



**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: Mitchell Robert Sumka**

Heard: November 24, 2020 by electronic hearing in Winnipeg, Manitoba

Decision: November 30, 2020

Reasons for Decision: March 17, 2021

**REASONS FOR DECISION**

Hearing Panel of the Prairie Regional Council:

Sherri Walsh  
Kathleen Jost  
Richard Bergeron

Chair  
Industry Representative  
Industry Representative

Appearances:

Sakeb Nazim	)	Enforcement Counsel for the Mutual Fund
	)	Dealers Association of Canada
	)	
	)	
Mitchell Sumka	)	Respondent
	)	
	)	

## I. INTRODUCTION

1. By Notice of Hearing dated December 11, 2019 (“Notice of Hearing”), the Mutual Fund Dealers Association of Canada (“MFDA”) commenced disciplinary proceedings against Mitchell Robert Sumka (the “Respondent”) pursuant to Sections 20 and 24 of MFDA By-Law No. 1.

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

**Allegation #1:** Between August 2015 and March 2018, the Respondent misappropriated approximately \$659,232.00 from two mutual fund clients and 12 other individuals, thereby failing to deal fairly, honestly and in good faith with the clients, failing to observe high standards of ethics and conduct in the transaction of business, engaging in business conduct which is unbecoming and detrimental to the public interest, and failing to be of such character and business repute as is consistent with the standard of conduct, contrary to MFDA Rule 2.1.1.

**Allegation #2:** Commencing in September 2018, the Respondent failed to co-operate with an investigation by MFDA Staff (“Staff”) into his conduct, contrary to section 22.1 of MFDA By-Law No. 1.

3. Prior to proceeding with the Hearing on the Merits (“the Hearing”), the Respondent admitted to having committed the misconduct which was alleged in the Notice of Hearing.

4. This admission was then set out in an Agreed Statement of Facts which the Respondent entered into with MFDA Staff (“Staff”) on November 9, 2020 (“the Agreement”).

5. The Respondent admitted that the facts set out in Part IV of the Agreement constituted misconduct for which he may be penalized on the exercise of discretion of the Hearing Panel (“the Panel”), pursuant to Section 24.1 of MFDA By-Law No. 1.

6. On the basis of those facts, Staff and the Respondent jointly requested that the Panel determine the appropriate penalty to impose on the Respondent.

7. In its written submissions filed before the Panel, Staff proposed that the following penalties be imposed on the Respondent:

- 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 \$100,000.00 broken down as follows:
  - i. \$50,000.00 fine in respect of the misappropriation (Allegation #1);
  - ii. \$50,000.00 fine for the failure to co-operate (Allegation #2); and
- c) Costs in the amount of \$9,000.00.

8. In his written submission filed before the Panel, the Respondent asked the MFDA "...to impose a permanent prohibition and termination of my membership and impose a permanent prohibition for me to conduct securities related business." He requested, however, that no monetary penalties be imposed on him in light of his limited financial circumstances and the Restitution Order which was imposed on him by the Provincial Court of Manitoba, which related to the same conduct which is the subject of these proceedings.

9. The Hearing was heard by electronic videoconference on November 24, 2020.

10. At the end of the Hearing, the Panel reserved its decision to allow it time to deliberate.

11. On November 30, 2020, the Panel issued an Order with reasons to follow which imposed the following penalty:

- a) The Respondent shall be permanently prohibited from conducting securities related business in any capacity while in the employ or associated with an MFDA Member pursuant to Section 24.1.1(e) of MFDA By-Law No. 1.

12. Here are our reasons for that decision.

## **II. ISSUES**

13. In light of the Agreement which was entered into evidence at the outset of the Hearing, the only issue for the Panel to determine was the appropriate sanction to impose on the Respondent, in the circumstances.

### III. EVIDENCE HEARD BY THE PANEL

14. In the Agreement, the parties agreed that their submissions regarding the appropriate sanction would be based only on the facts set out in Part IV of that document, subject to the Respondent's ability to lead evidence relevant to his financial situation.

15. At the outset of the Hearing, therefore, Staff consented to the Respondent entering into evidence a number of documents which were relevant to his financial situation, all of which he had previously disclosed to Staff ("Respondent's financial documents").

16. Staff objected, however, to the Respondent's request to submit further documents for the Panel's consideration, namely: the transcript from the sentencing hearing held in the Provincial Court of Manitoba on September 5, 2019 ("sentencing transcript"); and a 25 page document consisting of what may be characterized as letters of reference from various community-based organizations with whom the Respondent had either been volunteering since being released from jail, or from whom he had been receiving treatment for his addiction ("character reference document").

17. Staff objected to admitting the character reference document into evidence on the basis that: it was not relevant to the Respondent's financial situation; and had not been disclosed in accordance with the disclosure timelines set out in the *MFDA Rules of Procedure*.

18. The Respondent said he wanted to rely on this document to show the Panel the corrective measures he had been taking since acknowledging responsibility for his wrongdoing in this matter which, he submitted, was relevant to the penalty requested in connection with Allegation #1.

19. He said that the sentencing transcript was relevant to the penalty submissions he wanted to make relating to the penalty sought in connection with Allegation #2 – his failure to co-operate with an investigation by Staff.

