



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

**IN THE MATTER OF A SETTLEMENT HEARING  
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF  
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

**Re: Heather Nicola Churchill**

Heard: May 28, 2018 in Toronto, Ontario

Decision: June 14, 2018

Reasons for Decision: July 20, 2018

**REASONS FOR DECISION**

Hearing Panel of the Central Regional Council:

John Lorn McDougall, QC  
Guenther W.K. Kleberg  
Kenneth P. Mann

Chair  
Industry Representative  
Industry Representative

Appearances:

Paul Blasiak	)	Counsel for the Mutual Fund Dealers
	)	Association of Canada
	)	
	)	
Heather Nicola Churchill	)	Respondent, by teleconference
	)	
	)	

## **I. Introduction**

1. By Notice of Hearing dated February 18, 2018, the Mutual Fund Dealers Association of Canada (“MFDA”) alleged misconduct against Heather Nicola Churchill (“Respondent”).

2. The Notice of Hearing called for a first appearance before a hearing panel of the Central Regional Council (“Hearing Panel”) of the MFDA on April 25, 2018, at 9:30 am. On that date the date for a hearing on the merits was set for May 28, 2018, at 10:00 am.

3. The Notice of Hearing sets out the following allegations of violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: On April 4, 2016, the Respondent processed two switches totaling approximately \$297,407.35 in the investment accounts of client JB without the knowledge or authorization of the client, thereby engaging in unauthorized discretionary trading, contrary to MFDA Rules 2.3.1(a) and 2.1.1, and the policies and procedures of the Member.

Allegation #2: On or about April 5, 2016, the Respondent falsely reported to her Branch Manager, in response to the Branch Manager’s supervisory inquiries, that client JB had authorized two switches totaling approximately \$297,407.35 in the investment accounts of client JB, contrary to MFDA Rules 1.1.2, 2.5.1 and 2.1.1.

4. On May 24, 2018, the MFDA announced that Staff of the MFDA and the Respondent had entered into a settlement agreement dated May 20, 2018, (“Settlement Agreement”) and that a settlement hearing would take place on May 28, 2018, instead of the hearing on the merits.

5. The Respondent admits that:

a) On April 4, 2016, the Respondent processed two switches totaling approximately \$297,407.35 in the investment accounts of client JB without the knowledge or

authorization of the client, thereby engaging in unauthorized discretionary trading, contrary to MFDA Rules 2.3.1 and 2.1.1, and the policies and procedures of the Member; and

- b) On or about April 5, 2016, the Respondent falsely reported to her Branch Manager, in response to the Branch Manager's supervisory inquiries, that client JB had authorized two switches totaling approximately \$297,407.35 in the investment accounts of client JB, contrary to MFDA Rule 2.1.1.

6. Staff and the Respondent agreed to terms and conditions of the settlement and the Respondent has consented to the making of an order against her as follows:

- a) the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of one year commencing from the date of the Hearing Panel's final Order herein, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- b) the Respondent shall in the future comply with MFDA Rules 2.3.1 and 2.1.1; and
- c) the Respondent will attend by teleconference on the date set for the Settlement Hearing.

#### **I. SETTLEMENT AGREEMENT AND AGREED FACTS**

7. The additional portions of the Settlement Agreement which are relevant to these Reason for Decision are as follows:

#### **IV. AGREED FACTS**

##### **Registration History**

6. The Respondent was registered as a mutual fund salesperson (now known as a dealing representative) in Ontario from December 8, 2014 to September 14, 2016, and in Quebec from April 28, 2015 to September 14, 2016, with Scotia Securities Inc. ("Scotia"), a Member of the MFDA.

7. From September 3, 2014 to October 20, 2014, and from November 2, 2004 to March 20, 2009, the Respondent was registered as a mutual fund salesperson in Ontario with PFSL Investments Canada Ltd., a Member of the MFDA.

8. From March 24, 2010 to June 29, 2013, and from June 21, 1999 to August 14, 2004, the Respondent was registered as a mutual fund salesperson in Ontario with TD Investment Services Inc., a Member of the MFDA, and its predecessors TD Asset Management Inc. and CT Investment Management Group.

