

Decision and Reasons (Penalty)

File Nos. 201042 and 201344



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Gabriele Gentile and Ronald Bruce Brinson

Heard: December 9, 2015 in Halifax, Nova Scotia
Decision and Reasons (Penalty): March 22, 2016

**DECISION AND REASONS
(Penalty)**

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Ann C. Etter	Industry Representative
Darrell Bing	Industry Representative

Appearances:

David Halasz)	For the Mutual Fund Dealers Association of
Lyla Simon)	Canada
)	
Brian K. Awad)	For the Respondents
)	
)	

A. DECISION AND REASONS (MISCONDUCT)

1. By written Decision and Reasons (Misconduct) dated June 26, 2015, we reached the following conclusions:

- (a) In the case of the Respondent, Ronald Bruce Brinson, we find that “Between in or about February 2007 and June 2009, the Respondent, while designated as co-Branch Manager or alternate Branch Manager, received information on at least five occasions that Bruce Schriver, a licensed insurance agent of an affiliate of the Member who conducted business from the location for which the Respondent was the co-Branch Manager or alternate Branch Manager, had borrowed monies from clients and other individuals which he had not repaid, which information the Respondent failed to report to the Member’s head office compliance staff, as a result of which the Member was not made aware of the circumstances and was unable to conduct a reasonable supervisory investigation and take such other supervisory measures as may have been warranted in the circumstances, contrary to MFDA Rule 2.1.1(c).

- (b) In the case of the Gabriele Gentile, we find that “Between in or about February 2007 and June 2009, the Respondent, in his capacity as Branch Manager, received information on at least five occasions that Bruce Schriver, a licensed insurance agent of an affiliate of the Member who conducted business from the branch location supervised by the Respondent, had borrowed monies from clients and other individuals which he had not repaid, which information the Respondent failed to report to the Member’s head office compliance staff, as a result of which the Member was not made aware of the circumstances and was unable to conduct a reasonable supervisory investigation and take such other supervisory measures as may have been warranted in the circumstances, contrary to MFDA Rule 2.1.1(c).

B. HISTORY OF PROCEEDINGS

2. These conclusions were reached by the Hearing Panel after carefully reviewing the extensive documentary and testamentary evidence presented at the Hearing on the Merits, which took place over 12 days in the months of March, July, August and November of 2014. A total of 12 witnesses gave *viva-voce* testimony. 121 Exhibits were tendered. The parties filed written submissions and Books of Authorities and made oral submissions on November 5, 2014.

C. THE POSITION OF THE PARTIES

3. On the issue of appropriate penalty, if any, the parties filed written submissions and Books of Authorities. They made oral submissions to the Hearing Panel on December 9, 2015, in Halifax, Nova Scotia.

4. There was a significant difference of opinion between the parties as to the penalty disposition which we should make in light of all of the relevant circumstances.

5. The position of the MFDA Staff was as follows:

- (a) suspension of the authority of each of the Respondents to conduct securities related business in any capacity for a period in the range of two to three years from the date of the final order herein, pursuant to section 24.1.1(c) of MFDA By-law No. 1;
- (b) permanent prohibition of the authority of each of the Respondents to act as a Branch Manager or in any other supervisory capacity from the date of the final order herein, pursuant to section 24.1.1(f) of MFDA By-law No. 1;
- (c) fine in the amount of \$100,000.00 payable by each of the Respondents pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- (d) an amount for costs as set out in Staff's bill of costs, which totaled \$43,935.00.

6. In contradistinction, the Respondents submitted that the Hearing Panel's Decision and Reasons on Misconduct constituted sufficient warning to the industry in this unusual and

unprecedented case. They submitted that it would undermine “the purposes of the MFDA – in particular, the need for the MFDA to have a fair and balanced disciplinary process” – if any sanctions at all were to be imposed on the Respondents.

D. THE LAW

7. The parties, while not *ad idem*, did not differ widely on the applicable law. Rather, the divergence in their positions came in how they each submitted that the law was to be applied to the particular facts as found by the Hearing Panel in its Misconduct Decision.

