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: Gerard Campbell MacKinnon

Heard: September 30, 2016, in Halifax, Nova Scotia
Reasons for Decision: December 22, 2016

REASONS FOR DECISION

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Joanne Hébert	Industry Representative
Susan Nixon	Industry Representative

Appearances:

Maria L. Abate	)	Counsel for the Mutual Fund Dealers Association of Canada
J. Brian Church, Q.C.	)	Counsel for the Respondent

A. THE ALLEGATIONS

1. By Notice of Hearing, dated the 14th day of March, 2016, the following Allegations were made against Gerard Campbell MacKinnon ("Respondent"):

> **Allegation #1**: Between April 12, 2010 and June 11, 2014, the Respondent solicited and accepted $20,000 from client AD for an investment he purported to offer outside the Member, which monies he used to pay his personal debts and failed to invest on behalf of client AD, thereby misappropriating or failing to account for client monies, and engaging in conduct which gave rise to a conflict of interest between the Respondent and the client that the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.1 and 2.1.4.
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> **Allegation #2**: In March of 2013, the Respondent misled the Member when he falsely stated, in response to a question asked by the Member's compliance staff during a branch audit, that he was not involved in any activities which could give rise to a conflict or potential conflict of interest with a client, thereby interfering with the Member's ability to supervise his activities, and failing to observe high standards of ethics and engaging in conduct unbecoming an Approved Person, contrary to MFDA Rules 1.1.2, 2.5.1, 2.1.4, and 2.1.1.
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> **Allegation #3**: Commencing on November 4, 2014, the Respondent failed to attend for an interview with Staff for the purpose of investigating the Respondent's conduct, contrary to section 22.1 of MFDA By-law No. 1.

B. HISTORY OF PROCEEDINGS

2. The First Appearance took place before a Hearing Panel of the Atlantic Regional Council on May 11, 2016.

3. Following submissions from Staff of the MFDA and the Respondent, the Hearing Panel scheduled the Hearing on the Merits to take place on September 30, 2016, at a venue to be announced in Halifax, Nova Scotia.

4. The Hearing Panel also made an Order as to the delivery of disclosure by both Staff and the Respondent.

5. On September 13, 2016, the MFDA announced the venue for the Hearing on the Merits.

6. On September 22, 2016, the parties executed a Settlement Agreement.

7. On September 27, 2016, the MFDA provided Notice of the Settlement Hearing.

C. THE SETTLEMENT HEARING

8. At the commencement of the Settlement Hearing, on September 30, 2016, the Hearing Panel granted a joint Motion by Counsel for Staff and the Respondent to move the proceedings "in camera" while we considered the Settlement Agreement, as well as the written and oral submissions of Staff and the oral submissions of Counsel for the Respondent.

9. After a detailed review of the Settlement Agreement, as well as a consideration of the submissions of the parties, we unanimously concluded that it was in the public interest that the Settlement Agreement be accepted.

10. On September 30, 2016, the Hearing Panel executed an Order giving effect to the terms of the Settlement Agreement. At that time, we advised that we would provide reasons for our Decision. These are those Reasons.

D. THE SETTLEMENT AGREEMENT

11. The salient portions of the Settlement Agreement are as follows:

"IV. AGREED FACTS

Registration History

6. From March 6, 2003 to August 8, 2013, the Respondent was registered in Nova Scotia as a mutual fund salesperson (now known as a dealing representative) with Quadrus Investment Services Ltd. ("Quadrus"), a Member of the MFDA.

7. At all material times, the Respondent was also licensed as an insurance salesperson in Nova Scotia.

8. On August 8, 2013, Quadrus terminated the Respondent as a result of some of the events described below. The Respondent has not been registered in the securities industry since that time.

9. At all material times, the Respondent conducted business in and around Halifax, Nova Scotia.

The Respondent Accepts $20,000 from a Client and Uses the Monies to Pay Personal Debts

10. At all material times, client AD was a client of Quadrus. The Respondent was the mutual fund salesperson responsible for servicing client AD's accounts at Quadrus.

11. In late 2009, the Respondent recommended that client AD redeem $20,000 from his Registered Retirement Savings Plan ("RRSP") with Quadrus and invest the proceeds for a period of one year in an unspecified investment product which

would be managed by the Respondent. The Respondent represented to client AD that the investment would produce better returns than the mutual funds he held with Quadrus.

