent failed to fulfill his supervisory responsibilities as branch manager of the London Branch of Desjardins, contrary to MFDA Rules 2.5, 2.5.3 and 2.5.5 and MFDA Policy No. 2.

30. The Respondent admits that between September 2003 and November 2004, the Respondent failed to employ adequate supervision to prevent McPhail, an unregistered individual, from engaging in securities related business with clients of Desjardins, contrary to MFDA Rules 2.5 and 2.1.1(c).

31. The Respondent admits between January 2004 and November 2004, the Respondent failed to conduct reasonable supervisory investigations in response to information that McPhail, an unregistered individual, was engaging in securities related business with clients of Desjardins and to take such supervisory and disciplinary measures as might be warranted by the results of such investigations, contrary to MFDA Rules 1.1.1(c), 2.5 and 2.1.1(c).

## **VI. TERMS OF SETTLEMENT**

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

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<sup>3</sup> By Order dated August 8, 2005, an MFDA Hearing Panel determined that McPhail contravened his regulatory obligation to co-operate with an MFDA investigation and imposed a lifetime ban from the mutual fund industry and ordered McPhail to pay a fine of \$50,000 and costs of \$10,000.

1. the Respondent shall pay a fine in the amount of \$10,000;
2. the Respondent shall be permanently prohibited from being registered or acting in any supervisory capacity for a Member of the MFDA;
3. the Respondent is permanently prohibited from being registered or acting as a partner, director or senior officer of a Member of the MFDA; and
4. the Respondent shall pay costs in the amount of \$2,500.

## **VII. STAFF COMMITMENT**

33. 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 the facts set out in Part IV and the contraventions described in Part V of this Settlement Agreement, subject to the provisions of Part IX below. Nothing in this Settlement Agreement precludes Staff from investigating or initiating proceedings in respect of any facts and contraventions that are not set out in Parts IV and V of this Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the facts and contraventions set out in Parts IV and V, whether known or unknown at the time of settlement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations.

## **VIII. PROCEDURE FOR APPROVAL OF SETTLEMENT**

34. Acceptance of this Settlement Agreement shall be sought at a hearing of the Central Regional Council of the MFDA on a date agreed to by counsel for Staff and the Respondent.

35. Staff and the Respondent may refer to any part, or all, of the Settlement Agreement at the settlement hearing. Staff and the Respondent also agree that if this Settlement Agreement is accepted by the Hearing Panel, it will constitute the entirety of the evidence to be submitted respecting the Respondent in this matter, and the Respondent agrees to waive his rights to a full hearing, a review hearing before the Board of Directors of the MFDA or any securities commission with jurisdiction in the matter

under its enabling legislation, or a judicial review or appeal of the matter before any court of competent jurisdiction.

36. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, then the Respondent shall be deemed to have been penalized by the Hearing Panel pursuant to s. 24.1.2 of By-law No. 1 for the purpose of giving notice to the public thereof in accordance with s. 24.5 of By-law No. 1.

37. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, neither Staff nor the Respondent will make any public statement inconsistent with this Settlement Agreement. Nothing in this section is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

#### **IX. FAILURE TO HONOUR SETTLEMENT AGREEMENT**

38. 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. If such additional enforcement action is taken, the Respondent agrees that the proceeding may be heard and determined by a hearing panel comprised of all or some of the same members of the hearing panel that accepted the Settlement Agreement, if available.

#### **X. NON-ACCEPTANCE OF SETTLEMENT AGREEMENT**

39. If, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel or an Order in the form attached as Schedule "A" is not made by the Hearing Panel, each of Staff and the Respondent will be entitled to any available proceedings, remedies and challenges, including proceeding to a disciplinary hearing pursuant to sections 20 and 24 of By-law No. 1, unaffected by this Settlement Agreement or the settlement negotiations.

40. Whether or not this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees that he will not, in any proceeding, refer to or rely upon this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as the basis for any allegation against the MFDA of lack of jurisdiction, bias, appearance of bias, unfairness, or any other remedy or challenge that may otherwise be available.

**XI. DISCLOSURE OF AGREEMENT**

41. The terms of this Settlement Agreement will be treated as confidential by the parties hereto until accepted by the Hearing Panel, and forever if, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel, except with the written consent of both the Respondent and Staff or as may be required by law.

42. Any obligations of confidentiality shall terminate upon acceptance of this Settlement Agreement by the Hearing Panel.

**XII. EXECUTION OF SETTLEMENT AGREEMENT**

43. This Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement.

44. A facsimile copy of any signature shall be effective as an original signature.

Dated: November 11<sup>th</sup>, 2009

“William Chinas”

Witness- Signature

William Chinas

Witness- Print name

“Donald James Cunningham”

Donald James Cunningham

“Mark T. Gordon”

Staff of the MFDA  
Per: Mark T. Gordon  
Executive Vice-President



**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: Donald James Cunningham**

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**ORDER**

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**WHEREAS** on [date], the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Settlement Hearing pursuant to section 24.4 of By-law No. 1 in respect of Donald James Cunningham (the "Respondent");

**AND WHEREAS** the Respondent entered into a settlement agreement with Staff of the MFDA, dated [date] (the "Settlement Agreement"), in which the Respondent agreed to a proposed settlement of matters for which the Respondent could be disciplined pursuant to ss. 20 and 24.1 of By-law No. 1;

**AND WHEREAS** the Hearing Panel is of the opinion that the Respondent:

- (a) between June 2003 and September 2005, the Respondent failed to fulfill his supervisory responsibilities as branch manager of the London Branch of Desjardins, contrary to MFDA Rules 2.5, 2.5.3 and 2.5.5 and MFDA Policy No. 2;
- (b) between September 2003 and November 2004, the Respondent failed to employ adequate supervision to prevent Anthony McPhail ("McPhail"), an unregistered

individual, from engaging in securities related business with clients of Desjardins, contrary to MFDA Rules 2.5 and 2.1.1(c); and

(c) between January 2004 and November 2004, the Respondent failed to conduct reasonable supervisory investigations in response to information that McPhail, an unregistered individual, was engaging in securities related business with clients of Desjardins and to take such supervisory and disciplinary measures as might be warranted by the results of such investigations, contrary to MFDA Rules 1.1.1(c), 2.5 and 2.1.1(c).

**IT IS HEREBY ORDERED THAT** the Settlement Agreement is accepted, as a consequence of which, the Respondent shall:

1. pay a fine in the amount of \$10,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;
2. be permanently prohibited from being registered or acting in any supervisory capacity for a Member of the MFDA, pursuant to s. 24.1.1(f) of MFDA By-law No. 1;
3. the Respondent is permanently prohibited from being registered or acting as a partner, director or senior officer of a Member of the MFDA, pursuant to s. 24.1.1(f) of MFDA By-law No. 1; and
4. the Respondent shall pay costs of the MFDA's investigation and of this proceeding in the amount of \$2,500, pursuant to s. 24.2 of MFDA By-law No.1.

**DATED** this [day] day of [month], 20[ ].

Per: \_\_\_\_\_  
[Name of Public Representative], Chair

Per: \_\_\_\_\_  
[Name of Industry Representative]

Per: \_\_\_\_\_  
[Name of Industry Representative]