



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: Donald Jacob St. John

Heard: September 14, 2016 in Toronto, Ontario
Decision and Reasons: October 27, 2016

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

W.A. Derry Millar
Casimir Litwin
Brian Nowak

Chair
Industry Representative
Industry Representative

Appearances:

H. C. Clement Wai

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Counsel for the Mutual Fund Dealers
Association of Canada

Donald Jacob St. John

Not in attendance or represented by Counsel

I. INTRODUCTION

1. By Notice of Hearing dated April 16, 2016 (“Notice of Hearing”), Staff of the Mutual Fund Dealers Association of Canada (“MFDA”) alleged that Donald Jacob St. John (“Respondent”) violated the By-laws, Rules or Policies of the MFDA set out below:

Allegation #1: In November 2013, the Respondent misappropriated approximately \$100,000 from client JP, thereby failing to deal fairly, honestly and in good faith with client JP, and observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1.

Allegation #2: Commencing February 2015, the Respondent failed to cooperate with MFDA Staff’s investigation into his conduct by making statements to MFDA Staff which were false, misleading or incorrect, and failing to produce bank account statements requested by MFDA Staff, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

2. The hearing was held on September 14, 2016. The Respondent did not attend the hearing. The Respondent was served with the Notice of Hearing by courier and email on April 28, 2016¹. The Respondent filed a Response to the Notice of Hearing by letter dated June 29, 2016² (“Response”). Staff and the Respondent entered into an Agreed Statement of Facts dated September 2, 2016³ (“Agreed Statement of Facts”) which made it unnecessary to call any live evidence.

II. AGREED STATEMENT OF FACTS

3. The contents of the Agreed Statement of Facts is set out below.

¹ Exhibit 2.

² Exhibit 4.

³ Exhibit 5.

AGREED STATEMENT OF FACTS

I. INTRODUCTION

1. By Notice of Hearing dated April 12, 2016, the Mutual Fund Dealers Association of Canada (the “MFDA”) commenced a disciplinary proceeding against Donald Jacob St. John (the “Respondent”) pursuant to ss. 20 and 24 of MFDA By-law No. 1.

2. The Notice of Hearing set out the following allegations:

Allegation #1: In November 2013, the Respondent misappropriated approximately \$100,000 from client JP, thereby failing to deal fairly, honestly and in good faith with client JP, and observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1.

Allegation #2: Commencing February 2015, the Respondent failed to cooperate with MFDA Staff’s investigation into his conduct by making statements to MFDA Staff which were false, misleading or incorrect, and failing to produce bank account statements requested by MFDA Staff, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

II. IN PUBLIC / IN CAMERA

3. The Respondent and Staff of the MFDA (“Staff”) agree that this matter should be heard in public pursuant to Rule 1.8 of the MFDA Rules of Procedure.

III. ADMISSIONS AND ISSUES TO BE DETERMINED

4. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

5. Staff and the Respondent jointly request that the Hearing Panel determine, on the basis of this Agreed Statement of Facts, the appropriate penalty to impose on the Respondent.

IV. AGREED FACTS

6. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV and no other facts or documents. In the event the Hearing Panel advises one or both of Staff and the Respondent of any additional facts it considers necessary to determine the issues before it, Staff and the Respondent agree that such additional facts shall be provided to the Hearing Panel only with the consent of both Staff and the Respondent. If the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel.

7. Nothing in this Part IV is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

Registration History

8. From February 4, 2011 to January 30, 2015, the Respondent was registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with TD Investment Services Inc. (“TD”), a Member of the MFDA.

9. TD terminated the Respondent on January 30, 2015 as a result of the events described below.

10. At all material times, the Respondent conducted business at a TD branch located in Toronto, Ontario (the “Branch”). The Branch also operated as a bank branch for TD Canada Trust (“TD Bank”).