20. The Panel noted that pursuant to paragraph 6 of the Agreement, the parties had agreed that in the event the Panel advised one or both of Staff and the Respondent of any additional facts it considered necessary to determine the issues before it, such additional facts would be provided to the Panel only with the consent of both parties. (emphasis added)

21. After hearing the parties' submissions on the additional evidence the Respondent wanted to put before us, the Panel asked Staff whether they would consent to admitting this information and the proceedings adjourned to allow Staff to seek instructions.

22. Following the adjournment, Staff advised the Panel that despite its concerns about introducing evidence which was only disclosed shortly before the proceedings had commenced, contrary to the timelines required by the Rules of Procedure, and was evidence which fell outside the Agreement, it had received instructions to consent to admitting the documents into evidence. In response to the Panel’s inquiry as to whether Staff felt it required an adjournment to consider these documents before proceeding, it indicated that that would not be necessary.

23. The Panel confirms that in light of the provisions of the Agreement referenced above, if Staff had not consented to entering these further documents into evidence, we would have respected the terms of the Agreement and would not have admitted them into evidence.

24. The extent to which we placed any significance on these documents in reaching our decision, is discussed later in these Reasons.

**Agreed Facts**

25. The Agreement set out the following facts:

**Registration**

9. From March 2013 to March 2018, the Respondent was registered in Manitoba as a dealing representative (formerly known as a mutual fund salesperson) with TD Investment Services Inc. (the “Member”), a Member of the MFDA.

10. On March 5, 2018, the Member terminated the Respondent’s registration, and the Respondent is not currently registered in the securities industry in any capacity.

11. At all material times, the Respondent carried on business in the Winnipeg, Manitoba area.

**Allegation #1 – Misappropriation**

12. At all material times, the Respondent was employed by the Member and its affiliated bank, TD Canada Trust (“TD Canada Trust”). The Respondent serviced both Member clients and bank clients. Some clients maintained accounts with the Member and with TD Canada Trust.

13. Between August 2015 and March 2018, the Respondent misappropriated approximately \$659,233 from two mutual fund clients and 12 other individuals, all of whom held bank accounts at TD Canada Trust. The amounts misappropriated by the Respondent are particularized below:

	<b>Client/Individual</b>	<b>Member or Bank Client</b>	<b>Amount Misappropriated</b>
1.	NM	Member	\$22,000.00
2.	CA and JA	CA-Member; JA – Bank Client	\$6,000.00
3.	AW	Bank Client	\$22,500.00
4.	FW and AW	Bank Client	\$80,128.63
5.	MA	Bank Client	\$6,725.00
6.	FC and FF	Bank Client	\$80,000.00
7.	HM	Bank Client	\$107,464.82
8.	MK	Bank Client	\$149,753.11
9.	MKE	Bank Client	\$159,400.00
10.	CD	Bank Client	\$22,500.00
	CD	Bank Client	\$1,999,12

	<b>Client/Individual</b>	<b>Member or Bank Client</b>	<b>Amount Misappropriated</b>
11.	KL and DL	Bank Client	\$762.30
		<b>Total</b>	\$659,232.98

14. The Respondent misappropriated the monies described above from bank accounts at TD Canada Trust by creating new bank accounts for TD Canada Trust clients without the knowledge or approval of the account holders (the “Fake Accounts”), and then transferring monies from the account holders’ existing bank accounts at the TD Canada Trust to the Fake Accounts. The Respondent subsequently used a bank card to access the monies in the Fake Accounts.

15. The Respondent used the monies that he misappropriated for personal gambling.

16. The Respondent reimbursed six of the clients or other individuals by transferring \$244,689.82 that he had misappropriated from other clients or individuals.

17. TD Canada Trust discovered the Respondent’s conduct as a result of an anonymous verbal report from another employee who worked at the branch. The Member terminated the Respondent as an Approved Person and TD Canada Trust terminated the Respondent as an employee of the bank after confirming that the Respondent had engaged in the misappropriation of client money as described above.

18. TD Canada Trust subsequently reimbursed the amounts totaling \$414,543.16 that the Respondent obtained from account holders and did not repay.

**Allegation #2 - Failure to Co-operate**

19. On March 21, 2018, Staff sent a letter to the Respondent requesting that the Respondent provide a written statement by April 10, 2018 with respect to the events described above. On April 10, 2018, the Respondent responded to Staff’s letter, but did not provide the information requested by Staff.

20. On May 31, 2018, Staff sent an email to the Respondent requesting written statements to various questions concerning his conduct. On June 6, 2018, the Respondent responded to Staff’s email, but did not provide the information that Staff had requested from him.

21. On September 11, 2018, Staff sent a registered letter to the Respondent requesting that he contact Staff within ten business days to schedule an interview. The letter was returned to Staff as unclaimed.

22. On October 9, 2018, Staff sent an email to the Respondent requesting that he contact Staff by October 22, 2018 to schedule an interview. Staff received a “read receipt” indicating that the email was viewed on October 9, 2018. The Respondent did not respond to the October 9, 2018 email from Staff.

