



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8

CP 55, 19^e étage
20, rue queen ouest
Toronto ON M5H 3S8

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF
HACIK ISTANBUL**

**REASONS AND DECISION
(Section 8 of the *Securities Act*)**

Hearing: February 21, 2008

Decision: March 27, 2008

Panel: Wendell S. Wigle, Q.C. - Commissioner and Chair of the Panel
Carol S. Perry - Commissioner

Counsel: Michelle Vaillancourt - For Staff of the Ontario Securities
James Miglin (student-at-law) Commission
Aliamisse Mundulai - For Hacik Istanbul

REASONS AND DECISION

A. Overview

(i) Background

[1] This is an application (the “Application”) brought by Hacik Istanbul (the “Applicant”) pursuant to subsection 8(2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) for the Ontario Securities Commission (the “Commission”) to review a decision of a Director of the Commission, dated August 10, 2007 (the “Director’s Decision”).

[2] The Director refused to grant the Applicant transfer of his registration as a mutual fund salesperson on the grounds that the Applicant did not demonstrate the high standards of integrity required of a professional in the securities industry.

[3] A hearing was held before a Panel of the Commission on February 21, 2008 to consider the Application.

(ii) The Applicant

[4] The Applicant has been registered with the Commission as a mutual funds salesperson since June 30, 1991. From November 8, 2000 to April 18, 2007, the Applicant was sponsored by BMO Investments Inc. and employed by the parent company Bank of Montreal (“BMO”). The Applicant was terminated by BMO for cause because he improperly issued unearned Air Miles to himself and his spouse on a number of occasions dating back to 2002.

[5] Subsequent to his termination, the Applicant sought new employment. On May 12, 2007, the Applicant applied to the Commission to transfer his mutual funds salesperson registration to a new employer, Investment House of Canada Inc.

(iii) History of Proceedings

[6] On June 5, 2007, the Applicant received a letter from the Individual Registration Officer, Registrant Regulation of the Capital Markets Branch of the Commission, which informed the Applicant that his request to transfer his mutual funds salesperson registration to the Investment House of Canada Inc. was denied. Specifically, this letter stated:

Staff has recommended to the Director that this application for registration be refused. Through an internal branch audit conducted by your former sponsoring firm, you were found to have misappropriated your client’s loyalty points. Although your firm was able to recoup a portion of the loyalty points, these points were not voluntarily surrendered by you. For these reasons, staff feels that you do not meet the requirements for registration. It is staff’s opinion that you lack the integrity required of a

securities industry professional and are therefore unsuitable for registration.

[7] On June 12, 2007, the Applicant notified the Commission that he wished to exercise his right for an Opportunity to be Heard (“OTBH”) by the Director pursuant to subsection 26(3) of the Act. By letter dated June 18, 2007, the Applicant elected to conduct the OTBH in writing. Both Commission Staff and the Applicant provided written submissions to the Director.

[8] Staff also provided the Applicant with a memorandum prepared by Ms. Rita Lo, Registration Research Officer, dated July 18, 2007, which outlined the reasons why the Applicant’s request to transfer his mutual funds salesperson registration to his new employer was denied. The reasons stated in this memorandum were as follows:

- The Applicant admitted his wrongdoings to corporate security of BMO;
- The Applicant did not return the unearned Air Miles to BMO on his own initiative;
- The Applicant only returned 2,400 Air Miles out of a total of 6,500 Air Miles;
- The Applicant did not provide complete, full and accurate disclosure to Staff, and instead the Applicant told Staff that it was BMO’s responsibility to reconcile the problem with the outstanding Air Miles. On this point, Staff took the following position: “His untrue statement and wilful cover-ups of his expensing the outstanding [Air Miles] demonstrates his lack of integrity in both his actions while at BMO and after his termination”;
- The Air Miles incident did not only involve the Applicant’s spouse, but also the Applicant himself. On this point, Staff took the following position: “The Applicant failed to realize that his misappropriation of client [Air Miles] was equivalent to a theft, a criminal offence, though not in terms of money. His dispute that only he and his wife were involved – how about those affected clients whose entitlements to their mileages were deprived by this misconduct. As such, his statement indicated his lack of integrity, professional competence, and judgement. It also calls into question his fitness for registration”; and
- The Applicant’s misappropriation of client assets (i.e. the Air Miles) was not an isolated incident. On this point, Staff took the following position: “As stated in BMO’s letter, there were several incidents dating back to 2002 where the [Air Miles] were credited and redeemed to the Applicant’s spouse. These series of transgression[s] were [an] indication that his self-interest took precedence over his client interest and the standard of conduct and code of ethics. This calls into question his trustworthiness and overall character.”

