INVESTMENT DEALERS ASSOCIATION OF CANADA

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ASSOCIATION CANADIENNE DES COURTIERS EN VALEURS MOBILIÈRES

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Discipline

IDA Appeal Panel Dismisses Appeal by Jory Capital Inc. and Patrick Michael Cooney

Result of Appeal Hearing

An Appeal Panel of the Investment Dealers Association of Canada (IDA) has dismissed an appeal brought by Jory Capital Inc. (Jory), a Member Firm of the IDA, and Patrick Michael Cooney, at all material times the UDP, CEO and a director of Jory.

Original Decisions

The appeal was from two decisions of a Manitoba District Council Hearing Panel. The first, dated July 28, 2005 found that a June 22, 2004 payment by Jory to Mr. Cooney, while Jory was in a loss situation and under certain Early Warning Restrictions, violated By-law 30.3 (iv)(3). The Panel also found that Mr. Cooney violated By-law 30.3 (iv)(3) and thereby engaged in conduct that was unbecoming or detrimental to the public interest contrary to By-law 29.1. The second, dated January 5, 2006, imposed sanctions on the Appellants. Jory was fined $25,000. Mr. Cooney was fined $25,000 and was prohibited, for a period of five years, from receiving approval in any capacity where he might exercise significant influence on, or responsibility for, financial compliance. For further details, please see Bulletin #3499 dated January 16, 2006.

The Appeal Decision

The Appellants argued that the initial decision ought to have been set aside because:

- the Hearing Panel should have given effect to a defence of officially induced error;

- that Mr. Cooney's alleged violations were not intentional;
- that the Appellants were entitled to rely on the defence of due diligence; and
- that the IDA had no authority to restrict payments to Mr. Cooney.

The Appellants also argued that the sanctions imposed were too excessive.
In support of their arguments, the Appellants sought to introduce certain "fresh evidence" regarding Jory's and Mr. Cooney's financial projections at the relevant time. Despite finding that the proposed "fresh evidence" did not meet the legal test for admissibility, the Appeal Panel decided, in the circumstances of this case, that it did not want to deprive the Appellants of the opportunity to present that evidence which they considered important for their Appeal.

The Appeal Panel concluded that the Hearing Panel's decision on the issue of officially induced error was "eminently reasonable." The Appeal Panel stated that the Appellant had no reasonable basis for thinking that the June payment was authorized by the IDA. The Appeal Panel further found that the "fresh evidence" confirmed the conclusion of the Hearing Panel that the Appellant's projections of profits showed no measure of caution.

The Appeal Panel also concluded that the violations alleged against the Appellants were not statutory offences because the IDA's jurisdiction over its Members and registrants is contractual in nature. Notwithstanding this finding, the Appeal Panel went on to consider the possible defence of due diligence (which might be available in the context of a statutory offence). The Appeal Panel concluded that the due diligence defence was not available to the Appellants on the evidence presented because the Appellants had taken no steps to confirm whether the June payment was authorized by the IDA and had no basis for reasonably believing such authorization had been received.

The Appeal Panel similarly rejected the argument that the IDA had no authority to restrict the payments to Mr. Cooney.

Finally, the Appeal Panel found that the sanctions imposed were reasonable, having regard to Jory's and Mr. Cooney's prior disciplinary record in matters relating to financial compliance. The Appeal Panel agreed with the Hearing Panel that repeated violations had to attract progressively escalating sanctions.

Kenneth A. Nason
Association Secretary