23. On October 26, 2018, Staff sent another registered letter and another email to the Respondent requesting that the Respondent contact Staff by November 9, 2018 to schedule an interview. The registered mail was signed for by the Respondent’s mother who resided at the Respondent’s residence. The Respondent did not respond to the letter and he did not respond to the October 26, 2018 email.

24. On November 19, 2018, Staff sent another registered letter and another email to the Respondent requesting that he contact Staff by November 26, 2018 to schedule an interview. The letter stated that if Staff received no response, Staff would conduct the interview on January 23, 2019. Staff also informed the Respondent in the November 19, 2018 letter, and in an email sent on November 29, 2018, that if the Respondent did not attend an interview with Staff to give information respecting matters under investigation in accordance with his obligations pursuant to s. 22.1(c) of MFDA By-law No. 1, Staff would commence enforcement proceedings against the Respondent as a consequence of his failure to co-operate with Staff’s investigation. The registered letter dated November 19, 2018 was signed for by the Respondent’s mother who resided at the Respondent’s

residence. A second copy of the letter was also personally delivered to the Respondent's mother by a process server on November 28, 2018.

25. The Respondent did not respond to the Staff's letters to schedule an interview and did not attend the interview scheduled for January 23, 2019.

26. The Respondent's failure to co-operate with Staff's investigation into his conduct interfered with Staff's ability to confirm the full scope and extent of his misconduct.

#### **Additional Factors**

27. The Respondent has not previously been the subject of an MFDA disciplinary proceeding.

28. After the Respondent's misconduct was discovered by TD Canada Trust, the Respondent co-operated with the bank's investigation by agreeing to answer questions from bank personnel about his misconduct.

29. On June 14, 2018, the Respondent entered into a consumer proposal agreement whereby he agreed to pay \$18,000 over the course of 5 years to TD Canada Trust and various other creditors impacted by the Respondent's misconduct.

30. On September 5, 2019, the Respondent pleaded guilty to charges of fraud contrary to s. 380(1) of the Criminal Code in criminal proceedings before the Provincial Court of Manitoba (the "Court"). The Court sentenced the Respondent to a 27 month long jail term and ordered him to pay restitution in the amount of \$471,625. The Respondent was granted early release from his prison sentence. He has not yet paid the restitution ordered by the Court.

#### **Evidence regarding the Respondent's Financial Situation**

26. As the result of his misconduct, the Respondent was sentenced by the Provincial Court of Manitoba (the "Court") to 27 months in custody. He told the Panel that although he was released from custody before completing the full term, he was not able to earn an income or train for a new career during the time he was in custody.

27. He also pointed out that as part of his sentence, the Court ordered that for 5 years following his release from custody, he was prohibited from seeking employment in the field for which he was trained. Specifically, the Court prohibited him:

...from seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity, that involves having authority over the real property, money or a valuable security of another person.

28. Accordingly, the Respondent submitted that in order to earn any income, he will need to retrain because all of his education prior to his conviction, related to working in the financial industry.

29. He provided the Panel with evidence showing that he was taking steps to enroll with Red River College, with the hope of ultimately learning a trade.

30. As at the time of the Hearing, however, he did not have funding in place for attending school.

31. The financial documents which the Respondent entered into evidence included:

- a) a Consumer Proposal prepared by a licensed Insolvency Trustee which showed that the Respondent has committed to a Consumer Proposal in the amount of \$18,000.00 to be paid by 59 consecutive monthly payments of \$300.00 each, commencing July 15, 2018; and
- b) a Restitution Order issued by the Court which required him to pay the amount of \$471,446.43 to his former employer, TD Canada Trust.

32. On cross-examination by Staff, the Respondent said that while he had not started to make payments on the Restitution Order, since getting out of jail he had been in touch with the Court regarding a payment schedule. He also indicated that he had started making payments pursuant to the Consumer Proposal although he has been delayed in making some of those payments. He provided emails to the Panel evidencing his communications with the Insolvency Trustee.

33. The Respondent's financial documents also included information showing the balance in his bank account and his status with the Canada Revenue Agency.

34. The only employment the Respondent has had since leaving custody has been to work on a very casual basis for his father, but his evidence was that the possibility for this work was limited. He also advised that most of the money that he has been able to earn has been paid towards his obligations under the Consumer Proposal.

#### **Respondent's evidence regarding his Failure to Co-operate**

35. The Respondent told the Panel that he stopped responding to Staff's requests for information, on the advice of his criminal defence counsel. He confirmed, however, that he co-operated with the Member's investigation and entered a guilty plea before the Courts, at the earliest possible opportunity.

36. None of the Respondent's evidence was challenged by Staff.

#### IV. THE PARTIES' POSITIONS

##### The Factors a Panel Must Consider in Determining an Appropriate Penalty

37. In their written and oral submissions, both parties acknowledged that there is no dispute as to the factors a Hearing Panel must consider in determining an appropriate penalty. Those include:

- a) Protection of the investing public;
- b) The integrity of the securities market;
- c) Specific and general deterrence;
- d) Protection of the MFDA Membership; and
- e) Protection of the integrity of the MFDA's enforcement process.