(iv) Reasons for the Director’s Decision to Refuse Registration

[9] The Director’s Decision was issued on August 10, 2007. The Director refused to grant registration on the basis that:

Mr. Istanbul took Air Miles that did not belong to him and deposited them in his spouse’s account. This was an act of dishonesty. Mr. Istanbul refers to the misappropriation as being a single Air Miles incident, however, this was not a single act but numerous acts over a period of five years.

The Registrant did not deal fairly, honestly and in good faith with all of his clients nor his employer, BMO, over the last five years. Mr. Istanbul has clearly demonstrated a lack of integrity.

I find that the Registrant has not demonstrated the high standards of integrity required of a professional in the securities industry. Therefore, I refuse to grant the registration of Hacik Istanbul. (*Director’s Decision Re Hacik Istanbul* (2007), 30 O.S.C.B. 7179 at paras. 19 to 21)

(v) The Application for Hearing and Review Pursuant to Subsection 8(2) of the Act

[10] By letter dated September 5, 2007, the Applicant gave notice to the Commission for a hearing and review of the Director’s Decision in conformity with subsection 8(2) of the Act, and on October 29, 2007, the Applicant filed his Application according to the procedure set out in Rule 7 of the Commission’s *Rules of Practice*, (1997), 20 O.S.C.B. 1947.

[11] In the Application, the Applicant takes the position that paragraphs 8, 9, 12, 17, 18 and 20 of the Director’s Decision are incorrect, and that paragraph 14 of the Director’s Decision lacks relevance. The Applicant takes the following position in the Application:

- The financial loss to BMO due to the misappropriation of Air Miles was miscalculated;
- The Applicant’s conduct in question is not connected to the capital markets since it did not involve investment dealing and the conduct was not in any way directly related to the Applicant’s job function or technical responsibilities or expertise;
- The Applicant’s conduct did not jeopardize client well being, nor did it affect the Applicant’s overall relationship with his clients;
- The Applicant did not misappropriate Air Miles that should have been awarded to his bank’s clients. No clients were deprived of Air Miles;

- The Applicant did express regret for his actions and admitted to improperly issuing Air Miles and took full responsibility for his actions;
- The Applicant claims that his behaviour is justified because the general use and subsequent abuse of Air Miles coupons became common place among bank staff and that the Air Miles coupons were available to each and every BMO employee to use freely according to their own discretion;
- Paragraph 20 of the Director’s Decision, which states “the registrant did not deal fairly, honestly and in good faith with all of his clients”, is inaccurate as this matter did not involve any BMO clients; and
- The Applicant points out that during his seven years of employment with BMO, he performed his responsibilities in a professional and conscientious manner, and maintained an excellent employment record with above-average to high performance review ratings.

B. A Hearing and Review Pursuant to Section 8 of the Act is a Hearing *De Novo*

[12] A hearing and review of a decision of the Director is governed by section 8 of the Act, which states the following:

Review of Director’s decision

8. (1) Within 30 days after a decision of the Director, the Commission may notify the Director and any person or company directly affected of its intention to convene a hearing to review the decision.

Same

(2) Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.

Power on review

(3) Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.

Stay

(4) Despite the fact that a person or company requests a hearing and review under subsection (2), the decision under review takes effect immediately, but the Commission may grant a stay until disposition of the hearing and review.

[13] Pursuant to subsection 8(3) of the Act, a hearing and review of a Director's Decision is a hearing *de novo*. This subsection gives the Commission the power to either confirm the Director's Decision or make such other decision as the Commission considers proper.

[14] As established by the case law, a Commission Panel may substitute its own decision for that of the Director "[...] when conducting a review of the Director's decision pursuant to section 8 of the Act, [the Commission is] not bound in any way by the Director's determination" (See *Re Triax Growth Fund Inc.* (2005), 28 O.S.C.B. 10139 at para. 25). Further, the Commission recently confirmed in *Re Michalik* (2007), 30 O.S.C.B. 6717, that a review of a decision of a Director is conducted as a hearing *de novo* (see paras. 42 and 43).