11. During the period when he was registered with TD, the Respondent also worked as a bank teller with TD Bank.

12. The Respondent has not been registered in the securities industry in any capacity since January 30, 2015.

Allegation #1: Misappropriating Monies from Client JP

13. In November 2013, client JP was a 63 year old client of TD. The Respondent was familiar with client JP, including the investments held by the client, because the Respondent sometimes serviced her account at TD.

14. Client JP was a vulnerable client by virtue of her age.
15. On November 26, 2013, the Respondent recommended to client JP that she redeem \$100,000 from the TD Comfort Balanced Income Portfolio Fund that she held at TD and re-invest the proceeds into another investment with TD. Client JP accepted the Respondent's recommendation and agreed to proceed with the transaction. When the redemption was processed, the Respondent arranged for the proceeds of the redemption to be deposited into client JP's TD Bank account.
16. On November 27, 2013, the Respondent opened a TD Bank account under the fictitious name of "Brian McDade" (the "McDade Account"). Without the knowledge or authorization of client JP, the Respondent transferred the \$100,000 that had been deposited into client JP's TD Bank account into the McDade Account.
17. On November 28, 2013, the Respondent accessed the McDade Account and used \$36,958.85 to repay his student loan.
18. On November 29, 2013, the Respondent accessed the McDade Account again and transferred the remaining \$63,041.15 to his own TD Bank Account ending in account numbers 962 (the "962 Account").
19. On November 29, 2013, a mutual fund salesperson at TD ("AT") working at the Branch discovered that a substantial portion of client JP's \$100,000 redemption had been transferred from client JP's TD Bank account to the McDade Account and then to the Respondent's bank account. Further inquiries revealed that the address and phone number recorded for the McDade Account were false. AT contacted client JP to ask if she knew a person named Brian McDade. Client JP informed AT that she did not know any person by that name.
20. AT reported his findings to TD's human resources department.
21. On November 29, 2013, TD obtained a statement from the Respondent. During questioning by TD, the Respondent initially claimed that Brian McDade was a friend who agreed to loan him the money that had been transferred to his bank account. The Respondent subsequently admitted during the interview that Brian McDade was a fictitious name but he falsely asserted that client JP had agreed to loan him \$100,000.

22. TD was able to recover the amount misappropriated by the Respondent and reimbursed the monies to client JP.

23. By virtue of the foregoing conduct, the Respondent misappropriated approximately \$100,000 from client JP, thereby failing to deal fairly, honestly and in good faith with client JP, and observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1.

Allegation #2: Failure to Cooperate

24. On January 26, 2015, Staff sent a letter to the Respondent requesting a written statement concerning his conduct and “[c]opies of all your bank account statements for any accounts of which you hold a direct or indirect interest or signing authority, including but not limited to, any line of credit accounts, chequing or savings accounts for the period September – December 2013”.

25. In a written statement to Staff dated February 15, 2015, the Respondent falsely stated that client JP had offered to loan him \$100,000 and that he had set up the McDade Account to acquiesce to client JP’s request to keep the existence of the loan confidential.

26. Following an exchange of emails between Staff and the Respondent, on March 7, 2015, the Respondent provided Staff with a copy of bank account statements for a TD Bank account he held ending in account numbers 573 (the “573 Account”). The Respondent did not provide a copy of bank account statements for the 962 Account.

27. On March 9, 2015, Staff sent an email to the Respondent to confirm that he had only one bank account. The Respondent responded with an email stating “From what I saw at the bank – [the 573 Account] is the only account that I had during that period of time. I will do one more check tomorrow and get back to you.”

28. On March 11, 2015, the Respondent sent Staff an email stating: “I have confirmed that I did not have any other accounts at that time.” The Respondent’s statement was false, misleading and incorrect as it failed to disclose to Staff that the 962 Account existed

29. Later on March 11, 2015, Staff sent an email to the Respondent requesting, among other things:

- a) supporting or back-up documentation for a series of transactions; and
- b) a copy of the account opening documentation for the 573 Account.

30. To date, the Respondent has failed to provide all of the information or documentation requested by Staff on March 11, 2015.