*Aksomitis*, MFDA File No. 201531, Hearing Panel of the Atlantic Regional Council, Decision and Reasons dated May 24, 2016, at para. 24, citing *Breckenridge (Re)*, MFDA File No. 200718, Hearing Panel of the Central Regional Council 2007 LNCMFDA 38, at paras.75 & 76

38. Additional factors to be considered when determining an appropriate penalty include:

- a) The seriousness of the allegations proved against the Respondent;
- b) The Respondent's experience in the capital markets;
- c) The level of the Respondent's activity in the capital markets;
- d) The harm suffered by investors as a result of the Respondent's activities;
- e) The benefits received by the Respondent as a result of the improper activity;
- f) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- g) The damage caused to the integrity of the capital market in the jurisdiction by the Respondent's improper activities;
- h) 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 and improper activity;
- i) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and
- j) Previous decisions made in similar circumstances.

*Breckenridge (Re)*, *supra*, at para.77

## Staff's Submissions

### Seriousness of the Allegations

#### *Nature of the Misconduct – Allegation #1 – Misappropriation*

39. Staff referred the Panel to MFDA Rule 2.1.1 which prescribes the standard of conduct applicable to registrants in the Mutual Fund industry. The Rule requires that each Member and Approved Person deal fairly, honestly and in good faith with clients; observe high standards of ethics and conduct in the transaction of business; and refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest.

40. Staff submitted that although the misappropriation occurred in the Respondent's capacity as a bank employee and not as an Approved Person of the MFDA, his conduct was nevertheless a breach of Rule 2.1.1. In support of this submission, Staff cited decisions of MFDA Hearing Panels which have found that non-mutual fund related misappropriation which has been carried out by an Approved Person, constitutes a breach of Rule 2.1.1.

*Aksomitis, supra*, at paras. 21 and 33

41. Staff submitted that misappropriation of client funds by an Approved Person is completely inconsistent with the standard of conduct required by Rule 2.1.1 and is among the most serious types of misconduct encountered by securities regulators.

*Lee*, MFDA File No. 201914, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 3, 2019, at para. 20

42. Staff referred the Panel to decisions of other hearing panels which have held that misappropriation encompasses a serious breach of trust, causes real harm to the clients affected and undermines the reputation and integrity of the securities industry.

*Douglas*, MFDA File No. 201824, Hearing Panel of the Central Regional Council, Decision and Reasons dated October 9, 2018, at para. 24

*Palumbo*, MFDA File No. 201916, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated February 10, 2020, at paras. 38-39

43. As the panel in *Palumbo* pointed out, misappropriation is an irreparable breach of the trust which is the foundation of a healthy relationship between clients and Approved Persons. Not only do clients suffer financial loss, they also lose their faith in the Approved Person who misappropriated their monies. Misappropriation of funds has a negative effect on all those who

work in the securities industry. The misconduct of one Approved Person tarnishes the reputation of every other Approved Person and taints the integrity of the securities industry.

*Palumbo, supra*, at paras. 38 - 39

44. Staff submitted that given the amount of money the Respondent misappropriated, his misconduct was among the most serious type of misconduct in which a person could engage and therefore warranted a significant sanction.

45. Staff also pointed out that although the Respondent did not personally profit from his misconduct because he lost the money through gambling, the clients of both the Member and TD Bank suffered significant losses which the Bank was required to reimburse.

***Nature of the Misconduct – Allegation #2 – Failure to Co-operate***

46. Staff pointed out that pursuant to Section 21 of MFDA By-Law No. 1, the MFDA has a duty to conduct examinations and investigations of a Member, an Approved Person and any other person under its jurisdiction as it considers necessary or desirable in connection with any matter related to that Member's or Person's compliance with, among other things, the By-Laws, Rules and Policies of the MFDA.

47. In carrying out its duty under Section 21, the MFDA is authorized to request and oblige a Member, Approved Person or any other Person under its jurisdiction to:

- a) submit a report in writing with regard to any matter involved in any investigations;
- b) produce for investigation and provide copies of the books, records and accounts of such person relevant to the matters being investigated;
- c) attend and give information respecting such matters; and
- d) 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 MFDA.

Section 22.1, MFDA By-Law No. 1

48. Members, Approved Persons or other persons have a corresponding obligation to co-operate with the MFDA when it conducts examinations and investigations.

49. Staff provided the Panel with authorities that confirm that an Approved Person must provide Staff with information and documentation and attend an interview with Staff when

requested to do so and that failure to co-operate 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.

*Douglas, supra*

*Aksomitis, supra*

50. In this case, Staff said that because the Respondent had refused to submit the information and documents they requested, and had disregarded Staff's requests that he attend an interview with them, their efforts to effectively investigate the full nature and extent of the Respondent's misconduct, including its impact on his clients, were frustrated.

51. With respect to the Respondent's explanation as to why he failed to co-operate – based on the advice of his criminal defence lawyer -- Staff submitted that the fact of engaging in a parallel proceeding is not a mitigating factor. Plus, Staff said, the Respondent never communicated that fact to it, and simply stopped responding to its requests for information without providing any explanation.

#### ***Damage Caused to the Integrity of Capital Markets by the Respondent's Actions***

52. Staff submitted that misappropriation of funds by an Approved Person constitutes the most severe form of misconduct that can bring the reputation of the industry into disrepute.