[15] As a result, the Applicant does not have the onus of demonstrating that the Director was in error in making his decision. The Applicant has the same onus before the Commission as he had before the Director. Therefore, this is a fresh consideration of the matter, as if it had not been heard before and no decision had been previously rendered. (*Re Biocapital Biotechnology* (2001), 24 O.S.C.B. 2843 at p. 8 of 12; and *Re JDS Uniphase Ltd.* (1999), 22 O.S.C.B. 5303 at page 3 of 13).

C. The Issue

[16] As this is a hearing *de novo*, the issue before us is the same as was presented to the Director for determination. Therefore, we must determine whether the Applicant's registration as a mutual funds salesperson should be transferred to his prospective new employer, Investment House of Canada Inc.

D. The Errors in the Director's Decision

[17] At the outset of this hearing, Staff conceded that certain facts referred to in the Director's Decision regarding the manner in which the Applicant misappropriated Air Miles were incorrect. At paragraph 8 of their written submissions, Staff clarify that:

[...] the misappropriation of Air Miles to the Applicant's spouse occurred entirely through the use of coupon cards and that Air Miles were not credited to the Applicant's spouse through applications for loans or mortgages by the Applicant's clients as indicated in the Director's Decision. Paragraphs 8, 17 and 20 of the Decision should therefore be read in light of this correction.

[18] While we find it troubling that incorrect facts were put before the Director and were relied upon in coming to his conclusion, this is a hearing *de novo* and our role is not to assess the correctness of the Director's Decision, but to hear this matter anew. Our decision in this matter is based solely on the evidence and submissions presented before us at the hearing held on February 21, 2008.

E. The Evidence

(i) The Applicant

[19] The Applicant adduced the following evidence at the hearing:

- An affidavit, sworn February 5, 2008 (the “Affidavit”).
- Two letters from clients, dated March 1, 2004 and March 9, 2007, which attested to the Applicant’s high quality of work and customer service while employed at BMO; and
- A brief of documents, which contained statistics on the Applicant’s sales performance at BMO and copies of his performance reviews.

[20] The Applicant did not take the stand for direct examination. His Affidavit sets out his understanding of the facts in this matter, and we have set out the relevant excerpts of his Affidavit below.

[21] With respect to the Air Miles, the Applicant states:

The [Air Miles] Reward Miles program are cards which [BMO] issues and provides to employees of the bank at various level[s], so that they can use them to provide a “thank you” reward to [BMO] clients who have an [Air Miles] collection card or number as appreciation for their loyalty and business with [BMO]. [BMO] provides the [Air Miles] Reward Miles to the employees and employees distribute the [Air Miles] Reward Miles as they wish and at their own discretion while dealing with a specific customer at the time and they are freely distributed, and there are no specific criteria to be applied in awarding the Reward Miles to customers. (Affidavit, at para. 7)

[22] The Affidavit also states that the Applicant’s wife was a long standing customer of BMO and was issued Air Miles from time to time, by the Applicant and by others. With respect to the Applicant’s wife, the Affidavit states that:

My wife, in particular has maintained throughout the course of time I worked for the Bank of Montreal, personal bank accounts, investment and business accounts, and Master Card accounts on her personal name as well as jointly with me. (Affidavit, at para. 6)

[23] Subsequent to the Applicant’s termination at BMO, the Affidavit states that the Applicant sought new employment and was offered employment with the Investment House of Canada Inc., subject to the transfer of the Applicant’s registration as a mutual funds salesperson. The Applicant states in his Affidavit that:

I have been informed by the management at the Investment House of Canada Inc., that any time I am able to transfer my Mutual Funds

registration, they will be glad to offer me employment. (Affidavit, at para. 20)

[24] However, the Applicant did not provide any documentary evidence from Investment House of Canada Inc. with respect to his job offer, and Investment House of Canada Inc. did not appear at the hearing.

[25] The Affidavit also states that the Applicant has been unable to secure employment due to the fact that his registration as a mutual funds salesperson is not current and in good standing. As a result, the Applicant states that:

There has been tremendous financial pressure and hardship on myself and my family, and in particular my Daughter, as I am unable to continue to work and to provide them with economic security as I used to do before. (Affidavit, Para. 19)

(ii) Staff

(1) Cross-Examination of the Applicant

[26] Staff cross-examined the Applicant on his Affidavit. During cross-examination, the Applicant made the following admissions:

- Each Air Miles coupon was worth 10 Air Miles points;
- The Applicant issued Air Miles coupons to his wife approximately two to three times per week;
- On any given day when the Applicant issued Air Miles to his wife, he would normally complete about two coupons in favour of his wife;
- In the first five months of fiscal year 2007, the Applicant issued 1,230 Air Miles points to his wife (however, the Applicant did not agree with the dollar value attributed to these points);
- It was inappropriate for the Applicant to reward Air Miles to his wife on a discretionary basis for transactions conducted in a joint account when the Applicant was the other holder in the account; and
- It was inappropriate for the Applicant to issue Air Miles to himself through the use of Air Miles coupons during the period of February 28, 2002 to May 21, 2003.