31. Staff subsequently received from TD a copy of bank account statements for the 962 Account.

32. By virtue of the foregoing, the Respondent failed to cooperate with MFDA Staff's investigation into his conduct, and engaged in conduct contrary to the public interest, by making statements to MFDA Staff which were false, misleading or incorrect, and failing to produce bank account statements requested by MFDA Staff, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

Misconduct Admitted

33. By engaging in the conduct described above, the Respondent admits that:

- a) in November 2013, the Respondent misappropriated approximately \$100,000 from client JP, thereby failing to deal fairly, honestly and in good faith with client JP, and observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1; and
- b) commencing February 2015, the Respondent failed to cooperate with MFDA Staff's investigation into his conduct by making statements to MFDA Staff which were false, misleading or incorrect, and failing to produce bank account statements requested by MFDA Staff, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

Execution of Agreed Statement of Facts

34. This Agreed Statement of Facts may be signed in one or more counterparts which together shall constitute a binding agreement.

35. A facsimile copy of any signature shall be effective as an original signature.

DATED this 2 [day] day of Sept., 2016.

III. MFDA RULES

4. MFDA Rule 2.1.1 sets out the standard of conduct to be met by Members and Approved Persons. It states:

2.1.1 Standard of Conduct. Each Member and each Approved Person of a Member shall:

- (a) deal fairly, honestly and in good faith with its clients;
- (b) observe high standards of ethics and conduct in the transaction of business;
- (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
- (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

5. MFDA By-law No. 1, sets out the power to conduct examinations and investigations in ss. 21 and 22. Section 21 states:

21. POWER TO CONDUCT EXAMINATIONS AND INVESTIGATIONS

The Corporation shall make such examinations of and investigations into the conduct, business or affairs of any Member, Approved Person of a Member or any other person under the jurisdiction of the Corporation pursuant to the By-laws and/or the Rules as it considers necessary or desirable in connection with any matter relating to compliance by such person with:

21.1 the By-laws, Rules or Policies of the Corporation;

21.2 any securities legislation applicable to such person including any rulings, policies, regulations or directives of any securities commission; or

21.3 the by-laws, rules, regulations and policies of any self-regulatory organization.

6. MFDA By-law No. 1, s. 22 states:

22. INVESTIGATORY POWERS

22.1 For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

(a) to submit a report in writing with regard to any matter involved in any such investigation;

(b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and to attend and give information respecting any such matters;

(c) to make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the Corporation;

and the Member or person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion, require that any statement given by any Member or person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath.

IV. ANALYSIS AND DECISION - MISCONDUCT

7. The By-laws, Rules and Policies of the MFDA support its mandate to regulate the Canadian mutual fund industry in order to protect the investor public and strengthen public confidence in the Canadian mutual fund industry.

8. We are satisfied that the facts admitted by the Respondent support his admission of misconduct set out in the Agreed Statement of Facts and the violations of MFDA Rule 2.1.1 and By-law No. 1. s. 22.1.

9. We agree with the submission of Staff that misappropriation of client funds by an Approved Person is dishonest conduct, which is inconsistent with the standard of conduct set out in MFDA Rule 2.1.1. The Respondent admits to the misappropriation of client funds. It is clear from the Agreed Statement of Facts that the Respondent did misappropriate client funds. The misappropriation of client funds violates the standards of conduct set out in MFDA Rule 2.1.1.

10. We find that Allegation #1 has been established.

11. An Approved Person has an obligation to cooperate with Staff. The failure to cooperate hinders the MFDA's ability to investigate the conduct of registrants in the mutual fund industry and prevents the MFDA from fulfilling its regulatory mandate to protect the public.

12. Section 22.1 of MFDA By-law No. 1 enables the MFDA to require an Approved Person to submit a written report, produce documents for inspection and attend and give information, regarding the matter under investigation.

13. The Respondent not only failed to provide the information requested by Staff but misled Staff in his communications with Staff by making false statements.

14. The Respondent has admitted to failing to cooperate with Staff. The facts admitted by the Respondent support his admission of misconduct set out in the Agreed Statement of Facts.