#### ***Deterrence***

53. Staff submitted that the penalties it was seeking would provide an appropriate level of specific deterrence to the Respondent, and would also deter other registered individuals from engaging in similar conduct.

#### ***The Respondent's Experience in the Securities Industry***

54. The Respondent had been registered as a mutual fund dealing representative since March 2013. Staff submitted that as an experienced dealing representative he ought, therefore, to have known and respected both the MFDA's and the Member's compliance requirements.

#### ***The Respondent's Past Conduct Including Prior Sanctions***

55. Staff submitted that although the Respondent has no past disciplinary history with the MFDA, this factor should be given very little weight in light of the seriousness of his misconduct.

### ***The Respondent's Recognition of the Seriousness of the Misconduct***

56. Staff did not dispute the Respondent's sincerity in expressing remorse for his actions.

57. It acknowledged that he had entered into an Agreed Statement of Facts, co-operated with the Member in its investigation and worked with the Crown to enter a guilty plea as soon as his misconduct came to light.

58. It acknowledged that by signing the Agreement and admitting to the misconduct alleged in the Notice of Hearing the Respondent has accepted responsibility for his misconduct and demonstrated more than some degree of recognition of the seriousness of his actions. Further, by admitting his wrongdoing, the Respondent has saved the MFDA the time and expense of conducting a contested hearing.

### ***The Respondent's Ability to Pay***

59. Staff submitted that while the MFDA Sanction Guidelines state that a Respondent's ability to pay may be a consideration in determining the appropriate monetary sanction to be imposed, it is only one of the factors to be weighed in relation to all other applicable factors.

60. It cited previous decisions of MFDA Hearing Panels which have held that a Respondent's inability to pay a fine is outweighed by other factors, including the need to have a penalty that reflects the seriousness of the Respondent's conduct and one that takes in account the benefit gained by the Respondent and the loss to clients.

61. Staff was clear that it did not dispute the Respondent's evidence regarding his limited ability to pay a fine. However, given the nature of the misconduct, and size of the losses incurred, it submitted that based on the sentencing principles applied by MFDA Hearing Panels in these types of proceedings, a significant fine should be imposed.

### ***Previous Decisions made in Similar Circumstances***

62. In its written submissions, Staff provided the Panel with the following chart outlining penalties imposed by MFDA Hearing Panels in what it submitted were similar circumstances.

<b>CASE</b>	<b>RELEVANT FACTS</b>	<b>PENALTIES</b>
<i>Pino</i> , MFDA File 201691, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated February 8, 2019	<ul style="list-style-type: none"><li>Allegation #1: Respondent misappropriated approximately \$276,896.19 from a client</li></ul>	<ul style="list-style-type: none"><li>Permanent prohibition</li><li>Fine of \$400,000</li></ul>

CASE	RELEVANT FACTS	PENALTIES
	<ul style="list-style-type: none"> <li>• Allegation #2: Respondent engaged in outside business activities with respect to three companies</li> <li>• Allegation #3: Respondent failed to cooperate with an investigation conducted by Staff</li> <li>• Client was vulnerable senior citizen</li> <li>• Member reimbursed the client</li> </ul>	<ul style="list-style-type: none"> <li>• Costs of \$25,000</li> </ul>
<p><i>Ciardullo</i>, MFDA File 201691, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 5, 2013</p>	<ul style="list-style-type: none"> <li>• Allegation #1: Respondent engaged in personal financial dealings with clients by accepting at least \$385,609 from at least 15 clients, at least \$350,209 of which the Respondent failed to repay</li> <li>• Allegation #2: Respondent made false statements to MFDA Staff during the course of its investigation</li> <li>• Allegation #3: Respondent failed or refused to provide documents and information and to attend an interview requested by MFDA Staff</li> </ul>	<ul style="list-style-type: none"> <li>• Permanent prohibition</li> <li>• Fine of \$500,000</li> <li>• Costs of \$7,500</li> </ul>
<p><i>Palumbo</i>, MFDA File 201916, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated February 10, 2020</p>	<ul style="list-style-type: none"> <li>• Allegation #1: Respondent misappropriated approximately \$195,626 from 3 clients</li> <li>• Allegation #2: Respondent engaged in personal financial dealings by borrowing \$100,000 from a client (which he repaid)</li> <li>• Allegation #3: Respondent obtained, possessed, and in 6 instances used to process transactions, 13 pre-signed account forms in respect of 10 clients</li> <li>• Allegation #4: Respondent failed to cooperate with an investigation of his conduct by Staff</li> <li>• Respondent used the misappropriated funds for gambling</li> <li>• Vulnerable clients</li> <li>• Clients were repaid by the Respondent's family</li> </ul>	<ul style="list-style-type: none"> <li>• Permanent prohibition</li> <li>• Fine of \$120,000</li> <li>• Costs of \$7,500</li> </ul>
<p><i>Shaw</i>, MFDA File 201359, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 3, 2014</p>	<ul style="list-style-type: none"> <li>• Allegation #1: Respondent misappropriated approximately \$437,000 from 4 clients</li> <li>• Allegation #2: Respondent misled the Member during the course of its supervision and investigation of the Respondent's activities by making false or misleading statements</li> <li>• Allegation #3: Respondent failed to cooperate with an investigation of his activities by the MFDA by failing to comply with requests to provide a written</li> </ul>	<ul style="list-style-type: none"> <li>• Permanent prohibition</li> <li>• Fine of \$250,000</li> <li>• Costs of \$7,500</li> </ul>