[27] Staff also pointed out during cross-examination that according to BMO, the Applicant's wife did not have substantial business with the bank, as stated in the Applicant's affidavit. Corporate Security at BMO discovered that:

A review of Mrs. Istanbul's finances failed to reveal the supposedly high investments that her husband had offered as the reasons for rewarding Air Miles to her. In fact, it was observed that the majority of her business is at another institution. The totality of her dealings with BMO accounted to nominal-balance joint accounts and zero-balance credit facilities.

[28] The Applicant did not provide any evidence to contradict the findings of BMO Corporate Security.

(2) Staff's Witness

[29] Staff called one witness, Mr. William Lander Crook ("Mr. Crook"), an area manager with BMO in Scarborough. As well, Staff introduced Staff's New Brief of Evidence through this witness.

[30] Staff's New Brief of Evidence contained Policy 420-19 – Customer Service Request/Problem Resolution, dated December 17, 2004 ("BMO Policy 420-19"). Mr. Crook testified that BMO Policy 420-19 governs the use of the Air Miles recovery coupon (the coupon that the Applicant was using to award Air Miles to his wife). BMO Policy 420-19 states that:

The Service Recovery Coupon (formally known as Getting it Right Coupon) is an interactive tool for use with personal/commercial customers in the branch distribution channel. It was developed to:

- encourage employees to thank clients for bringing their problem to our attention
- assure customers that we are committed to ensuring their satisfaction
- compensate them for the inconvenience caused by our error.

[31] Mr. Crook also explained that these coupons were distributed to clients to encourage clients to let the bank know about the problems they were having. Specifically, Mr. Crook stated that:

[...] we want to acknowledge the customer's problem, deal with it, and it's almost like a token of appreciation, acknowledging it, saying we're committed to solving the problem, and then give a token, 10 Air Miles as a credit to their Air Miles collector number.

[32] Mr. Crook also testified that these coupons were made available to all employees, and BMO staff were encouraged to use them when the occasion is correct; however, the coupons were not controlled in any way.

[33] According to Mr. Crook, the coupon governed by BMO Policy 420-19 was never meant to be used to reward clients for business, instead this coupon was meant to reflect that there was a breakdown in service and that the bank wanted to open the door to have the conversation with the client on the service issue so that it can be remedied.

[34] With respect to the Applicant's use of the Air Miles coupons, Mr. Crook testified that an investigation was launched following the discovery of an abnormal amount of Air Miles being awarded to Mrs. Istanbul. An email from Ms. Lynnore Moreno, Team Leader, National Services of BMO ("Moreno") to Ray Abi-Abdallah, the Applicant's Branch Manager, dated March 26, 2007, pointed out that:

I don't know if you are aware that your Branch has been awarding [Air Miles] (offer Code 2REL81 10AMRMS) to one particular customer – Mrs. Annie Istanbul, since 2002. As of today, she had been awarded almost 6,500 [Air Miles]. As the offer code is specifically meant to "to resolve client's problem", this situation raises a red flag the fact that the client's problem has never been resolved since 2002, and has even gone worse to a point where BMO has awarded her 310 [Air Miles] for the month of February, 2007 alone, and 320 for March, 2007 (up to March 22, 2007 only).

[35] Subsequent to this email, Moreno provided data regarding the activity of Mrs. Istanbul's Air Miles collector number, and Corporate Security of BMO launched an investigation into the matter.

