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: Frank Harrison Dew

Heard: April 19, 2018 in Charlottetown, Prince Edward Island
Decision: April 19, 2018
Reasons for Decision: July 23, 2018

REASONS FOR DECISION

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, QC	Chair
Darrell Bing	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

Michelle Pong	)	Counsel for the Mutual Fund Dealers Association of Canada
Frank Harrison Dew	)	Respondent, not in attendance or represented by counsel

A. The Allegations

1. By Notice of Hearing, dated the July 4, 2017, the Mutual Fund Dealers Association of Canada ("MFDA") made the following Allegations against Frank Harrison Dew ("Respondent"):

> Allegation # 1: Between January 16, 2012 and June 24, 2015, the Respondent misappropriated $37,000 received from two clients, thereby failing to deal fairly, honestly and in good faith with clients and engaging in conduct unbecoming and detrimental to the public interest, contrary to MFDA Rule 2.1.1.
>
> Allegation #2: Commencing on September 24, 2015, the Respondent failed to co-operate 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.

B. Service

2. The Notice of Hearing provided for a First Appearance by teleconference on August 10, 2017.

3. On July 25, 2017, the Respondent was personally served with, *inter alia*, the Notice of Hearing, as appears by the Affidavit of Service of Douglas A. Williams, Commissioner of the Supreme Court of Nova Scotia, sworn July 31, 2017.

C. First appearance

4. At the First Appearance before a Hearing Panel of the Atlantic Regional Council, the Respondent was represented by Counsel.

5. After hearing submissions from both Counsel for Staff of the MFDA ("Staff") and the Respondent, an Order was made with respect to scheduling and other procedural matters. This Order provided, *inter alia*, that the Hearing on the Merits would proceed on April 19, 2018, at 10:00 a.m., in Charlottetown, Prince Edward Island.

D. Reply

6. On September 22, 2017, the Respondent delivered his Reply in accordance with the Order of August 10, 2017. The Reply was marked as Exhibit 3 at the Hearing on the Merits.

7. In his Reply, the Respondent admitted "the facts alleged and conclusions drawn" in the Notice of Hearing.

8. Although admitting that it was not a defence to Allegation #2, the Respondent stated that he did not provide an interview to Staff as he was aware that the Charlottetown Police Services were conducting a simultaneous criminal investigation and he believed that the contents of any interview would be subject to seizure by the police.

9. In his Reply, the Respondent further stated that, on April 13, 2017, he pled guilty to criminal charges which were the consequence of the police investigation. On June 21, 2017, the Respondent was sentenced to 54 months in a federal penitentiary.

E. Hearing on the Merits

10. On April 19, 2018, neither the Respondent, nor anyone on his behalf, attended at the Hearing on the Merits. We were advised that the Respondent was not able to attend the Hearing as he was in prison.

11. As the Respondent had been personally served with the Notice of Hearing, had appeared by Counsel at the First Appearance when the date for the Hearing on the Merits was established and had, subsequently, filed a Reply to the Allegations, we determined to proceed with the Hearing on the Merits.

F. Manner of Proceeding

12. Rule 13.5 of the MFDA Rules of Procedure provides as follows:

> "(1) Where a Respondent, having been served with a Notice of Hearing, fails to attend the hearing of the proceedings on its merits, the Hearing Panel may proceed in accordance with Rule 7.3."

13. Rule 7.3 provides that 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 sections 24.1 and 24.2 respectively of MFDA By-law No. 1."

14. The Hearing Panel advised Staff that it was prepared to proceed with the Hearing on the Merits in the absence of the Respondent but that it wanted the Allegations to be proven by means of admissible evidence.

G. Evidence

15. In addition to the admissions contained in the Respondent's Reply, Staff presented *viva voce* and documentary evidence from John James Gallimore ("Gallimore").

16. Gallimore is a Senior Investigator with the MFDA. He conducted the investigation into the activities of the Respondent.

17. Gallimore swore an Affidavit, which was marked as Exhibit 4 at the Hearing on the Merits.

18. Attached to the Gallimore Affidavit was a 52 Count Information relating to the Respondent, along with an Agreed Statement of Facts executed by the Respondent.

19. According to the Agreed Statement of Facts, the Respondent and his co-conspirator misappropriated funds and manipulated their own compensation in the following ways:

a) The Respondent and his co-conspirator created false investment statements for clients to demonstrate the application of their funds and the performance of those funds entrusted. Some client addresses were changed to post boxes that were controlled by the Respondent so the client would never see the actual statements from the financial institutions.

b) The Respondent and his co-conspirator submitted new applications for new life insurance policies for clients and allowed other life insurance policies to lapse to generate additional commissions for the Respondent. The clients would be aware of the new applications for life insurance but would be unaware that the existing life insurance policies were lapsed.

c) The Respondent and his co-conspirator received cheques from clients, on the understanding that the funds would be deposited to their existing insurance policies or investment products. The funds were instead deposited into a bank account controlled by the Respondent.