12. On April 12, 2010, based upon the Respondent's recommendation, client AD redeemed $20,713.48 from his RRSP with Quadrus. After the deduction of withholding taxes and the payment of deferred sales charges ("DSCs"), client AD received net proceeds from the redemption of approximately of $14,000.

13. On April 20, 2010, Quadrus issued a cheque to client AD in the amount of $14,000 which client AD deposited into his personal bank account.

14. On April 22, 2010, based upon the Respondent's recommendation, client AD redeemed a further $7,812.50 from his RRSP with Quadrus. After the deduction of withholding taxes and the payment of DSCs, client AD received net redemption proceeds of approximately $6,000.

15. On April 28, 2010, Quadrus issued a cheque to client AD in the amount of $6,000 which client AD deposited into his personal bank account.

16. On May 14, 2010, client AD provided the Respondent with two certified cheques in the amounts of $14,000 and $6,000 payable to the Respondent personally for the purpose of investing in the investment product recommended by the Respondent as described in paragraph 11 above.

17. Shortly thereafter, the Respondent deposited the certified cheques provided by client AD into the Respondent's personal bank account.

18. The Respondent did not invest the monies received from client AD. Instead, the Respondent used these monies to pay his personal debts, without the knowledge or authorization of client AD.

19. In July 2013, Quadrus was notified of a complaint from an insurance client serviced by the Respondent which claimed that the Respondent had sold investments outside of Quadrus. Quadrus commenced an investigation into the Respondent's conduct. As part of its investigation, Quadrus sent letters on July 30 and August 29, 2013 to mutual fund clients serviced by the Respondent to determine if the Respondent had offered or sold any outside investments to them.

20. Quadrus terminated the Respondent on August 8, 2013.

21. On December 16, 2013, in response to Quadrus' letters, client AD complained to Quadrus with respect to the investment product sold by the Respondent and the whereabouts of the $20,000 he had provided to the Respondent.

22. On February 3, 2014, the Respondent delivered a personal cheque to client AD in the amount of $23,400, for the repayment of client AD's $20,000 investment and a purported interest payment of $3,400.

23. On May 26, 2014, the Respondent paid $4,722.60 to Quadrus to reimburse it for additional compensation it paid to client AD in respect of his losses.

Misleading the Member

24. On March 5, 2013, Quadrus' compliance staff conducted on audit of the Respondent's practices as part of its Branch Review Program. Quadrus' compliance staff interviewed the Respondent as part of the audit.

25. Also as part of the audit, Quadrus' compliance staff explained the term conflicts of interest and presented the Respondent with various scenarios to ensure he understood its meaning during the interview.

26. During the interview, Quadrus' compliance staff asked the Respondent the following question, "Are you familiar with the concept of conflicts of interest and situations that are or which could lead to a real or perceived conflicts (*sic*) of interest? (Examples include acting on behalf of clients, financial or business dealings with clients, gift or favours)". In response to this question, the Respondent confirmed that he understood conflicts of interest and was not involved in any activity that would be considered a conflict of interest.

27. The Respondent's statement to Quadrus' compliance staff that he was not involved in any activity that would be considered a conflict of interest was false and misleading having regard to the Respondent's conduct described above.

28. The Respondent did not contact Quadrus' compliance staff, following his interview, to correct his statement to them.

Failure to Cooperate

29. On September 29, 2014, Staff sent a letter to the Respondent, by registered and regular mail, requesting his attendance at an interview for the purpose of investigating his activities while he was registered as a dealing representative.

30. On October 21, 2014, the Respondent contacted Staff by telephone to schedule a date for an interview.

31. On October 28, 2014, Staff sent a letter to the Respondent, by regular mail and email, confirming that an interview had been scheduled for November 19, 2014 in Halifax, Nova Scotia.

32. On November 4, 2014, the Respondent sent a letter to Staff advising that he would not be attending the scheduled interview.

33. On November 7, 2014, Staff sent a letter to the Respondent, by registered and regular mail and email, advising the Respondent that if he failed to attend the interview, Staff may commence a disciplinary hearing against him for failing to cooperate with the MFDA's investigation into his activities, pursuant to section 22.1 of MFDA By-law No. 1.

34. On November 12, 2014, the Respondent contacted Staff, by telephone, to further discuss his attendance at an interview. During the telephone call, the Respondent acknowledged that he understood the implications of failing to attend the interview with Staff.