9. At all material times, the Respondent conducted business in the greater Ottawa region.

### **Misconduct**

11. Scotia's PPM [Policies and Procedures Manual] also stipulated that customer instructions must be received at the time of the trade, and that when taking telephone trade instructions from a client the Approved Person must document those instructions by recording the following information on an Investment Directions account form:

- a) the time and date when instructions were obtained;
- b) the name of the person providing the instructions;
- c) the transaction type – purchase, redemption, switch, other;
- d) the fund name;
- e) the dollar amount or number of units;
- f) a summary of any discussions with the customer, including any MRF/Personal Banking Advisor/Small Business Banking Advisor recommendation, regardless of whether the customer acted on the recommendation and any alternatives discussed; and
- g) for mutual fund purchases, transfers and switches, the check boxes on the Investment Directions form must be completed to confirm the required verbal disclosures have been made, understood and acknowledged by the customer.

12. On April 1, 2016, the Respondent met with client JB to review the status of client JB's Registered Retirement Savings Plan ("RRSP") and Tax Free Savings Account ("TFSA").

13. During the meeting, client JB informed the Respondent that he intended to retire in approximately two to three years. The Respondent updated the Know-Your-Client form ("KYC Form") that Scotia had on file for client JB's RRSP to reflect this new information and a change in client JB's investment objectives. The Respondent also completed a new KYC Form for client JB's TFSA but no changes were made to the investment objectives listed for client JB's TFSA.

14. The Respondent and client JB also discussed changes to the current account holdings for both his RRSP and TFSA as a result of client JB's intention to retire in the near future. The Respondent provided client JB with documentation relating to certain investments for client JB to consider. However, client JB did not agree to make any changes to the holdings in either of his accounts.

15. On April 2, 2016, an "Unsuitable Holdings Report" (the "Report") was generated by Scotia's compliance monitoring systems for client JB's RRSP account because the holdings in his portfolio were not consistent with client JB's updated KYC information and the exiting account holdings were therefore flagged as unsuitable.

16. After observing the Report, Branch Manager MM discussed options with the Respondent for addressing the suitability concerns that had been flagged in client JB's RRSP account, and directed her to contact client JB to review those options and obtain instructions.

17. On April 4, 2016, the Respondent disregarded the directive that she had received from Branch Manager MM and processed switches in client JB's RRSP and his TFSA prior to obtaining any instructions from client JB.

18. Prior to the switches being completed by the Respondent, the only product held by client JB in both his RRSP and his TFSA was the Scotia Diversified Monthly Income Fund, a medium risk fund. The Respondent switched the entirety of client JB's RRSP holdings, approximately \$269,505.15, to the Scotia Innova Balanced Income Portfolio Fund, a low risk fund. The Respondent switched the entirety of client JB's TFSA holdings, approximately \$27,902.20, to the Scotia Partners Growth Portfolio Fund, a medium risk fund.

19. The switch that the Respondent processed in client JB's RRSP account addressed the suitability concerns described above that had been flagged in the RRSP account.

20. In order to process the switch trades, the Respondent signed and submitted Investment Directions account forms that falsely indicated that, at 1:00 PM on April 4, 2016, the Respondent had discussed and obtained instructions from client JB to proceed with the switch transactions requested on the forms.

21. The Respondent informed client JB that the switches had been processed in his accounts by leaving him a voicemail message. Client JB did not receive the voicemail message that day.

22. On or about April 5, 2016, the Respondent falsely reported to Branch Manager MM that client JB had decided to change the composition of his portfolio by switching his existing holdings.

23. On April 11, 2016, client JB contacted the Respondent and requested that the transactions be reversed as he had not authorized the switches processed in his RRSP and TFSA.

24. On the same day, the Respondent prepared and submitted an "SSI Dealer Account Investment Adjustment Request" ("Adjustment Request Form") to reverse the switches

that had been processed in client JB's accounts. On the Adjustment Request Form, the Respondent indicated that the reason for processing the adjustment transaction was to reverse a "switch without client consent".

