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: David Hamilton Cudmore

Heard: May 3, 2018 in Charlottetown, Prince Edward Island
Decision: May 3, 2018
Reasons for Decision: June 13, 2018

REASONS FOR DECISION

Hearing Panel of the Atlantic Regional Council:

R. Scott Peacock	Chair
Patrick Galarneau	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

Michelle Pong	)	Counsel for the Mutual Fund Dealers Association of Canada
David Hamilton Cudmore	)	Respondent, not in attendance or represented by counsel

The Proceedings

1. This matter came before the Mutual Fund Dealers Association of Canada ("MFDA") Atlantic Regional Council by virtue of a Notice of Hearing alleging David Hamilton Cudmore ("Respondent") did:

> "Allegation # 1: Commencing on October 26, 2015, the Respondent failed to cooperate with an investigation into his activities conducted by Staff of the MFDA, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1"

2. The Notice of Hearing was issued on July 4, 2017, setting forth the allegation. The first appearance in this matter was held on the August 17, 2017. The hearing on the merits was set at that appearance for May 3, 2018 in Charlottetown, Prince Edward Island. An order was issued setting the merits hearing for that date.

3. The Respondent was personally served on September 28, 2017 with a copy of the order. Enforcement Counsel submitted for identification and tendered exhibits 1 through 5 respectively: the Notice of Hearing, the Affidavit of Service, the Affidavit of Camille LeBlanc, the Affidavit of J. Gallimore and correspondence of J. Wallace. No reply was filed by the Respondent in accordance with MFDA Rule of Procedure 8.

4. The panel was satisfied that service was made upon the Respondent in accordance with the Rules and the principles of natural justice. The Respondent did not appear, nor was he represented at the hearing. MFDA Rules of Procedure 7.3, 8.3 and 8.4 make specific provision for the conduct of a hearing where no Reply has been filed in accordance with the Rules of Procedure:

> "7.3 Failure to Attend Hearing
>
> (1) Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:
>
> a) proceed with the hearing without further notice to and in the absence of the Respondent; and

b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in section 24.1 and 24.2 respectively of MFDA By-law No. 1."

"8.3 Acceptance of Facts and Conclusions

(1) A Hearing Panel may accept as proven any facts alleged or conclusions drawn by the Corporation in the Notice of Hearing that the Respondent does not specifically deny in the Reply in accordance with Rule 8.2(1)(a)(ii) and (iii).

"8.4 Effect of Failure to Deliver a Proper Reply (in Part)

(1) Where a Respondent fails to serve and file a Reply in accordance with the requirements of Rules 8.1 and 8.2, the Hearing Panel may do any one or more of the following:

a) proceed with the hearing without further notice to and in the absence of the Respondent:
b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 an d 24.2 respectively of MFDA By-law No. 1; …"

Findings of the Panel

5. The panel accepted the facts and conclusions alleged in the Notice of Hearing as proven in accordance with the MFDA Rules of Procedure after considering the Notice of Hearing, having heard the submissions of Enforcement Counsel and considered the exhibits tendered. No reply or submissions were received from the Respondent who did not attend, nor was he represented.

6. The panel was satisfied that the facts and conclusions accepted as proven in the Notice of Hearing established that the Respondent failed to cooperate with an investigation under By-law No. 1 s. 21 as required by section 22.1. Further the panel was satisfied that the failure to cooperate constituted a breach of the required Standard of Conduct set forth in MFDA Rule 2.2.1.

7. The privilege of operating in a regulated securities industry requires that each participant conduct themselves in a manner that is in the public interest. Although not a true fiduciary standard, the Approved Person must expect to be held to higher standard. That required standard does not allow nor contemplate conduct that would cause investors and the general public to question the integrity of the Approved Person or Member of the MFDA. By failing to cooperate and ignoring

repeated communications from Enforcement Staff the Respondent demonstrated a disregard for the obligations he had undertaken by virtue of his membership and registration as an Approved Person. Such a demonstration is in the opinion of the panel a clear breach of the high standard and ethical conduct of business, conduct unbecoming and contrary to the public interest. It is evidence of an unwillingness to be regulated in accordance with industry practice and standards. The Respondent's conduct was detrimental to the public and industry interest.