35. The Respondent failed to attend the interview with Staff on November 19, 2014.

V. CONTRAVENTIONS

36. The Respondent admits that between April 12, 2010 and June 11, 2014, he solicited and accepted $20,000 from client AD for an investment he purported to offer outside the Member, but instead used the monies to pay his personal debts and failed to invest it on behalf of client AD, thereby misappropriating or failing to account for client monies, and engaging in conduct which gave rise to a conflict of interest between the Respondent and the client that the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.1 and 2.1.4.

37. The Respondent admits that in March 2013, he misled the Member when he falsely stated, in response to a question asked by the Member's compliance staff during a branch audit, that he was not involved in any activities which could give rise to a conflict or potential conflict of interest with a client, thereby interfering with the Member's ability to supervise his activities, and failing to

observe high standards of ethics and engaging in conduct unbecoming an Approved Person, contrary to MFDA Rules 1.1.2, 2.5.1, 2.1.4, and 2.1.1.

38. The Respondent admits that beginning on November 4, 2014, he failed to attend for an interview with Staff for the purpose of investigating the Respondent's conduct, contrary to section 22.1 of MFDA By-law No. 1.

VI. TERMS OF SETTLEMENT

39. The Respondent agrees to the following terms of settlement:

a. the Respondent shall be permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member pursuant to section 24.1.1(e) of MFDA By-law No. 1;
b. the Respondent shall pay a fine in the amount $15,000;
c. the Respondent shall pay costs in the amount of $7,500; and
d. the Respondent will attend in person, on the date set for the Settlement Hearing."

E. THE LAW RELATING TO SETTLEMENT AGREEMENTS

12. Section 24.4.3 of MFDA By-law No. 1 provides the Hearing Panel with only two options when considering a Settlement Agreement. The Panel must either accept or reject the Settlement Agreement. It does not have the power to modify or vary any part of it.

13. The role of a Hearing Panel at a settlement hearing is fundamentally different than its role at a contested hearing. As the Hearing Panel stated in *Professional Investments (Kingston) Inc.*:

> "In a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement

Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

Professional Investments (Kingston) Inc. (Re), 2009 LNCMFDA 9, at para. 13.

14. Settlements do assist the MFDA in fulfilling its regulatory objective of protecting the public. They advance this objective by proscribing activities which are harmful to the public, while enabling the parties to reach a flexible remedy to address the interests of both the regulator and the Respondent.

15. Past MFDA Hearing Panels have set out a number of considerations which should be taken into account when determining whether a proposed settlement should be accepted. These include:

(a) whether acceptance of the settlement agreement would be in the public interest and whether the penalty imposed will protect investors;

(b) whether the settlement agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the settlement agreement;

(c) whether the settlement agreement addresses the issues of both specific and general deterrence;

(d) whether the proposed settlement will prevent the type of conduct described in the settlement agreement from occurring again in the future;

(e) whether the settlement agreement will foster confidence in the integrity of the Canadian capital markets;

(f) whether the settlement agreement will foster confidence in the integrity of the MFDA; and

(g) whether the settlement agreement will foster confidence in the regulatory process itself.

Investors Group Financial Services (2005) MFDA Ontario Regional Council, File No. 200401 at pp. 2-4.

16. The primary goal of securities regulation is the protection of the investor.

Pezim v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) at paras. 59 & 68.

17. Past MFDA Hearing Panels have also delineated a number of factors which should be considered when determining whether a proposed penalty is appropriate. 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
(k) previous decisions made in similar circumstances.

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

18. The MFDA Penalty Guidelines, while not mandatory, are an additional source which Hearing Panels can refer to in determining the appropriateness of the proposed penalties.

F. CONSIDERATIONS IN THE PRESENT CASE

(a) Nature of the Misconduct

19. In the Settlement Agreement, the Respondent admitted that in May of 2010 he received a total of $20,000 from a client. These funds were to be invested in an investment product recommended by the Respondent.

20. The Respondent did not invest the funds received. Instead, he deposited them into his personal bank account and used these funds to pay his personal debts without the knowledge of or authorization from his client.

21. The Respondent thereby misappropriated a total of $20,000 from his client.

22. Approximately four years later, in February and May of 2014, the Respondent made payments to the client and the Member representing repayment of the funds misappropriated and the compensation paid by the Member to the client.

23. The Respondent, further, admitted that in March of 2013, he misled the Member when he falsely stated, in response to a question asked by the Member's compliance staff during a branch audit, that he was not involved in any activities which could give rise to a conflict or potential conflict of interest with a client.

24. After the misconduct of the Respondent had been discovered and repayment had been made, MFDA Staff requested the Respondent's attendance at an interview for the purpose of investigating his activities while he was registered as a dealing representative.