CASE	RELEVANT FACTS	PENALTIES
	statement regarding allegations of unauthorized redemptions from client accounts and misappropriations of client monies <ul style="list-style-type: none"> <li>• Respondent repaid \$360,000</li> </ul>	
<i>Dew</i> , MFDA File 201738, Hearing Panel of the Atlantic Regional Council, Decision and Reasons dated July 23, 2018	<ul style="list-style-type: none"> <li>• Allegation #1: Respondent misappropriated \$37,000 received from two clients</li> <li>• Allegation #2: Respondent failed to co-operate with an investigation into his activities conducted by Staff</li> <li>• Respondent served 54 months custodial sentence and ordered to pay restitution of \$2,911,076 in criminal proceedings</li> <li>• Member reimbursed the clients</li> </ul>	<ul style="list-style-type: none"> <li>• Permanent prohibition</li> <li>• Fine of \$37,000 x 2 = \$74,000 for misappropriation</li> <li>• Fine of \$50,000 for failure to co-operate</li> <li>• Costs of \$5,000</li> </ul>

63. With respect to the above referenced decisions, Staff said that the common thread that connected them to this case was that they all involved situations where Approved Persons had misappropriated significant amounts of money from clients and Panels had imposed significant fines ranging from amounts equivalent to the amount of money misappropriated - to twice those amounts.

64. Staff highlighted the decision in *Dew, supra*, where the Respondent, in addition to receiving a permanent prohibition, was fined an amount twice the amount of the monies he had misappropriated, for a total of \$74,000.00, together with a fine of \$50,000.00 for having failed to co-operate with Staff’s investigation. The Respondent in that case also served a 54 month custodial sentence and was ordered by the Court to pay restitution of \$2,911,076.00.

**Respondent’s Submissions**

65. Prior to the Hearing, the Respondent filed a 5-page written submission which he then referred to in his oral submission to the Panel.

66. In both his written and oral submissions, the Respondent confirmed his understanding of the MFDA’s role in protecting the public and requested that the MFDA impose a permanent prohibition on his ability to conduct securities related business.

67. His written submission started with the following acknowledgments:

The MFDA plays a crucial role in the protection of the economy and the consumers who choose to invest in it. Investors must feel safe when investing, and critical to that trust is the mutual fund representatives who

create the public confidence in the system. When a mutual fund representative breaches that trust, it not only victimizes the person whose money is lost, but the sanctity of the whole system.

When a person breaches this trust, it is the MFDA who must ensure that a consequence is imposed, significant enough to deter the individual representative, to other mutual fund representatives so they think twice before committing such a breach, and to maintain public confidence in the system. After all, if an investor cannot trust a banker with their money, then where is safe?

I fully comprehend the magnitude of my offending behaviour and I am extremely remorseful. I cannot undo my actions, but I can do my best going forward to address the root causes of my offending, to repair the harm done to my victims, and to give back to the community, and work hard to make it a better place.

I am asking the MFDA to impose a permanent prohibition and termination of my membership and to impose a permanent prohibition for me to conduct securities related business.

Although I caused significant harm to the investors and to the integrity of the mutual fund industry as a whole, I am asking the panel to consider not imposing any further fines.

Permanent termination of my membership to the MFDA is regarded as the most severe sanction that a hearing panel can impose, and to meet the principles of this discipline hearing, is a sufficient sanction to address the objectives of the MFDA in discipline hearings.

68. The Respondent submitted that his intention was always to repay the money, however, his judgment was “overborne”, to use his word, by his underlying illness – a gambling and alcohol addiction. Despite this explanation, he did not, in any way, deny the seriousness of his misconduct.

### *Deterrence*

69. With respect to specific and general deterrence, the Respondent submitted that specific deterrence has already been accomplished for him in a significant way. He told the Panel that because of the choices he made in committing the misconduct and criminal offence, he lost not only his employment but also the only career choice that he has worked for years to advance.

70. He pointed out that his name was published in many news articles once he was arrested and charged and that this publicity is another form of deterrence that has had a big impact on him.

71. He described being sentenced to a 27-month jail term, in front of his family, who cried as the judge was told of his offending behaviour, saying this was a moment he will never forget.

72. The Respondent also told the Panel that the Restitution Order which the Court made will likely impact his finances for the rest of his life.

73. He submitted that while he appreciated that normally given the type of misconduct he committed a significant fine would be imposed, in addition to a permanent prohibition on working in the industry, in this case the consequences he has already sustained, including being ordered to pay back funds totalling almost \$490,000.00, as well as having served a penitentiary sentence,

achieve the same effect towards ensuring general deterrence, without having to impose a further financial penalty.