15. We find that Allegation #2 has been established.

16. We find that the Staff of the MFDA have established on the evidence before us that the Respondent has committed violations of the MFDA Rules and By-law No. 1 as set out in the Allegations #1 and 2 made against the Respondent.

V. SUBMISSIONS - PENALTY

A. STAFF

17. In its Written Submissions, Staff proposed the following sanctions against the Respondent:

- (a) A permanent prohibition on the authority to conduct securities related business in any capacity while in the employ of, or in association with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- (b) A fine in the range of \$50,000 to \$75,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- (c) Costs attributable to conducting the investigation and hearing of this matter in the amount of \$7,500, pursuant to s. 24.2 of MFDA By-law No. 1.

18. In oral argument, Staff proposed a fine of \$50,000.00.

19. Staff submit that the following principles should govern the Hearing Panel's exercise of its discretion:

- (a) The primary goal of securities regulation is the protection of the investor.⁴
- (b) When determining the appropriate sanctions to impose, the Hearing Panel should consider:

⁴ *Pezim v. British Columbia (Superintendent of Brokers)* [1994], S.C.J. 58, *Iacobucci, J. at paragraphs 59 and 68.*

- (i) the protection of the investing public;
 - (ii) the integrity of the capital markets;
 - (iii) specific and general deterrence;
 - (iv) the protection of the MFDA's membership; and
 - (v) the protection of the integrity of the MFDA's enforcement processes.⁵
- (c) Other factors that Hearing Panels frequently consider when determining an appropriate penalty include the following:
- (i) the seriousness of the allegations proved against the Respondent;
 - (ii) the Respondent's past conduct, including prior sanctions;
 - (iii) the Respondent's experience and level of activity in capital markets;
 - (iv) whether the Respondent recognizes the seriousness of the improper activity;
 - (v) the harm suffered by investors as a result of the Respondent's activities;
 - (vi) the benefits received by the Respondent as a result of the improper activity;
 - (vii) the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
 - (viii) the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
 - (ix) 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;
 - (x) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
 - (xi) previous decisions made in similar circumstances.⁶

⁵ *In the Matter of Arnold Tonnies* [2005] Hearing of the Prairie Regional Council, MFDA File NO. 200503, Hearing Panel Decision dated June 27, 2005, at p. 22.

⁶ *Headley (Re)*, 2006 LNCMFDA 3, at para. 85.

20. Staff submit that an additional source of factors to be taken into account when determining the appropriate penalties to be imposed in disciplinary proceedings is the MFDA Penalty Guidelines. The Penalty Guidelines were published to assist Hearing Panels when imposing penalties in disciplinary proceedings and to enable Staff and respondents to take appropriate factors and penalty ranges into account when negotiating settlements in disciplinary proceedings. As stated in the introduction to the Penalty Guidelines under the heading “Purpose Of The MFDA Penalty Guidelines”:

Range Is Guideline Only

The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel.⁷

21. The MFDA Penalty Guidelines provide the following for breaches of the Standard of Conduct:

SPECIFIC FACTORS TO CONSIDER	PENALTY TYPES & RANGES
<ol style="list-style-type: none"> 1. Nature of the circumstances and conduct. 2. Number of individuals affected. 3. Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute. 	<ul style="list-style-type: none"> • Fine: Minimum of \$5,000. • Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course). • Suspension. • Permanent prohibition in egregious cases.

22. The MFDA Penalty Guidelines provide the following for Failure to Cooperate:

SPECIFIC FACTORS TO CONSIDER	PENALTY TYPES & RANGES
<ol style="list-style-type: none"> 1. Whether the contravention was intentional or inadvertent. 2. Whether there was complete or only partial non-compliance. 3. The impact that the non-compliance had on the investigation. 4. Whether the Respondent can demonstrate that the 	<ul style="list-style-type: none"> • Fine: Minimum of \$50,000. • Termination of Member or permanent prohibition of an Approved Person. • Interim order pursuant to s. 24.3 of MFDA By-law No. 1.

