

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

AND

**IN THE MATTER OF
JAIME ARLINDO VILAS-BOAS**

DIRECTOR'S DECISION

Background

1. From October 8, 1998 to December 14, 2000, Jaime Arlindo Vilas-Boas (Applicant) was registered as a salesperson of Merrill Lynch Canada Inc. (Merrill), a dealer in the category of Broker and Investment Dealer. By letter dated October 30, 2001, BMO Mutual Funds (BMO) filed an application for the Applicant as a mutual fund salesperson. The application included a completed Form 4A – Application for Registration as a Mutual Fund Salesperson, fees and other related materials (Application).
2. Upon receipt of the Application, staff of the Registrant Regulation team, Capital Markets Branch, Ontario Securities Commission (OSC) performed routine inquiries and discovered that there were two outstanding Investment Dealers Association (IDA) investigations involving the Applicant.
3. Inquiries made of the IDA staff revealed that the investigations involved a client complaint submitted by Chris and Colleen McNeil (McNeil complaint) and comments made by Merrill on the Applicant's Uniform Termination Notice (UTN).
4. Following receipt of the IDA information, by letters dated January 24, 2002 and February 13, 2002, staff proposed that the Applicant's registration be subject to certain terms and conditions, pending the outcome of the IDA's investigations. The proposed terms and conditions required the filing of a monthly supervision report by the Applicant's supervising officer at BMO and also required that the Applicant sell mutual funds only. The Applicant had two choices. Either consent to the terms and conditions or exercise his right to be heard before the Director. The Applicant did not consent to the imposition of terms and conditions on his registration.
5. By letter dated May 3, 2002, staff advised the Applicant that it had recommended to the Director that his application for registration be denied on the basis that he was not suitable

for registration. The letter states that “It is staff’s opinion that the above facts raise serious concerns about your integrity and trustworthiness as a securities industry professional.”

6. The Applicant has asked for a right to be heard before the Director. The parties agreed to conduct this hearing in writing. In making my decision, I have been provided with the following documents:
 - Written Submissions of Staff (undated), together with Staff Brief of Documents and Staff Brief of Authorities
 - Affidavit of Kathie Lisa Johnston (Johnston) sworn July 18, 2002 (Johnston is an Investigator in the Enforcement department of the IDA)
 - Written Submissions of the Applicant (undated) received by telecopy on August 28, 2002

IDA Investigation

7. The IDA has two principal concerns – the McNeil complaint and the information on the Applicant’s UTN.
8. Although the IDA’s investigation into these matters is not complete and the allegations have not been proven before a disciplinary panel, it is important to understand the IDA’s concerns regarding the Applicants conduct as a registrant. For this reason, the IDA’s concerns will be summarized briefly.
9. The McNeil complaint relates to the Applicant’s involvement in the incorporation and funding of their company, Myotec Inc. By letter to the IDA dated January 17, 2001, the McNeils’ allege, among other things, that the Applicant misled them by stating that Merrill would be involved in the establishment and financing of Myotec. One of the allegations is that the Applicant produced a document on Merrill letterhead entitled “Steps to Going Public”. The document stated that “In this transaction, Merrill Lynch is acting as Financial Advisor and Process Consultant”. Johnston is advised that Merrill did not, in any way, participate in the venture.
10. The Applicant further recommended that the McNeils engage the services of Marvin Winick, who was represented to be a Chartered Accountant, to structure the financial affairs of the company. Johnston is advised that Mr. Winick was expelled from the Institute of Chartered Accountants of Ontario for professional misconduct in 1992. The Applicant advised Johnston that he had failed to verify Winick’s credentials in any way before recommending him.
11. On the strength of the Applicant’s representations, the McNeils engaged Winick and invested over \$85,000 in the venture.
12. In addition, the Applicant appears to have facilitated the sale of shares of Myotec to several individual investors without the benefit of a prospectus, in violation of section 53 of the *Securities Act* (Ontario). It also appears that the Applicant may have engaged in similar conduct with respect to a company called Urban Resorts Inc. (Urban)

13. As well, Johnston was advised by the Applicant's former manager at Merrill that Merrill had conducted an internal investigation of the Applicant's role in the Urban transaction. As a result of this investigation, the Applicant was reprimanded and would have been terminated from Merrill had he not resigned shortly after the reprimand was delivered.
14. The Applicants UTN states that the Applicant "resigned while on suspension from member firm [Merrill] prior to being terminated for cause" and that the Applicant "engaged in unauthorized corporate financing transactions".

Staff submissions

15. The written submissions of OSC staff provide a useful summary of the law in this area and I will provide some of that analysis in this decision.
16. Section 26 of the *Securities Act* provides that:

Granting of Registration – Unless it appears to the Director that the applicant is not suitable for registration... or that proposed registration... is objectionable, the Director shall grant registration... to an applicant.