74. In the Respondent's submission, these consequences, taken together, send a strong message to others in the industry.

### ***Public Confidence in the Industry***

75. The Respondent acknowledged the need to promote public confidence in the MFDA. Again, he submitted that the penal sentence that was imposed upon him combined with the permanent termination of his ability to work in the securities industry, more than satisfies the public that breaches of trust such as the ones he committed are taken very seriously.

76. He also said that if an additional fine were imposed upon him, it would restrict his ability to pay back the victims of his crime. He respectfully submitted that it would be more important to the public that he use whatever limited resources he possesses to start paying back the victims by satisfying his obligations under the Restitution Order and Consumer Proposal, than by using them towards paying a fine.

### ***Prior Conduct***

77. The Respondent pointed out that prior to this misconduct, he had never been the subject of any sort of MFDA discipline.

78. He also submitted that since acknowledging his wrongdoing he has taken significant steps to rehabilitate himself to ensure this type of behaviour never occurs again, pointing the Panel to the character reference document which shows that he has been seeking treatment for his addictions and has been giving back to the community through volunteer work.

### ***Harm Suffered to the Investor and Benefit Received***

79. The Respondent confirmed that the investors were reimbursed by the TD Bank and the Bank has a stand-alone Restitution Order requiring him to pay back the full amount. He stated that it is his hope now that he has been released from custody to be able to make monthly payments towards that Order.

80. He also submitted that he did not profit from his offending behaviour. He recognized that what he did was wrong and although he did not offer it as an excuse for his behaviour, he said that it was always his intention to ensure every client was paid back.

### ***Ability to Pay***

81. The Respondent submitted that based on the financial disclosure provided, including his bank statements and documents relating to his dealings with the Trustee in Bankruptcy, his ability to pay a fine is “non-existent” and any fine imposed on him would be meaningless because there would be no ability to collect it.

82. He plans to return to school, but he submitted that once he finishes school, it will be a number of years before he can rebuild his life financially. He expects that the consequences of having to repay the Restitution Order will have a lifelong impact on his finances. He also stressed to the Panel that a requirement to pay a fine would interfere with his ability to satisfy the Restitution Order and Consumer Proposal.

### ***Failure to Co-operate***

83. With respect to his failure to co-operate with the MFDA’s investigation, the Respondent told the Panel that the reason he did not respond to the MFDA was on the advice of his criminal defence lawyer. Plus, having fully co-operated with TD Bank, he said he believed that all of the relevant information was in their hands.

84. He told the Panel that once the police contacted him, he turned himself in and pleaded guilty at the earliest opportunity, recognizing that in doing so, he would be going to a federal penitentiary.

## **V. ANALYSIS**

85. As noted at the beginning of these Reasons, the sole issue for the Panel to determine in these proceedings was the appropriate penalty to impose, having regard to all circumstances. There were no facts in dispute nor issues of credibility to be determined. Since both parties agreed that a permanent prohibition was appropriate, the only real issue for the Panel to determine was whether it should impose financial sanctions and costs.

86. As both parties acknowledged in their written and oral submissions, the factors a Hearing Panel must consider in determining an appropriate penalty are those set out in paragraphs 37 and 38 of these Reasons, including:

- a) The seriousness of the allegations proved against the Respondent;
- b) The Respondent’s experience in the capital markets;

- c) The level of the Respondent's activity in the capital markets;
- d) The harm suffered by investors as a result of the Respondent's activities;
- e) The benefits received by the Respondent as a result of the improper activity;
- f) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- g) The damage caused to the integrity of the capital market in the jurisdiction by the Respondent's improper activities;
- h) 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 and improper activity;
- i) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and
- j) Previous decisions made in similar circumstances.

*Breckenridge (Re), supra*, at para.77

87. The primary goal of securities regulation, of course, is the protection of the investing public.

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

88. In reaching our determination, we have considered and weighed all of the above-listed factors.

89. The main aggravating factor in this case is the undeniable seriousness of the Respondent's misconduct, including the amount of funds which he misappropriated.

90. The Bank has reimbursed the clients but the amount of that reimbursement remains owing to it.

91. Conduct of this nature taints the reputation of the industry and brings it into disrepute. It has the potential to compromise public confidence in the nature of the advisor/client relationship and the expectation that Approved Persons will comply with their regulatory obligations and the policies and procedures of the Member.

92. The Panel acknowledges that although of the 14 clients from whom the Respondent misappropriated funds, only two of those individuals were MFDA clients, the rest being clients of the TD Bank, the Respondent's conduct amounts to a contravention of MFDA Rule 2.1.1.

93. As Staff submitted, this is consistent with the finding of other Panels. It is based on the rationale that an Approved Person is required to comply with their obligations pursuant MFDA By-Laws, Rules and Policies, even if no MFDA client is involved. In such situations, the activity itself amounts to conduct which is not allowed under MFDA Rules.

*Aksomitis, supra*, at para.33

94. Although the Respondent did not personally benefit from his actions, the misappropriation was nonetheless the result of his intentional act.

95. The fact that the Respondent submits he was motivated by an underlying disease does not diminish the seriousness of his misconduct.

96. The Panel finds that as an experienced dealing representative, the Respondent ought to have known and respected the MFDA's and the Member's compliance requirements.