⁷ Extract from the MFDA Penalty Guidelines

refusal to cooperate was based on reasonable
reliance on competent legal advice.

23. Staff submit that with respect to Allegation No. 1, the Respondent misappropriated approximately \$100,000 from client JP. At the time of the misappropriation, client JP was 63 years old. Misappropriation is among the most serious types of misconduct encountered by securities regulators, as it usually involves a significant breach of trust, causes serious harm to the clients affected and undermines the reputation and integrity of the securities industry. The Respondent was in a position of trust as a dealing representative for his client JP and egregiously breached this trust by misappropriating client funds for his own personal use.

24. Staff submit with respect to Allegation No. 2:

- (a) The MFDA is authorized to require an Approved Person to provide a report, produce for inspection and provide copies of relevant documents and attend and give information respecting matters the MFDA has chosen to examine or investigate. It is implicit in this requirement that Approved Persons are required to cooperate in an honest and complete manner.
- (b) The Respondent initially claimed to the Member that the funds he received were from a friend who agreed to loan him the money. In the initial statement to Staff, the Respondent falsely stated that client JP had offered to loan him \$100,000. The Respondent also failed to provide Staff with documents including copies of the account statements of the account that was used by the Respondent in the transfer of client JP's monies.
- (c) An Approved Person's failure to fully cooperate with Staff's investigation subverts or frustrates the MFDA's ability to perform its regulatory investigative function and undermines the integrity and effectiveness of a self-regulatory system.

25. Staff submit:

- (a) Client JP was elderly at the time of the misappropriation. The Member was able to reverse the transactions and the client was made whole.
- (b) The Respondent initially benefitted financially from the misconduct in the amount of approximately \$100,000. Following the investigation by the Member, the Member was able to recover the amount misappropriated from the Respondent and reimbursed the monies to client JP. No financial benefit has been retained by the Respondent.
- (c) Although the Respondent has no past disciplinary history with the MFDA, this factor should be given very little weight in light of the serious nature of the misconduct in this matter.
- (d) By entering into an Agreed Statement of Facts in which the Respondent has admitted to the misconduct, the Respondent has accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring the time and expense of conducting a full disciplinary hearing. Although the Respondent cooperated with Staff during their investigation by attending at an interview, the Respondent initially misled staff with respect to the misappropriation by stating that client JP had offered to loan him the monies.
- (e) The proposed penalties are consistent with the Penalty Guidelines.
- (f) The proposed penalties are consistent with decisions made by MFDA Hearing Panels as well as other securities the regulatory bodies in similar circumstances. Staff provided a chart setting out the penalties assessed in similar cases.

26. In summary, Staff submit:

- (a) The proposed penalties and costs must achieve both specific and general deterrence. The proposed fines are significant and will send a message to the Respondent and others in the capital markets.
- (b) The proposed penalties reflects the seriousness of the Respondent's misconduct and are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by its Members and Approved Persons.

- (c) MFDA Hearing Panels have consistently imposed permanent prohibitions on individuals who misappropriate client funds.
- (d) MFDA Hearing Panels have also consistently imposed permanent prohibitions on individuals whose past conduct suggest that they are ungovernable.
- (e) The permanent prohibition will achieve the MFDA's mandate of investor protections as the Respondent will no longer be able to operate in the securities industry. The proposed penalties will deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants, and foster public confidence in the securities industry.
- (f) The proposed penalties are reasonable and proportionate having regard to the conduct of the Respondent and the circumstances of this case.

27. Staff also request an order for costs be made against the Respondent. Staff submit that the amount requested will permit the MFDA to recover from the Respondent a portion of the costs attributable to conducting the investigation and this hearing, such that these costs do not have to be borne by the MFDA or subsidized by those Members and Approved Persons of the MFDA who do not engage in this type of activity.