25. On or about April 12, 2016, client JB advised staff of Scotia that he had not authorized the switches processed in his RRSP and TFSA. Scotia reversed the switches in May 2016.

## **II. FURTHER AGREED FACTS**

8. Section 24.4 of By-law No. 1 governs hearing panels considering whether to accept or reject settlement agreements. Rule 15 of the MFDA Rules of Procedure contains the procedural rules for settlement hearings. Rule 15.3 Additional Facts Only to be Disclosed on Consent provides as follows:

### ***15.3 Additional Facts Only to be Disclosed on Consent***

(1) The Hearing Panel may advise the parties of any additional facts which it considers necessary to assess the settlement but unless the parties consent, any facts which are not contained in the Settlement Agreement shall not be disclosed to the Hearing Panel.

(2) If a Respondent is not present at the settlement hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel.

9. During the course of submissions by Staff, a question was posed by a Hearing Panel member, Mr. Kleberg, with the permission of Staff, to the Respondent who was in attendance by telephone. Ms. Churchill responded at some length but the salient portions of what she said are as follows:

Ms. Churchill: Sure. On Friday I met with the client and did a detailed illustration of how the market works. The client understood the information, and as a result, I proceeded to the KYC questions. So therefore, in my mind, and having the experience, I know he understand [sic] at that point how to answer the questions.

...

The client at that time admitted to me that it is appropriate and to go ahead with the trades. I emailed the client the information we discussed just for his keeping and to go over when he gets home, you know, because we don't have paper in the branch anymore. It's electronic. So I sent him the information.

...

So on Monday when that was initiate – you know, the client, um, holding is out of sync, that was generated. The branch manager called me, and I met him at the step. He said, “Heather, this is generated. You have to fix it.” I said, “Yes, I know.” He goes, “You have two options. You could either get – you could either submit the form that says the customer wants to stay in his holdings, or you could have the customer redo his questionnaire.” I said to the branch manager, “Don't worry about it. We already had the discussion. I will fix it. He wants to, um, switch.” I said, “I'll take care of it.”

So I went back to my office immediately, because I know those things have to be executed immediately. And this was before 4:00 p.m.; it was in the morning. And so I went to the office and, um, made the switch as per the client's instructions going from high risk to a low risk because there was no benefits for me there. I am pro client, I'm a woman of integrity. I made sure I'm going to execute what the client's asking.

...

Never heard from the client until, I can't recall, probably two weeks or three weeks. There was a drop in the market. Um, heard from the client. He wasn't happy. He said, “I did not speak with you the day the trade was made. I did not say yes.” And I never argue with a client because I never do. The Client's always right. I apologized. I said, “I'm sorry, I though that's what you wanted to do. I'm very sorry about that.” And he was upset because his holdings dropped a bit.

10. Upon the completion of Staff's submission, the Respondent was asked if there was anything more she wished to say. The Respondent responded affirmatively and said, in relevant part, the following:

Ms. Churchill: I would like to move on to the processing of the documents. When I processed the trade and I called the customer, Mr. Blasiak is correct, at the end of that form according to Scotiabank – I’ve done over 20 years with TD Bank, which is a little different – very different; clients have to be in front of you. So this is a new world for me where you take instructions.

So what I did, when I called the client and left a message I wrote – um, spoke to the client. At the same time, I documented the time I left a message, so “spoke to client”. Why did I do that? In the Scotia world you can only do two things: the client has to sign or you write “spoke to client”. So in my head, I left a message and I executed what was asked the day prior. So I couldn’t leave a message saying called the client, client didn’t pick up so I left a voicemail. That’s unacceptable.

So hindsight 20/20, I take responsibility for that because technically I didn’t speak to the client. If I had to do it again I would go back to the manual, because the manual clearly says you have to speak with a client but it wasn’t intentional on my part to – there’s no benefit for me there. I thought at that point I was doing what was right, but it doesn’t make it right. I take full responsibility.