[36] Mr. Crook also gave testimony with respect to a memorandum dated April 11, 2007, prepared by Philip Wilson, a Senior Investigator of Corporate Security with BMO. This document described the findings of the investigation, namely:

- The Applicant was awarding an abnormal amount of Air Miles to one particular customer, Mrs. Annie Istanbul, his wife. The investigation revealed that this started in 2002 and to date there had been approximately 6,500 Air Miles awarded to her which equates to approximately \$1,700 from BMO;
- The Applicant admitted to issuing his wife the Air Miles as he believed that these vouchers were to be used for rewarding a good customer with high investments. He stated that he did the same thing for all his top customers. However, when asked to name the other top customers, he couldn't. Mr. Istanbul also advised that many other of the branch staff used these coupons in the same manner;
- A review of Mrs. Istanbul's finances failed to reveal the supposedly "high investments" that her husband had offered as the reasons for awarding Air Miles to her. In fact, it was observed that the majority of her business is at another institution. The totality of her dealings with BMO amounted to nominal balance joint accounts and zero balance credit facilities and an RRSP, with no investments (i.e. no substantial holdings). A \$30K cheque processed to the joint account recently was for an outside investment in a spousal RSP the Applicant made for his wife. We also see payments for VW Credit Canada for his car loan, and pre-authorized monthly investments with Scotia McLeod; and
- A detailed review of all Air Miles problem resolution awards, processed at Kennedy Park Plaza Branch, was conducted for the first five months of fiscal

2007. The Branch issued a total of 1620 Air Miles representing 162 conflict resolutions, of which 1230 Air Miles were awarded to Annie Istanbul, representing 123 conflict resolutions or 76% of all such awards.

[37] This memorandum also recommended that the matter be referred to the Toronto Police, and Mr. Crook testified that to his knowledge, the matter was referred to the Toronto Police.

[38] Also, Mr. Crook prepared a chart to accompany the memorandum, which set out the percentage of Air Miles that were distributed to Mrs. Istanbul from November 2006 to March 2007. The data in this chart revealed that Mrs. Istanbul received:

- 90.0% of Air Miles issued from BMO Branch 423 in November 2006;
- 88.9% of Air Miles issued from BMO Branch 423 in December 2006;
- 60.7% of Air Miles issued from BMO Branch 423 in January 2007;
- 68.5% of Air Miles issued from BMO Branch 423 in February 2007; and
- 81.3% of Air Miles issued from BMO Branch 423 in March 2007.

[39] Mr. Crook also explained that there were 14 other employees at the same branch as the Applicant who would be interacting with clients and have the opportunity to distribute Air Miles coupons; however, the statistics revealed an odd pattern, namely, that a large percentage of the Air Miles (75.9%) were going to one individual, the Applicant's wife.

[40] With respect to the monetary value of the Air Miles misappropriated by the Applicant, Mr. Crook explained that there is a cost to the Air Miles product that gets charged back to BMO; whenever Air Miles are awarded, they are charged out to BMO at around \$0.27 cents per Air Mile. Therefore, 6,500 Air Miles would cost BMO \$1,700.

[41] During cross-examination, counsel for the Applicant asked Mr. Crook some questions about the Applicant's performance at BMO. Mr. Crook explained that he only had peripheral knowledge of the Applicant's performance, as the Applicant did not report directly to him. Further, Mr. Crook explained that the investigation of the Applicant was limited to the Applicant's use of Air Miles coupons and not his performance as a financial planner.

[42] Counsel for the Applicant also asked Mr. Crook to speak to the letters of reference provided by two of the Applicant's clients and to the Applicant's performance rating given to him by his manager, Samuel Chan. With respect to the Applicant's performance rating, Mr. Crook noted that the document gave the Applicant an overall performance rating of "successfully meeting expectations".

[43] Further, during cross-examination, counsel for the Applicant questioned Mr. Crook about the data collected regarding the Air Miles points and the pattern that emerged in the data. Counsel for the Applicant pointed out that on some occasions other clients received more than one Air Miles coupon on a given day. Mr. Crook explained that the fact a client received more than one Air Miles coupon on a given day would not be out of the question; instead, what would be problematic would be a pattern of continual awarding of Air Miles coupons to the same client over a long period of time. Mr. Crook explained that the statistics established a pattern that was not favourable to the Applicant and his wife.

F. Submissions

[44] Both counsel for the Applicant and counsel for Staff gave written and oral submissions.

(i) The Applicant

[45] Counsel for the Applicant submitted that the transfer of the Applicant's registration as a mutual funds salesperson should be granted because, pursuant to subsection 26(1) of the Act, the Applicant fulfills the suitability requirement and the transfer of his registration would not be objectionable. According to counsel for the Applicant, the events which led to the termination of the Applicant's employment do not warrant the refusal of the transfer of the Applicant's registration as a mutual funds salesperson to another employer.