Penalty

8. The panel heard submissions from Enforcement Counsel in respect to an appropriate penalty and disposition for this matter. The panel considered the precedents cited and provided by Enforcement Counsel in her Book of Authorities. Enforcement Counsel cited prior cases which held that failure to cooperate was serious misconduct.[1] Enforcement Counsel proposed a permanent prohibition pursuant to By-law No.1 s. 24.1.1(e), a fine in the amount of at least $75,000 pursuant to By-law No. 1 s. 24.1.1(b) and costs in the amount of $7,500 pursuant to By-law No. 1 s. 24.2.

9. The MFDA Penalty Guidelines provide comment in respect to some of the key issues to be considered in determining an appropriate penalty in consideration of all of the proven or accepted facts and allegations. The Penalty Guidelines provide:

> 1. Whether the contravention was intentional or inadvertent.
> 2. Whether there was complete or only partial non-compliance.
> 3. The impact of non-compliance on the investigation.
> 4. Whether the Respondent can demonstrate that the refusal to cooperate was based on reasonable reliance on competent legal advice.

On the facts of this mater, the panel finds that the complete failure of the Respondent to communicate with Staff is an intentional act. Further, the intentional act was complete non-compliance. The Respondent's non-compliance prevented Enforcement Staff from determining the full extent and nature of the Respondent's business dealings with investors who had entrusted investment funds to him. There was no evidence presented in respect to any legal advice that may

[1] Book of Authorities, page 4 para.10

have been received by the Respondent. Having made these findings the panel concluded that the failure to cooperate constitutes serious misconduct which directly impacts the efficacy and integrity of the capital markets, investor confidence and the public interest.

10. The concept of protection of the investor, capital market efficacy and public interest were recognized by Iacobucci J. in *Pezim v British Columbia Superintendent of Brokers*[2]. When deliberating in respect to an appropriate penalty the panel must consider not only whether the penalty is sufficient to deter the individual Respondent, but also will it deter likeminded market participants in the same circumstances. The issue of general deterrence was considered in the case of *Re: Cartaway Resources Corp.*[3] where LeBel J. stated in part:

> " … it is reasonable to view general deterrence as an appropriate and perhaps necessary consideration in making orders that are both protective and punitive. …"

11. The panel considered the minimum penalty submission by Enforcement Counsel of $75,000 for failure to cooperate, and considered it to be an appropriate minimum without considering other aggravating factors. Considering the accepted facts in this matter, the failure to cooperate and breach of the standard of conduct, that figure was not considered to be adequate to provide both general and specific deterrence. The panel decided that the amount of $125,000 was appropriate.

12. The panel considered Enforcement Counsel's submission that the Respondent should pay costs pursuant to By-law No. 1 s. 24.2 in the amount of $7,500. If the panel would have had the benefit of a detailed submission on the actual costs incurred in the proceeding and investigation in the form of a bill of costs or similar submission, the panel could have made an informed decision on the portion of those costs, whether in whole or part, that the Respondent should be required to pay. Having only the submission requesting $7,500 the panel had no further information to evaluate the costs submission. The panel is of the opinion that $7,500 was a minimum amount for costs recovery.

[2] [1994] 2 SCR 537 para 59
[3] [2004] 1 SCR 672 para. 60 and 61

13. Having considered the facts as accepted from the Notice of Hearing and the precedents referred to the panel by Enforcement Counsel the panel finds and orders that:

a) The Respondent is permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any Member of the Mutual Fund Dealers Association of Canada pursuant to By-law No.1 s.24.1.1(e);

b) The Respondent shall pay a fine in the amount of $ 125,000 to the Mutual Fund Dealers Association of Canada pursuant to By-law No. 1 s. 24.1.1(b);

c) The Respondent shall pay costs to the Mutual Fund Dealers Association of Canada in the amount of $ 7,500.

DATED this 13th day of June, 2018.

"R. Scott Peacock"

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Chair

"Patrick Galarneau"

Patrick Galarneau
Industry Representative

"Guenther W. K. Kleberg"

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