B. RESPONDENT

28. While the Respondent did not appear at the hearing and consequently made no submissions with respect to penalty, he did file the Response in which he sought to explain his actions. In his Response, the Respondent blamed his actions on his medical condition and on TD Canada Trust for failing to agree to his request to move from "a customer facing position to a back office position because I didn't trust myself to be interacting with clients." He stated "I knew, deep down, that something was going to happen as I felt that I was unable to control my actions".

29. The Respondent acknowledges in his Response that he misappropriated the \$100,000.00 and that initially he failed to cooperate but ultimately decided to tell the truth.

30. The Respondent did not provide any medical evidence with respect to his statements relating to his medical condition.

31. The Respondent's position on penalty is set out below:

- (a) He should make a donation of \$1,000.00 to an organization that looks out for people's well-being; and
- (b) He should attend a seminar on ethics at his expense.

32. The Respondent submits that he has suffered substantial punishment through the loss of his employment and the embarrassment and shame of his actions which he must live with every day.

33. The Respondent submits that his case should be looked at in a similar way as that of Superintendent D. Mark Fenton rising from his internal discipline hearing by the Toronto Police Service arising from his actions at the G20 Summit in Toronto in June 2010. In the Fenton matter, Superintendent Fenton was docked 30 days pay. The Respondent uses the comment by the Hearing Officer that "his misconduct occurred under the noses of his superiors - he should have been stopped by his superiors - that never happened" to suggest that the Member was responsible in some fashion for the Respondent's conduct because it did not move him from a customer facing position as he requested.

34. The Respondent also submits that prior to his misconduct in November 2013, he had "an exemplary career at TD Canada Trust":

- (a) He had won the "Champions Club - a coveted award for being an Outstanding Advisor in 2012."
- (b) He had "received numerous personal accolades from my District Vice President in Ottawa for Outstanding Customer Service."
- (c) He had never been in trouble before.

VI. ANALYSIS AND DECISION – PENALTY

35. We agree with the submissions of Staff with respect to the principles applicable to the determination of the appropriate penalty in this matter set out in paragraph 18 above.

36. We agree that an Approved Person who misappropriates money from a client should be prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member. Such conduct undermines the integrity of the Canadian mutual fund industry and all of those hard-working and honest people who work in the industry.

37. Misappropriating \$100,000.00 from a 63-year-old client is a very serious matter which must be condemned by the Hearing Panel. We disagree with the Respondent's submission that somehow the Member is responsible for his decision to misappropriate \$100,000.00 from the client because it did not move him from a customer facing position to a back office position. The Respondent is responsible for this decision and cannot blame his employer.

38. Failure to cooperate with an investigation by the MFDA hinders the MFDA's ability to investigate the conduct of registrants in the mutual fund industry and prevents it from fulfilling the MFDA's mandate to protect the public. While it is commendable that the Respondent ultimately decided to tell the truth and to enter into the Agreed Statement of Facts, it must be noted that initially he misled the investigator carrying out the investigation into his conduct.

39. We disagree with the Respondent's submission with respect to a penalty of \$1,000.00 and the attendance at an ethics course at his expense. His proposed penalty does not recognize the seriousness of his misconduct. We are also of the opinion that the Fenton decision does not assist us in determining the appropriate penalty.

40. In our view the appropriate penalty is a permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of, or in

association with, any MFDA Member. We are also of the opinion that the appropriate fine in this case is \$50,000.00.

41. With respect to Staff's request for costs, we agree that the Respondent should contribute to the cost of the investigation and hearing. In our view, the \$7,500.00 requested by staff is a fair and reasonable amount.

VII. CONCLUSION

42. For the reasons set out above we find that the appropriate penalty in this case is:

- (a) A permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member;
- (b) A fine in the amount of \$50,000.00 in respect of the Respondent's failure to cooperate with Staff's investigation; and

43. The Respondent shall pay costs to the MFDA in the amount of \$7,500.00.

DATED this 27th day of October, 2016.

“W.A. Derry Millar”

W.A. Derry Millar
Chair

“Casimir Litwin”

Casimir Litwin
Industry Representative

“Brian Nowak”

Brian Nowak
Industry Representative