8. It is trite law that the primary goal of securities regulation is the protection of investors. Related goals include ensuring efficient capital markets and public confidence in the investment industry. A Hearing Panel should seek to achieve these goals in the imposition of penalties in the case before it.

9. Numerous MFDA panels have set out a number of factors which should be considered when determining an appropriate penalty. These include:

- (a) the seriousness of the allegations proved against the Respondent;
- (b) the Respondent's past conduct, including prior sanctions;
- (c) the Respondent's experience and level of activity in the capital markets;
- (d) whether the Respondent recognizes the seriousness of the improper activity;
- (e) the harm suffered by investors as a result of the Respondent's activities;
- (f) the benefits received by the Respondent as a result of the improper activity;
- (g) the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- (h) the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- (i) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;

- (j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- (j) previous decisions made in similar circumstances.

Stephen Headley (Re), 2006 LNCMFDA 3 at para. 85.

10. We agree with the parties that the Hearing Panel, in exercising its discretion, should consider both general and specific deterrence.

11. The parties both recommended that the Hearing Panel should have reference to the MFDA Penalty Guidelines. These Guidelines are not binding on the Hearing Panel but are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances. The Guidelines specifically provide that a Hearing Panel, in appropriate circumstances, may impose no penalty at all.

E. ANALYSIS

12. In our view, it is critical, in assessing the appropriate penalty, that the Hearing Panel must not only look at the actions of the Respondents but also at the Respondents themselves.

13. According to the evidence presented, the Respondent Brinson has worked in the mutual fund industry since 1977. The Allegations related to a period commencing in 2007 and ending in 2009.

14. There has been no suggestion that Mr. Brinson, apart from the matters which we considered, has ever had any difficulties with either the MFDA or any other relevant regulatory authority, up to and including the date of the closing submissions on Penalty, a period of approximately 38 years. In our view, that is a powerful mitigating factor.

15. The Respondent Gentile has likewise had a long and, with the current exception, unblemished career, having started in the mutual fund industry in 1989.

16. In its closing Submissions, Staff indicated that, while both Respondents were owners/operators of the Mumford Road Branch, pursuant to a franchise agreement in operation at the material time, currently they are no longer registered as Branch Managers and do not have an ownership interest in the said Branch.

17. We agree with a number of the Penalty Submissions made on behalf of the Respondents:

- (a) In view of our finding that Mr. Brinson's obligations were the same as those of Mr. Gentile, any sanction imposed should apply equally to both Respondents.
- (b) The fact that the Respondents advanced a defence is not an aggravating factor for purposes of determining the appropriate sanction.
- (c) The Respondents co-operated with the MFDA throughout both the investigation and the prosecution.
- (d) The defence was conducted in a respectful and efficient manner.
- (e) The defence advanced did not lack any insights into the relevant issues of the case.
- (f) The Respondents displayed a recognition as to the existence or importance of the obligations of branch managers generally.
- (g) While our Decision on Misconduct found that the Respondents failed in their duties and obligations to further investigate or report to head office certain information that they received over a period of time, relating to Bruce Schriver, it is our view that the impact which this lengthy Hearing process has had and will have on the Respondents gives us confidence that there is very little likelihood that either of them will re-offend.

18. Consequently, in any penalty which we impose, we do not feel that there is any necessity for either or both of the Respondents to write or re-write any industry courses, as suggested by the Penalty Guidelines.

19. The only exception would be if, at any time in the future, either or both of the Respondents seek to resume the position of Branch Manager, before doing so, they will be required to successfully complete the appropriate Branch Managers' Examination Course in existence at the material time.

20. We do not feel that this is a case which calls for a permanent prohibition of the authority of either of the Respondents to act as a Branch Manager or in any other supervisory capacity, as suggested by Staff.

21. We do agree with Staff that general deterrence is often the primary consideration in regulatory matters.

22. As the Supreme Court of Canada stated in Re Cartaway Resources Corp., [2004] 1 S.C.R. 672 at paras 60 and 62:

“. . . it is reasonable to view general deterrence as an appropriate, and, perhaps necessary, consideration in making orders that are both protective and preventative. . . . It may well be that the regulation of market behaviour only works effectively when securities commissions impose ex-post sanctions that deter forward-looking market participants from engaging in similar wrongdoing.”