25. The Respondent admits that he failed to attend for an interview, even after Staff had explained the implications of such a failure.

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

26. The Respondent was registered in Nova Scotia as a mutual fund salesperson with Quadrus, a Member of the MFDA. At all material times, he was also registered, and continues to be registered, as an insurance salesperson in Nova Scotia.

27. The Respondent has no previous disciplinary history.

(c) Whether the Respondent Recognizes the Seriousness of his Misconduct

28. We agree with the submission of Staff that the Respondent has recognized the seriousness of his misconduct and has shown remorse for this misconduct by entering into the Settlement Agreement. We also accept the statement of Counsel for Staff that the Respondent has co-operated during the litigation phase of the proceedings.

29. We note the submission by Counsel for the Respondent that arrangements have been made for immediate payment of both the fine and costs should the Settlement Agreement be accepted by this Hearing Panel.

(d) The Harm Suffered by Investors as a Result of the Misconduct and the Benefits Received by the Respondent as a Result of the Improper Activity

30. As indicated, in 2014, the Respondent made monetary reparations to both the client and the Member. Consequently, the financial benefit to the Respondent was either eliminated or greatly diminished.

(e) Previous Decisions

31. Staff provided the Hearing Panel with what it felt were previous Decisions made in similar circumstances. These included:

(a) *Gaunt (Re),* [2013] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201232, Hearing Panel Decision dated September 20, 2013.
(b) *Lipovetsky (Re)*, [2013] Hearing Panel of the Central Regional Council, MFDA File No. 201252, Hearing Panel Decision dated July 25, 2013.
(c) *Toussaint (Re)*, [2011] Hearing Panel of the Central Regional Council, MFDA File No. 201039, Hearing Panel Decision dated September 26, 2011.

(d) *Pigeau (Re)*, [2013] Hearing Panel of the Central Regional Council, MFDA File No. 201223, Hearing Panel Decision dated April 5, 2013.

(f) Specific and General Deterrence

32. Sanctions are intended to be preventative, protective and prospective in nature. One of the objectives of securities regulation is to prevent harm to investors and the capital markets.

33. An appropriate sanction is one which will protect the public interest and prevent future conduct detrimental to the integrity of the capital markets.

34. The actions of the Respondent in misappropriating funds were planned and deliberate. His status as a mutual fund salesperson permitted him to gain the trust of his client. He abused this trust in a most fundamental fashion.

35. While the repayment of the misappropriated funds is a mitigating factor, it does not dispel the fact that the Respondent breached his position of trust and took advantage of his client.

36. As the Hearing Panel stated in the case of *Bruce Patrick Schriver*:

> "It is incumbent upon this Hearing Panel to communicate to the Respondent, to the public and to the mutual fund industry as a whole that serious consequences will befall those who are engaged in activities similar to those of the Respondent in the case before us."
>
> *Bruce Patrick Schriver*, [2010] Hearing Panel of the Atlantic Regional Council, MFDA File Nos. 200901 and 200918, Hearing Panel Decision dated February 24, 2014, at para. 27.

37. We believe that by imposing the ultimate penalty of a permanent prohibition from conducting securities related business while in the employ of, or associated with, a Member of the MFDA, the appropriate message will have been conveyed.

38. Were it not for the mitigating factors listed above, in our view, the fine imposed would have been substantially more significant.

39. However, taking all of the relevant factors into consideration, we believe that the proposed penalty is appropriate.

G. DECISION

40. After a detailed consideration of the Settlement Agreement and the applicable law, the submissions of the parties, as well as the factors specific to the Respondent, we unanimously concluded that it was in the public interest that this Settlement Agreement be accepted.

H. PENALTIES IMPOSED

41. As a result of the acceptance of the Settlement Agreement, the following penalties were imposed upon the Respondent:

(a) the Respondent shall be permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member pursuant to section 24.1.1(e) of MFDA By-law No. 1;

(b) the Respondent shall pay a fine in the amount of $15,000;

(c) the Respondent shall pay costs in the amount of $7,500; and

(d) if at any time a non-party to this proceeding, with the exception of the bodies set out in section 23 of MFDA By-law No. 1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this 22nd day of December, 2016.

"Thomas J. Lockwood"

Thomas J. Lockwood, QC
Chair

"Joanne Hébert"

Joanne Hébert
Industry Representative

"Susan Nixon"

Susan Nixon
Industry Representative

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