



**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: Anthony MacFarlane**

Heard: February 15, 2011, Toronto, Ontario  
Reasons for Decision: March 2, 2011

**REASONS FOR DECISION**

Hearing Panel of the Central Regional Council:

Terrance Sweeney  
Cheryl Hamilton  
Robert Guilday

Chair  
Industry Representative, by teleconference  
Industry Representative, by teleconference

Appearances:

Charles Toth	)	For the Mutual Fund Dealers Association of Canada
	)	
Michel Castillo	)	For the Respondent, Anthony MacFarlane,
	)	by teleconference
	)	
Anthony MacFarlane	)	Respondent, by teleconference

1. By a Notice of Hearing, dated July 22, 2010, the MFDA commenced a disciplinary proceeding against Anthony MacFarlane (“MacFarlane”). In that Notice of Hearing, the MFDA made three allegations against MacFarlane:

**Allegation #1:** Between about December 2007 and May 2008, the Respondent received \$10,595.25 from client JN which he failed to invest on her behalf and account for, thereby failing to deal fairly, honestly and in good faith with client JN, contrary to MFDA Rule 2.1.1.

**Allegation #2:** Between about January 2005 and March 2008, the Respondent engaged in another gainful occupation, being the preparation of income tax returns for clients and other individuals, which was not disclosed to and approved by the Member, contrary to MFDA Rule 1.2.1(d).

**Allegation #3:** Commencing in August 2009, the Respondent failed to provide information and produce documents requested during the course of an investigation of his conduct, contrary to section 22.1 of MFDA By-law No. 1.

2. We were constituted as a Hearing Panel of the Central Regional Council to conduct the hearing.

3. The first appearance was by teleconference on September 8, 2010, at which time we fixed a hearing date of October 25, 2010.

4. The hearing date was adjourned on December 14, 2010 and again on December 17, 2010 to February 15, 2011.

5. In the meantime, the parties had reached a settlement.

6. In order to accommodate the Respondent and his counsel, both of whom live in London, Ontario, and two members of the Hearing Panel who would be out of town on the hearing date, the Chair ordered that those persons could be present by way of teleconference.

7. At the opening of the proceedings on February 15, 2011, we granted a joint motion of counsel for the MFDA and the Respondent to move *in camera* to consider the Settlement Agreement (“SA”).

8. During the *in camera* session, we heard submissions of counsel for each party as to why the SA should be accepted and the applicable legal and public policy reasons therefore.

9. We then retired to consider the SA. After due deliberation, we unanimously agreed to accept the SA although not without some misgivings.

10. The Chair then, in open session, advised the parties that the Hearing Panel had unanimously accepted the SA. The SA was marked as an exhibit.<sup>1</sup>

## **THE SETTLEMENT AGREEMENT**

11. The Hearing Panel is well aware that it may only accept or reject a settlement agreement.<sup>2</sup>

12. There were two aspects to the SA which concerned the Hearing Panel:

- a. MacFarlane has not honoured his undertaking to produce the Meridian bank statements; and
- b. The generous terms allowed to MacFarlane to pay a relatively small fine and costs.

13. Counsel for MFDA responded by saying that MFDA has no knowledge of any other customers of MacFarlane who suffered at his hands. Moreover, counsel for the Respondent produced a three-page document outlining the problems experienced by MacFarlane from 2007. Counsel for the Respondent asked, counsel for MFDA consented and the Hearing Panel ruled that the document be marked as “confidential”.<sup>3</sup>

14. Courts and tribunals should tread lightly in considering to refuse to accept a settlement agreement negotiated at arm’s length between two parties when they are represented by counsel.

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<sup>1</sup> Exhibit 3 A and B

<sup>2</sup> MFDA By-law No. 1, subsection 24.4.3

<sup>3</sup> Rule 1.8(5) MFDA Rules of Procedure, Updated Version: July 16, 2010

15. Winkler R. S. J., as he then was, in another context set out the principles to be applied in considering a negotiated settlement. In *Gilbert v. Canadian Imperial Bank of Commerce*,<sup>4</sup> he said:

There is a presumption of fairness when a proposed ... settlement negotiated at arm's length is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

The test to be applied is whether the settlement is fair and reasonable. ... This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give and take.

16. The British Columbia Court of Appeal enunciated the principle in 2007<sup>5</sup> when Donald J.A. said:

Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation. ... Settlements are also efficient. Both parties can forego the time and expense of a hearing. ...

17. The primary goal of securities regulation is the protection of the public.<sup>6</sup>

18. We believe that the SA will enhance investor protection and strengthen public confidence in the MFDA.

19. We considered the following mitigating factors:

- a. MacFarlane agreed to the SA and saved MFDA Staff some costs and the risk of future litigation;
- b. The personal matters disclosed in the confidential document;
- c. MacFarlane reimbursed his client for the monies he took, with interest;
- d. He expressed genuine remorse; and
- e. He had no previous history with MFDA.

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<sup>4</sup> 2004 CanLII 34176 (ON S.C.) at paras. 9 and 10

<sup>5</sup> *British Columbia Securities Commission v. Seifert*, 2007 BCCA 484 at para. 49

<sup>6</sup> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 59

## **PENALTY**

20. Counsel for the MFDA, in his brief and in his submissions, urged us to accept the penalty as it would be in the public interest.

21. He referred the Hearing Panel to the “Penalty Guidelines” issued by MFDA. He acknowledged that the penalty proposed was below the minima suggested for infractions of the sort engaged in by MacFarlane. However, he referred again to the mitigating factors in this case. Accordingly, we agreed that the reasons advanced by counsel for MFDA and counsel for the Respondent were sufficient to find that, in the circumstances of this case, the penalty was reasonable and proportionate.

22. In summary and for all of the reasons listed above, we accepted the SA and signed the order presented to us at the conclusion of the hearing.

23. We said that we would give reasons for our decision. These are our reasons.

**DATED** this 2<sup>nd</sup> day of March 2011.

“Terrance Sweeney”

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Terrance Sweeney,  
Chair

“Cheryl Hamilton”

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Cheryl Hamilton,  
Industry Representative

“Robert Guilday”

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Robert Guilday,  
Industry Representative