23. The Respondents argued that in some cases "there may be a quantifiable economic incentive not to comply with requirements. In such cases, the regulatory sanction can be set rationally and justifiably at a level that negates that incentive (and, thus, serves the purpose of generally deterring non-compliance.)”

24. As there is no measure of profit to guide this Hearing Panel in the case before us, it was submitted by the Respondents that we should follow the general guideline set down by the Ontario Court of Appeal in the case of R. v Cotton Felts Ltd. (1982) O.J. No. 178 at para. 22:

“Without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated.”

25. We carefully considered whether it would be appropriate, in all of the circumstances of this case, to impose a period of suspension on the Respondents as requested by Staff.

26. We do not feel that such a suspension is required for purposes of specific deterrence.

27. With respect to general deterrence, we would have been inclined to impose a period of suspension but for the numerous mitigating factors, listed above, specific to the two Respondents before us.

28. Consequently, we have unanimously concluded that a period of suspension is not warranted.

F. DECISION

29. The Penalty Guidelines suggest a minimum fine of \$5,000.00 for a breach of Rule 2.1.1.

30. After a careful review of all of the facts and circumstances of this case, and being especially mindful of the need for general deterrence, we have concluded that each of the Respondents should pay a fine of \$10,000.00.

31. We also think it is appropriate that each of the Respondents be given a period of 1 year from the date of the release of this Decision and Reasons to pay the fine.

G. COSTS

32. Section 24.2 of MFDA By-law No. 1 provides as follows:

“A Hearing Panel may in any case in its discretion require that the Member or Approved Person pay the whole or part of the costs of the proceedings before the Hearing Panel pursuant to Section 20 and Section 24.1 or Section. 24.3 and any investigations relating thereto.”

33. There is no authority granted to a Hearing Panel to award costs to the Respondents.

34. Staff sought costs in the amount of \$43,935.00. A Cost Summary detailing how this figure was arrived was filed with the Hearing Panel.

35. Staff submitted that this was less than the full amount of the costs. An award in this amount would permit the MFDA to recover a portion of the costs attributable to conducting the investigation and the Hearing, such that the costs do not have to be borne entirely by the MFDA or subsidized by those Members or Approved Persons who did not engage in the type of activity which the Hearing Panel had concluded the Respondents had engaged in.

36. The Respondents were adamantly opposed to the Hearing Panel making any cost award. Their submissions included, *inter alia*, the following:

- (a) The Amended Notice of Hearing contained Allegations that each of the Respondents had acted contrary to MFDA Rules 2.5.3(b), 2.1.1(c) and MFDA Policy No. 3. The Hearing Panel only found a breach of Rule 2.1.1(c). Consequently, if permitted, the Respondents would have sought costs. As By-law No. 1 does not permit this, the only fair and equitable result is an order of no costs.
- (b) It could and should have been a simple proceeding. The Hearing was 3 to 4 times longer than it needed to be. Staff chose to call a parade of witnesses who had loaned money to Schriver. This testimony was never contested by the Respondents and, in their view, was irrelevant.
- (c) Staff brought a series of Motions which tended to lengthen the proceedings.
- (d) The costs to the Respondents have been huge, but the By-law does not permit them to seek recovery of even a portion of those costs.

37. The awarding of costs is discretionary. After a lengthy reflection, we have decided that, in the particular circumstances of this case, the most just and equitable decision would be to make no Order as to Costs.

H. ORDER

38. We hereby make the following Order:

- (a) Should either or both of the Respondents, at any time in the future, seek to hold the position of Branch Manager, before doing so they will be required to successfully pass the then current Branch Managers' Examination Course.
- (b) The Respondents shall each pay a fine of \$10,000.00 such fine shall be paid within one (1) calendar year from the date of this Decision.
- (c) There shall be no Order as to Costs.

DATED this 22nd day of March, 2016.

"Thomas J. Lockwood"

Thomas J. Lockwood, Q.C.
Chair

"Ann C. Etter"

Ann C. Etter
Industry Representative

"Darrell Bing"

Darrell Bing
Industry Representative

DM 472524 v1