INVESTMENT DEALERS ASSOCIATION OF CANADA

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ASSOCIATION CANADIENNE DES COURTIERS EN VALEURS MOBILIÈRES

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Barbara Lohmann
Enforcement Counsel
(604) 331-4795

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Discipline - Motions

Motion Application by Charles Kamal Dass Dismissed

Nature of the Proceedings — A Hearing Panel of the Investment Dealers Association of Canada (the "Association") appointed pursuant to IDA By-law 20 heard a disciplinary motion by Charles Kamal Dass ("Dass"), who was formerly registered as a Registered Representative with the Port Alberni, BC office of Dundee Securities Corporation ("Dundee"). A Notice of Hearing, containing certain allegations against Dass, was served on Dass by the Association, although the Notice of Hearing has been sealed, by agreement of the parties, pending the ultimate outcome of the motion (the "Motion"). The Motion was for an order that the Association does not have jurisdiction to proceed with the allegations against Dass contained in the Notice of Hearing on the basis that he is no longer an approved person since he resigned from the industry on July 21, 2004.

Decision of the Hearing Panel — By written decision (the "Decision") dated July 19, 2006, the Hearing Panel dismissed the Motion.

Summary of Findings — The Association's position was that, notwithstanding that Dass was no longer a registrant; it nevertheless continued to have jurisdiction over him pursuant to Association By-law 20.7. By-law 20.7 gives the Association jurisdiction over a former registrant for five years from the date on which the registrant ceased to be an Approved Person.

To support his position, Dass relied on *Chalmers*, a decision of the Ontario Court of Appeal. However, the Hearing Panel distinguished *Chalmers* on the basis that the Association is not a separate corporate entity and does not have the legal status to attorn to any statutory jurisdiction, including the *British Columbia Securities Act*.

The Panel found that the Association is an unincorporated association

which derives its existence from its contractual relationship with its members and approved persons. Unlike the TSE, the Association does not depend upon a statute for its existence. Therefore, the concept of *ultra vires* does not apply to the by-laws of the Association. The Panel stated that *Chalmers* should be restricted to domestic tribunals which are created and governed by statute.

Dass also relied on the decision of the Saskatchewan Financial Services Commission ("SFSC") in *MacBain.* The SFSC followed the *Chalmers* decision and found that if the Association had no statutory authority to regulate former members, then any by-law purporting to do so is *ultra vires* and of no force and effect. The Hearing Panel however, stated that its interpretation of *Chalmers* differed from that of the SFSC. They acknowledged that the Association does not have the ability to make laws of general application and that the Association has no statutory authority. However, their interpretation of the source of the Association's jurisdiction over its members is contractual and not statutory. Accordingly, they were not able to interpret the findings in *Chalmers* in such a manner as to find By-law 20.7 is *ultra vires* the Association.

Dass also argued that because the Association is officially recognized in BC by the British Columbia Securities Commission, that the Association is therefore governed by the *Securities Act*, and in particular, section 26 (since Section 26 refers only to Members, not former Members, the Association no longer has jurisdiction over Dass). In rejecting this argument, the Panel stated that the effect of recognition as a self-regulatory organization was not an act of attornment by the Association. In effect, the British Columbia Securities Commission recognizes as a self-regulatory organization those members and approved persons of the Association who are subject to the jurisdiction of the Commission and who are collectively referred to as the "Pacific District Council".

In this context, Section 26 of the *Act* mandates that self-regulatory bodies like the Association regulate the members and approved persons in accordance with the by-laws, rules and other regulatory instruments of the self-regulatory body. Section 26 does not in any way attempt to define or restrict what these by-laws or regulatory instruments should be.

With respect to the definition of membership, the Panel stated that Association By-law 20.7 constitutes an agreement between a member or approved person and the Association setting the term of such party's membership to be from the date such membership commences up until such member or approved person resigns from the Association and then, but only for the limited purposes of By-laws 19 & 20, for a period of five years following such resignation.

Dass' second ground to support the Motion was based upon the

relationship between the Association and Dass being founded on contract prior to his resignation. His resignation terminated his contractual relationship with the Association. He argued that disciplinary proceedings may result in a penalty which would be unenforceable against him.

The Panel also dismissed this argument. The issue before them was not one of whether or not the Association had the ability to enforce a penalty against Dass once he resigned from the Association. Rather, the issue was whether or not the Association has the jurisdiction to proceed with a disciplinary hearing against Dass.

RE-OPENING THE MOTION

After the hearing of the motion, but prior to the delivery of the decision and reasons to the National Hearing Co-ordinator ("NHC"), the Association applied to re-open the hearing of the Motion in order to have the Panel hear additional argument from the Association opposing the Motion. Dass opposed the Association's application to re-open the matter.

The reason for making the request to re-open the hearing was to be able to present the Panel with an argument that had just been heard by a Hearing Panel of the Ontario District Council (that argument was heard after the arguments in the Dass matter had been heard). The matter before the Ontario Panel also involved the jurisdiction to discipline an approved person after that person was no longer in the industry. While the Ontario Panel had not yet rendered its decision the Association nevertheless wished this Panel to hear the same argument.

The Panel found they had "unfettered discretion" to re-open a hearing, a discretion which should be used sparingly. They also had the discretion to re-open a hearing if the Panel believes it is in the public interest to do so.

However, the Panel dismissed the Association's application to re-open this matter. In making its decision, the Panel found that the public interest is better served by considering the element of fairness to Dass rather than the possibility of conflicting decisions facing the Association.

Kenneth A. Nason
Association Secretary