11. Staff was asked by the Chair what its position was with respect to the Hearing Panel considering the facts put before it by Ms. Churchill. Mr. Blasiak, Staff counsel said as follows:

The Chair: Well, it’s gone a little further than that. At this point, the Panel needs to know from Mr. Blasiak what his position is.

Mr. Blasiak: In light of that, I agree that the panel can take into consideration what Ms. Churchill has said.

12. The Chair then asked the Respondent whether it was still her wish that the Hearing Panel accept the settlement. She responded as follows:

Ms. Churchill: Yes, sir. I would like to accept – I would like to just get this thing over with and move on with my life. I am fine. I don't think I could go back into this for the next year; I have to get over it. So a year is fine for me. And I did say that to Mr. Blasiak, and I agreed to a year. I cannot do this within a year anyway. I've gone through too much.

13. The Hearing Panel reserved its decision and, following deliberations after receiving supplementary submissions from Staff, decided to accept the Settlement Agreement. An order to that effect was issued on June 14, 2018.

### **III. ANALYSIS AND REASONS**

14. The role of a hearing panel when dealing with an application for the “acceptance” of a settlement agreement is tightly circumscribed. MFDA By-law No.1, s. 24.4.3 provides that a hearing panel may only accept or reject the settlement agreement as presented. No amendments are permitted.

15. A further limitation on the hearing panel is, as described in paragraph 8 above, the limitation to the facts contained in the settlement agreement and any further facts which may be agreed by both parties for consideration by the hearing panel. As set out in the paragraphs above, that is what occurred in this case when the Respondent explained the circumstances that led to this disciplinary proceeding against her.

16. The Hearing Panel was puzzled why, if the Respondent was acting against instructions when she made the switches, she called her client and left a voice message in which she reported that she had made the switches. Staff had no explanation as to the reason she reported to the client; it seems obvious that she must have done so because she thought she had instructions to make the switch. That is what she told us in response to Mr. Kleberg's question.

17. We cannot change the Settlement Agreement. The choice is stark: rejection is the only alternative to acceptance. That is not a realistic choice in this case. Ms. Churchill is, in Staff's own word, “impecunious”. She can't fund a defence to the charges. She didn't consult a lawyer because

she couldn't afford to do so. To reject the Settlement Agreement would simply prolong the agony for the Respondent, as she amply made clear in her evidence quoted in paragraph 12 above.

18. What is important is that, whatever the failings of the Settlement Agreement with respect to the Agreed Facts and our doubts about the accuracy of them, it is not the job of the Hearing Panel to make changes to those facts. We have only to decide whether the penalty falls within the zone of reasonable appropriateness in order to be able to accept it.

19. The Respondent has made it clear that she recognizes that the situation she finds herself in is because she failed to follow the Member's rule that clients must be spoken to directly and that, with 100% hindsight, it was an error not to have done so. Had she done so, this proceeding is unlikely to have been commenced.

20. The Respondent had no motive to make an unauthorized trade, she made nothing out of it, she has cooperated fully with Staff, she has lost her employment and she has been unable to find other employment because of this proceeding. As well, we were told she has health problems which exacerbate her difficulties.

21. The Hearing Panel expressed the view that a one year suspension seemed excessive before we heard from Ms. Churchill. We remain of the view that it is harsh, especially given she had been out of the industry for 14 months at the time of the hearing.

22. The Respondent, however, seemingly was not troubled by a further year out of the industry as we understood her to say that she couldn't go back for a year anyway. That was an important fact for the Hearing Panel and allowed us to find that a reasonable person in the industry with knowledge of all the facts including those from Ms. Churchill at the hearing would find the resolution contained in the Settlement Agreement was reasonable in all the circumstances. We therefore accepted the settlement and signed an order to that effect on June 14, 2018.

**DATED** this 20<sup>th</sup> day of July, 2018.

“John Lorn McDougall”

John Lorn McDougall, QC  
Chair

“Guenther W.K. Kleberg”

Guenther W.K. Kleberg  
Industry Representative

“Kenneth P. Mann”

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