[46] With respect to suitability, counsel for the Applicant submitted that the Applicant has been registered as a mutual funds salesperson since June 30, 1991, and there has never been a client complaint against him. Further, the Applicant is suitable for registration because his performance reviews in his capacity as a financial planner at BMO have consistently been above average, and the issue relating to the misappropriation of Air Miles coupons is not directly related to the Applicant's work as a financial planner and is not related to the capital markets. While counsel for the Applicant admitted that there was inappropriate dealing on behalf of the Applicant at his last place of employment, this conduct was not related to transactions in the markets. The Applicant takes the position that no evidence was submitted to the Commission that indicates that he is a person who cannot be trusted in dealing in the capital markets. In addition, the Applicant conduct relating to the misappropriation of Air Miles did not relate to or affect his clients.

[47] With respect to the Applicant's registration being objectionable, counsel for the Applicant submitted that BMO (or any other third party) never objected to the Applicant's registration. This is evident from a letter written by Betty Davis, Manager, Registration Department of BMO Investments Inc., dated May 3, 2007, which states:

Mr. Istanbul has been terminated from Bank of Montreal. This matter has not been reported to any regulatory agency. The completion of the investigation by Corporate Security reported that the matter may be passed over to the law enforcement agency for possible criminal charges.

[48] According to counsel for the Applicant, the fact that the Applicant acted inappropriately with respect to issuing Air Miles to himself and his spouse is not in itself objectionable. While there has been inappropriate handling of property of the former employer, this is a matter to be dealt with in the employment context by the employer, and the employer did terminate the Applicant. The Applicant takes the position that to revoke registration of the Applicant has a much more significant effect; it takes away the Applicant's livelihood. In the view of the Applicant, one can have issues with his employer, and these issues could be of a criminal or quasi-criminal nature, but they may not relate to the registrant's ability to deal in the capital markets.

[49] Counsel for the Applicant also pointed out that since April 18, 2007, the Applicant has been unemployed since his registration as a mutual funds salesperson was suspended. This suspension is automatic pursuant to subsection 25(2) of the Act. It was submitted by counsel for the Applicant that this Panel take into consideration this suspension and the fact that the Applicant has not been able to earn a livelihood when determining an appropriate course of action in this matter.

(ii) Staff

[50] Staff submitted that section 26 of the Act governs the analysis in this matter. According to Staff, the question for the Panel to determine is whether the Applicant is suitable for registration, or whether his registration is objectionable.

[51] Staff pointed out that the term "suitable" is not defined in the legislation; however, in the recent Commission decision *Re Michalik*, the Commission established that there are three components to suitability, namely, integrity, competency and financial solvency. According to Staff, this matter relates solely to the Applicant's integrity.

[52] Staff take the position that the Applicant lacks the requisite integrity for registration for two main reasons: (1) the nature of his wrongful conduct, including evidence that reveals the Applicant improperly issued Air Miles, which is a misappropriation of BMO's property; and (2) the Applicant failed to provide full, plain and truthful disclosure to Staff regarding his conduct.

[53] With respect to the Applicant's improper conduct, Staff pointed out that the Applicant used the Air Miles coupons for a purpose for which they were not intended. Further, the conduct of the Applicant was not a one-time incident, rather the conduct was repeated, deliberate and prolonged over a period of time from 2002 to 2007.

[54] Staff also emphasized that the Applicant provided the following inaccurate and false information to the Commission:

- The Applicant claimed his wife merited the Air Miles because she had substantial investments; however, no proof of these substantial investments was adduced. The evidence reveals that her holdings are joint accounts with her husband and do not have substantial balances; and

- The Applicant rationalized that his behaviour regarding the misappropriation of Air Miles coupons was acceptable because the Air Miles coupons were not locked up and anyone could have access to them and use them inappropriately, however, the investigation at BMO revealed that no other employees were abusing the Air Miles coupons.

[55] Accordingly, it is Staff's position that the Applicant does not possess the requisite level of integrity to be a registrant. Staff submitted that registration is a privilege and not a right. Further, registrants are put in a position of trust, and the Applicant's conduct with respect to the misappropriation of Air Miles demonstrates that the Applicant is not trustworthy. As a result, Staff request that the Applicant's request to transfer his registration be refused.

G. Analysis

(i) Registration Under the Act

(1) The Purpose of the Registration Regime

[56] As established by section 1.1 of the Act, the purpose of the Act are: (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets. Moreover, the Commission explained in *Re Michalik, supra* that "[when] exercising its discretion to review the decision of a Director, the Commission is required to act in the public interest with due regard to its mandate/purpose under the Act, set out in section 1.1 of the Act" (at para. 44).