d) The Respondent and his co-conspirator received cheques from clients, on the understanding that the funds would be used to purchase investment products, but instead the Respondent and his co-conspirator submitted the funds to London Life Insurance Company ("London Life") to be applied to premiums for life insurance policies which enabled the Respondent and his co-conspirator to obtain commissions.

e) Withdrawals from investment products were used to fund premiums for life insurance policies without the client's knowledge in order for the Respondent and his co-conspirator to obtain commissions.

f) Clients were told that they were purchasing a policy with an annual premium of a certain number of dollars when, in fact, the amount was only a monthly premium. Clients' addresses were changed to the Respondent's office address so the clients would be unaware of the true circumstances of their policies.

g) In some cases, the Respondent and his co-conspirator changed the premium value of a client's life insurance policy to increase the commission paid.

h) In some cases, clients purchased life insurance policies and were told that the policy would be self-supporting, with coverage continuing with only a few premium payments required.

In total, the Respondent and his co-conspirator defrauded their clients of $2,911,076.64. London Life has fully indemnified the clients for the amounts that were misappropriated by the Respondent and his co-conspirator.

20. According to Gallimore, on April 13, 2017, the Respondent pled guilty to 26 counts of fraud over $5,000.00 contrary to section 380(1)(a) of the Criminal Code of Canada and amendments thereto. On June 21, 2017, he was sentenced to 54 months in a federal penitentiary and ordered to pay restitution to London Life in the amount of $2,911,076.64.

21. After considering the admissions contained in the Respondent's Reply, as well as the *viva voce* and documentary evidence of Gallimore, the Hearing Panel had little hesitation in concluding that Allegations 1 and 2 had been established against the Respondent.

22. We made this finding on the Record at the Hearing on the Merits.

H. Penalty

23. Staff, in its written and oral submissions, sought the following sanctions against the Respondent:

a) A permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1;

b) A fine in the amount of $87,000, pursuant to section 24.1.1.(b) of MFDA By-law No. 1; and

c) Costs in the range of $5,000 to $7,500, attributable to conducting the investigation and hearing of this matter, pursuant to section 24.2 of MFDA By-law No. 1.

24. After submitting that the primary goal of securities regulation is the protection of the investor, Staff relied upon, *inter alia*, the following well-recognized Factors concerning the appropriateness of the penalty:

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 activities;
g) The risk to investors and 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
k) Previous decisions made in similar circumstances.

25. We agree with Staff that general deterrence is an important factor for Hearing Panels to take into account when determining an appropriate penalty. Penalties should discourage other registrants from engaging in the misconduct for which the Respondent is being disciplined.

26. As was stated by the Supreme Court in *Re: Cartaway Resources Corp.* [2004] 1 S.C.R. 672 at para. 61:

> "A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction . . . The respective importance of general deterrence as a . . . factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.".

27. We were also referred to the MFDA Penalty Guidelines as an additional basis upon which we could exercise our discretion in assessing the appropriate penalty.

28. Staff then made the following oral and written submissions with respect to the facts relating to the Respondent in the case before us:

I. The Present Case

(a) Nature of Misconduct

29. The contraventions that the Respondent has admitted are egregious.

30. Failure to co-operate with his self-governing body demonstrates a fundamental breach of the Respondent's obligations. By failing to respond to requests of him to deliver a written statement and to schedule and attend an interview, the Respondent illustrated that he intentionally failed to co-operate with the investigation by Staff. The refusal of the Respondent to co-operate effectively undermined Staff's ability to continue the investigation and determine the full nature and extent of his misconduct.

(b) The Respondent's Past Conduct and Level of Activity in the Capital Markets

31. From September 1996 to June 24, 2015, the Respondent was registered as a mutual fund salesperson (now known as a dealing representative) in the province of Prince Edward Island with Quadrus Investment Services Ltd. ("Quadrus" or the "Member"), a Member of the MFDA.

32. From at least January 13, 2006 to July 24, 2015, the Respondent was also an insurance agent with London Life.

33. Quadrus is affiliated with London Life and has been a Member of the MFDA since March 25, 2002.

34. At all material times, the Respondent conducted business in and around Charlottetown, Prince Edward Island.

35. Although the Respondent had no prior disciplinary history with the MFDA, Staff submitted that this factor should be given little weight in light of the serious misconduct associated with subverting the ability of the regulator to perform its function, by fully investigating his conduct and determining, in an expeditious manner, all of the relevant facts.

36. The refusal of the Respondent to co-operate undermined Staff's ability to determine whether any Member clients, beyond Member clients CVK and LVK (the "Clients"), had funds misappropriated by the Respondent.

(c) The Respondent's Recognition of the Seriousness of his Misconduct

37. The Respondent's Reply to the Notice of Hearing indicated that he recognized the seriousness of his misconduct and had accepted responsibility for his misconduct. This saved the MFDA the time, resources and expenses associated with conducting a full hearing of the allegations.

(d) Client Harm

38. The Respondent misappropriated $37,000 provided to him by the Clients for investment in their Tax Free Savings Accounts.

39. In 2016, the Member compensated the Clients for the entirety of their losses.

(e) The Benefits Received by the Respondent

40. The refusal of the Respondent to co-operate undermined Staff's ability to determine whether the Respondent misappropriated funds from other Member clients.