Terms and Conditions – The Director may in his or her discretion restrict a registration by imposing terms and conditions [which]...may restrict the duration of a registration and may restrict the registration to trades in certain securities or a certain class of securities.

17. Clearly the onus of proof rests with staff of the Commission, who must establish that the registrant is "not suitable for registration" or that the registration is otherwise "objectionable".
18. I was referred to a number of Commission decisions including the *Mithras* and *Charko* decisions that read in part as follows:

... the role of the Commission is 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 doing so 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 OSCB 1600

... the Director must necessarily place a strong reliance on an applicant's past behaviour.

Re Charko, (1992) 15 OSCB 3986

19. I was also referred to various other decisions (listed below) where registrants had demonstrated a lack of understanding of their duties as registrants and whose reinstatement was denied.

Re Ramdhani (2002) 25 OSCB 1745

Re DiCostanzo (2001) 24 OSCB 5307

Re Bushell (2001) 24 OSCB 5669

Re Thatcher (2001) 24 OSCB 631

Re Curia (2000) 23 OSCB 1745

20. Staff also noted that in considering an application for registration from an individual who has failed to act in his clients' best interests, it is appropriate to take into account the principle of general deterrence. As expressed by Director Wolburgh-Jenah in considering the case of Craig Alan Jaynes:

Mr. Jaynes' conduct as a registrant had clear consequences for many of his clients at Marchmont. That such conduct should have little or no consequences for Mr. Jaynes, or indeed others who would follow his example and breach their obligations in like fashion, is inconceivable and wholly inconsistent with the important principle of general deterrence...

Re Jaynes (2000) 23 OSCB 1543

21. The Jaynes decision also notes that "[w]hile 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."

Re Jaynes (2000) 23 OSCB 1543

22. Staff submits that the Applicant should not be registered as a mutual fund salesperson at this time, while serious questions are outstanding concerning his suitability for registration. Staff further argues that evidence gathered by the IDA staff to date provides a strong *prima facie* case that the Applicant has repeatedly breached the *Securities Act* while previously registered as a salesperson. As well, the Applicant's former employer clearly recognized the seriousness of the Applicant's breaches, giving him a written reprimand, and then informing the IDA that the Applicant's employment would have been terminated had the Applicant not resigned.

23. As well, I was advised that the IDA's investigation into the Applicant's conduct is nearly complete, with the matter anticipated to proceed to litigation counsel shortly.

24. Staff therefore requests that the Applicant's application for a registration as a mutual fund salesperson be denied. In the alternative, staff request that the Applicant be registered subject to terms and conditions.

Applicant submissions

25. In his submissions, the Applicant argues that
- staff's position is ill founded in facts and instead relies on feelings, opinions and unsubstantiated allegations;
 - there are no facts that justify staff's opinion that the Applicant is not suitable for registration in accordance with legal standards;
 - "there is absolutely no illustration herein that in the past, the Applicant did not understand his responsibilities, did not live up to his obligations, did not discharge his obligations to act fairly, honestly and good faith with his clients, that he committed any illegal act or legally reprehensible actions or that he acted dishonestly or fraudulently";
 - staff's position is ill founded in law, "constituting on the part of staff, an arbitrary and abusive exercise of its discretionary power of recommendation which is not necessary for the protection of the public interest"; and
 - nothing in staff's written documents (as included in the written materials for this hearing) "would tend to demonstrate that from the Applicant's past and/or present, one should fear for his future behaviour".

Decision

26. On the basis of having reviewed and considered all written submissions provided to me, it is my decision to deny the registration of the Applicant as a mutual fund salesperson. In my opinion, it would be inappropriate to register the Applicant as a mutual fund salesperson while serious questions regarding his past conduct remain outstanding. Further, I think it is clear that the past conduct of the Applicant would lead to the conclusion that his conduct in the future may well be detrimental to the integrity of the capital markets (the *Mithras* test). In the words of the *Mithras* decision, "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...". As well, I was guided by the *Charko* decision and determined that I must place a strong reliance on the Applicant's past behaviour.
27. Further, I determined that it was inappropriate solely to impose terms and conditions on the Applicant's registration. I decided that staff's characterization of the Applicant's conduct (based on evidence gathered by IDA staff to date) provided, in staff's words "a strong *prima facie* case that the applicant has repeatedly breached the *Securities Act* while previously registered". As a result, I did not agree with the Applicant's arguments that staff's position is ill founded in fact or in law nor that it relied on feelings, opinions or unsubstantiated allegations.

28. The Applicant is, however, invited to re-apply for registration as a mutual fund salesperson following the conclusion of the IDA's enforcement proceeding.

September 18, 2002

Marriane Bridge
Manager, Compliance
Capital Markets
Ontario Securities Commission

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