[57] As set out in paragraph (iii) of subsection 2.1(1) of the Act, one of the primary means for achieving the purposes of the Act is the requirement "for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants". Maintaining high standards of fitness and business conduct for registrants is important because registrants are in a position where they may potentially harm the public, thus the conduct of registrants is a matter of public interest.

[58] As part of the Commission's public interest mandate, it is the role of the Commission:

to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we

believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. (*Re Mithras Management Ltd.*, (1990), 13 O.S.C.B. 1600 at 1610 and 1611)

(2) The Statutory Framework

[59] Paragraph (a) of subsection 25(1) of the Act creates a requirement for salespersons of securities (such as mutual funds) to be registered:

25. (1) No person or company shall,

(a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer; or

[...]

and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions. R.S.O. 1990, c. S.5, s. 25 (1); 1994, c. 11, s. 359; 1999, c. 9, s. 199.

[60] Registration is a privilege that is granted to individuals and entities that have demonstrated their suitability. The case law confirms that no person has a right to be registered (*Re Kippax* (2003), 26 O.S.C.B. 8205 at para. 2). The Commission emphasized this principle in *Re Trend Capital Services Inc.*:

The regime of securities regulation established by the Act and the Regulations, and discussed in decisions of the Commission and the Courts makes it clear that obtaining registration entitling persons to deal with the public is a privilege and not a right and that this must constantly be borne in mind. (*Re Trend Capital Services Inc.* (1992), 15 O.S.C.B. 1711 at pp. 1764 and 1765)

[61] Since registration is a privilege, the Act contemplates that when the employment of a registrant is terminated, registration is suspended until reinstatement of the registration has been approved by the Director. This is provided for in subsection 25(2) of the Act, which reads as follows:

(2) The *termination of the employment* of a salesperson with a registered dealer shall *operate as a suspension of the registration* of the salesperson until notice in writing has been received by the Director from another registered dealer of the employment of the salesperson by the other registered dealer and the reinstatement of the registration has been approved by the Director. [Emphasis Added]

[62] Therefore, the effect of the Applicant being terminated from his position at BMO is a suspension of his registration as a mutual funds salesperson.

[63] Section 26 of the Act specifies the test that must be applied when determining whether to grant registration. Section 26 of the Act states:

Granting of registration

26. (1) Unless it appears to the Director that the applicant is not suitable for registration, renewal of registration or reinstatement of registration or that the proposed registration, renewal of registration, reinstatement of registration or amendment to registration is objectionable, the Director shall grant registration, renewal of registration, reinstatement of registration or amendment to registration to an applicant.

Terms and conditions

(2) The Director may in his or her discretion restrict a registration by imposing terms and conditions thereon and, without limiting the generality of the foregoing, may restrict the duration of a registration and may restrict the registration to trades in certain securities or a certain class of securities.

Refusal

(3) The Director shall not refuse to grant, renew, reinstate or amend registration or impose terms and conditions thereon without giving the applicant an opportunity to be heard.

[64] According to subsection 26(1) of the Act, registration will be granted unless the applicant is not suitable for registration or the registration is objectionable. In this case, Staff takes the position that the Applicant is not suitable for registration.

(3) Suitability and Integrity

[65] Suitability is not defined in the Act; however, the case law has established that there are three criteria for determining suitability for registration: integrity, proficiency and financial solvency (see *Re Goldman Sachs Asset Management L.P.* (2006), 29 O.S.C.B. 4349 at para. 6; and *Re Hansberger Global Investors Inc.* (2005), 28 O.S.C.B. 6899 at para. 6). In this case, Staff takes the position that the Applicant does not satisfy the criterion of integrity, and is therefore not suitable for registration.

[66] Integrity is not defined in the Act. Staff relied on *Re Wall* (2007), 30 O.S.C.B. 7521, a decision of a Director of the Commission which addresses the issue of integrity. This decision explains that:

OSC staff look at the honesty and the character of the applicant when analyzing integrity. In particular, staff examines the applicant's dealings with clients, compliance with Ontario securities law and other applicable laws and the use of prudent business practices. (*Re Wall, supra* at para. 23)

[67] We accept that conduct related to registrants' activities in matters not related to securities laws may be relevant because it may indicate compromised integrity, particularly where there is a connection between the conduct and the registrant's role and/or position as a securities industry professional.