(f) Previous Decisions Made in Similar Circumstances

41. Staff referred the Hearing Panel to what it submitted were previous decisions made in similar circumstances. These Decisions included:

(a) *In the Matter of Daniel William Yanaky* [2015] MFDA Hearing Panel of the Central Regional Council, MFDA File No. 201403, Reasons for Decision dated March 17, 2015.

(b) *In the Matter of Michael Labrick Harvey* [2012] MFDA Hearing Panel of the Pacific Regional Council, MFDA File No. 201112, Reasons for Decision dated March 14, 2012.

(c) *In the Matter of Sergio Peter Gizzo* [2011] MFDA Hearing Panel of the Central Regional Council, MFDA File No. 201024, Reasons for Decision dated March 16, 2011.

(d) *In the Matter of Cory Piggot* [2007] MFDA Hearing Panel of the Ontario Regional Council, MFDA File No. 200706, Decisions and Reasons dated October 29, 2007.

(e) *In the Matter of John Quigley* [2007] MFDA Hearing Panel of the Ontario Regional Council, MFDA File No. 200703, Decision dated July 12, 2007.

(f) *In the Matter of Robert Roy Parkinson* [2005] MFDA Hearing Panel of the Ontario Regional Council, MFDA File No. 200501, Decisions and Reasons dated April 29, 2005.

J. Decision

42. At the conclusion of Staff's oral submissions, the Hearing Panel retired to consider the matter. After a careful consideration, we read our Decision into the Record and indicated that we would provide our reasoning for same in written form. These are those Reasons.

43. We will deal with each of Staff's Penalty requests in order.

(i) Permanent Prohibition

44. We are, unanimously, of the view that there should be a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1.

45. The Respondent's registration status as a mutual fund salesperson permitted him to gain the trust of his clients. He abused that trust in a most fundamental fashion. The abuse continued over an extended period of time.

46. In our view, it is incumbent upon this Hearing Panel to communicate to the Respondent, the public and the mutual fund industry as a whole that serious consequences will befall those who engage in activities similar to those of the Respondent in the case before us. We do so by imposing a permanent prohibition.

(ii) Fine

47. In both its written and oral submissions, Staff requested a fine in the amount of $87,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1.

48. When questioned as to how this amount was arrived at, Staff referred us to a series of MFDA Decisions which have imposed a fine of $50,000 for failing to co-operate with an investigation contrary to section 22.1 of MFDA By-law No. These cases included:

a) *In the Matter of Robert Roy Parkinson* [2005], *supra*.
b) *In the Matter of John Quigley* [2007], *supra*.
c) *In the Matter of Cory Piggot* [2007], *supra*.
d) *In the Matter of Stephan Headley*, [2006] MFDA Hearing Panel of the Ontario Regional Council, MFDA File No. 200509, Decision and Reasons dated February 21, 2006.

49. Staff then added the $37,000 misappropriation figure to the $50,000 to arrive at the suggested fine of $87,000.

50. While we agreed that there is clear and convincing precedent for a fine of $50,000 for failure to co-operate, we did not believe that a fine of $37,000 for the misappropriation allegation was sufficient in the particular circumstances of this case.

51. While our decision to impose a permanent prohibition was based, in part, on the Respondent's failure to co-operate with the MFDA, we would have imposed that penalty if the misappropriation finding was the only matter before us.

52. After careful consideration we, unanimously, determined that the fine requested by Staff was too low. We felt that a fine of at least double the amount of the misappropriation would send the appropriate message to the Respondent, the public and the mutual fund industry.

53. We, therefore, doubled the $37,000 that was misappropriated and added that to the $50,000 for failure to co-operate and imposed a fine of $124,000.

(iii) Costs

54. In its written and oral submissions, Staff requested costs "in the range of $5,000 to $7,500" attributable to conducting the investigation and hearing of this matter, pursuant to section 24.2 of MFDA By-law No. 1.

55. Although no hourly breakdown of the hours spent on this matter was provided, we agreed with the submission that any award in the range suggested would only permit the MFDA to recover a portion of its costs.

56. While we have found that the Respondent did not co-operate with the investigation into his activities, he did, in our view, co-operate with the prosecution by retaining Counsel who attended the First Appearance and by filing a Reply in which he admitted the facts alleged and conclusions drawn by the MFDA in its Notice of Hearing. This undoubtedly led to a streamlining of the proceedings and a reduction in the amount of work required by Staff to complete the prosecution.

57. Consequently, we have decided to impose costs in the amount of $5,000, which is at the lower end of the suggested range.

K. Penalties Imposed

58. At the conclusion of the Hearing on the Merits, the following Penalties were imposed on the Respondent:

a) A permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1.

b) A fine in the amount of $124,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1.

c) Costs in the amount of $5,000, pursuant to section 24.2 of MFDA By-law No. 1.

DATED this 23rd day of July, 2018.

"Thomas J. Lockwood"

Thomas J. Lockwood, QC
Chair

"Darrell Bing"

Darrell Bing
Industry Representative

"Guenther W. K. Kleberg"

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