[68] In our view, an assessment of integrity should also be guided by the criteria set out in paragraph 2.1(1)(iii) of the Act. This provision states that an important principle that the Commission shall consider in pursuing the purposes of the Act is "the maintenance of *high standards of fitness and business conduct* to ensure *honest and responsible conduct* by market participants" [Emphasis added].

(4) Application of Registration Criteria to the Applicant

[69] In order to determine whether the Applicant possesses the required integrity we must consider the principles stated above.

[70] We acknowledge that the conduct of the Applicant did not affect his clients, and it is not alleged that he breached Ontario securities law. Specifically, it is clear that no clients were harmed by his conduct with respect to the misappropriation of Air Miles. We also acknowledge that in his role as a mutual funds salesperson, the Applicant received favourable performance reviews and there was no evidence of any client problems or complaints.

[71] What is at issue is whether the Applicant's breach of trust and dishonesty demonstrates a standard of business conduct that is below the level required of a securities industry professional.

[72] This is not the case of an isolated inappropriate act. The evidence shows that: (1) the Applicant misappropriated property of his employer (the Air Miles coupons) from 2002 to 2007; (2) the Applicant only returned 2,400 Air Miles to BMO; (3) the remaining 4,100 Air Miles were already used and the Applicant did not reimburse BMO for these Air Miles. We also find that the Applicant was not always honest and cooperative in his disclosure to BMO. For example, the Applicant claimed that all other BMO employees were using the Air Miles coupons in the same fashion, and that his wife had substantial holdings with BMO; however, the evidence presented did not support this. Further, the Applicant stated that he treated all his clients similarly and distributed the Air Miles coupons to all clients that merited them. However, the evidence showed that the Applicant only issued Air Miles coupons on a regular and repeated basis to his wife.

[73] There is also a self-dealing aspect to the Applicant's conduct. By improperly issuing Air Miles to his wife, the Applicant engaged in conduct that benefited not only his spouse but also himself. Further we note that during the period from 2002 to 2007 the

Applicant also issued Air Miles directly to himself. The Applicant justified the issuance of Air Miles coupons to his wife on the basis that she had significant holdings with the bank; however, four out of the five accounts in question were held jointly by the Applicant and his wife. Thus, the Applicant as a joint holder of four of the accounts knowingly benefited. This aspect of his conduct is troubling to us because registrants should be able to identify and avoid conflicts of interest that result from a non-arm's length relationship.

[74] We find there is a connection between the conduct of the Applicant and the position that he held with BMO. It was as a registrant employed by BMO that he was given access to the Air Miles coupons to use at his discretion with clients. He abused this trust and misappropriated Air Miles for his own and his wife's benefit.

[75] We also have concerns regarding the Applicant's truthfulness in his disclosure and cooperation with Staff. While inadvertent non-disclosure of information to Staff may not, in and of itself, warrant a denial of registration, it is not acceptable for a registrant who was terminated for cause by his employer to not provide Staff with accurate information regarding the circumstances surrounding his termination.

[76] Having found that the Applicant has demonstrated a standard of business conduct below that required of a securities industry professional, we must now assess the proper action to take in this matter. The question before us is, does the conduct of the Applicant give us concern that his future conduct will be detrimental to the integrity of the capital markets?

[77] The case law establishes that we are not here to punish, but to protect the public interest by removing from the capital markets those whose conduct in the future may well be detrimental to the integrity of the capital markets (see *Re Mithras Management Ltd.*, *supra* at 1610 and 1611).

[78] While, terms and conditions may be imposed on a registrant to address specific circumstances, Staff submitted that in this case it would be inappropriate. To support this position, Staff relied on *Re Jaynes* (2000), 23 O.S.C.B. 1543 at 1548, which states:

While terms and conditions restricting registration may be appropriate in a wide variety of circumstances, they should not be used to "shore up" a fundamentally objectionable registration. To do so would be to create the very real risk that a client's interests cannot be effectively served due to the severity and extent of the restrictions imposed.

[79] The Applicant did not ask that terms and conditions be attached to his registration, and in any event, it is our view that it would not be appropriate in this case.

[80] Taking all of the Applicant's conduct into consideration, we find the Applicant lacks the trustworthiness and integrity required of a registrant. We, therefore, find the Applicant is not suitable for registration.

H. Conclusion

[81] For the reasons stated above, it is hereby ordered that the Applicant's request for transfer of his registration as a mutual funds salesperson be denied.

Dated at Toronto on this 27th day of March, 2008

“Wendell S. Wigle”

Wendell S. Wigle, Q.C.

“Carol S. Perry”

Carol S. Perry