97. As the Panel in *Breckenridge, supra*, stated, when determining an appropriate penalty, it is incumbent upon the Hearing Panel to communicate to the Respondent, the public and the mutual fund industry as a whole, that serious consequences will befall those who are engaged in activities similar to the misconduct committed by the Respondent in this case.

98. The Respondent has already agreed to the imposition of a permanent prohibition on conducting securities related business in any capacity while in the employ of or associated with an MFDA Member, pursuant to Section 24.1.1(e) of MFDA By-Law No. 1.

99. In our view, the permanent prohibition achieves that goal. It also satisfies the primary goal of securities regulation - protection of the investor. A permanent prohibition is preventative, protective and prospective in nature and satisfies the need to preserve the integrity of the securities markets, protection of the MFDA Membership and the goals of specific and general deterrence.

100. We find, in light of the seriousness of the Respondent's misconduct, nothing short of a permanent prohibition on his ability to conduct securities related business in any capacity, is appropriate.

101. The Panel has no hesitation in finding that the Respondent accepts full responsibility for his actions. His remorse was demonstrable throughout the proceedings.

102. We note that the character reference document – while not relevant to the factors to be taken into consideration in determining the appropriate penalty *per se* – confirms to us that the Respondent is sincere in expressing remorse and accepting responsibility for his actions.

103. Appropriate penalties must also be proportionate and reasonable. As discussed below, our determination not to impose further sanctions by way of a fine reflects a careful weighing of all the above referenced factors which a Panel must consider in imposing a penalty.

### **Ability to Pay**

104. The Panel acknowledges that the Respondent's ability to pay is only one of the factors we must weigh in relation to all other applicable factors, including general and specific deterrence, and the need to ensure the public's confidence in the MFDA disciplinary processes.

105. As the Sanction Guidelines state, the burden is on the Respondent to raise the issue of their inability to pay and to provide evidence of this inability, such as tax returns or audited financial statements.

106. The Panel finds that the Respondent has satisfied this burden,

107. By virtue of the combined effect of the Consumer Proposal which the Respondent entered into and the Restitution Order imposed by the Provincial Court, the Respondent has an outstanding financial obligation to pay almost \$500,000.00.

108. The effect of the permanent prohibition on his ability to work in the securities industry combined with the restrictions on his employment which were ordered by the Court, means that the Respondent has a very limited ability to earn an income by which to satisfy this obligation, let alone one which will allow him to maintain a sustainable existence. Assuming he is able to pursue further education or training as he desires (something which requires financial resources in and of itself), it will be many years before he turns that retraining into a sustainable income.

109. We agree with the Respondent's submission that in all of the circumstances, imposing an Order to pay a fine and costs will not only be meaningless, but will also potentially interfere with his ability to satisfy the other sanctions which have been imposed on him, including the obligation to reimburse the victims of his misconduct.

110. Such an effect, in our view, is neither reasonable nor proportionate.

## **Existence of Other Sanctions**

111. Probably the most significant factor in our decision not to order the Respondent to pay a fine or costs is the fact of the other sanctions which have already been imposed on him. The Sanction Guidelines say that a sanction which is imposed on a Respondent for the same misconduct by the Member or other regulator is a factor to consider. We find that the sanctions which were imposed on the Respondent by the Court may be considered in a similar manner.

112. A 27-month custodial order, a Restitution Order in the amount of \$471,625.00 and the future restrictions on his ability to work as ordered by the Provincial Court of Manitoba, constitute severe sanctions.

113. If these sanctions had not been imposed on the Respondent, the Panel would certainly have required the Respondent to pay a fine and order of costs. In the circumstances, however, based on the totality of the evidence, the Panel finds that the imposition of a fine is not necessary to achieve the MFDA's recognized purposes in conducting disciplinary proceedings of its Members and Approved Persons.

114. These sanctions, when combined with the Panel's order of a permanent prohibition clearly achieve the goals of: general and specific deterrence; protection of the investing public; and the need to ensure public confidence in the MFDA's disciplinary processes.

115. The Panel is satisfied of the Respondent's sincerity in wanting to rebuild his life and make proper restitution for his misconduct. We find that ordering him to pay further financial sanctions, in all of these circumstances, taking into consideration the factors listed above, would be disproportionately punitive and cruel and is not necessary to satisfy the MFDA's regulatory obligations to the public.

## **Previous Decisions in Similar Circumstances**

116. Only one of the five cases to which Staff referred us, involved a Respondent who had spent time in custody – *Dew*. In that case, the Panel imposed a fine of more than double the amount of the Respondent's misappropriation.

117. Each case, however, turns on its specific facts. We note that in that case, there was no discussion by the Panel of the Respondent's ability to pay or of whether it took the custodial sentence into account; nor was there any reference to a Court having made an order of restitution, as was the case in these proceedings.

## **Failure to Co-operate**

118. With respect to the Respondent's failure to co-operate with the MFDA's investigation, the Panel has taken into consideration the fact that the Respondent:

- a) fully co-operated with the TD Bank who was able to make its clients whole;
- b) voluntarily co-operated with the police and the Crown in the criminal proceedings and pleaded guilty, thereby saving the system the need to proceed through a trial on the merits;
- c) acknowledged the initial investigation letters from Staff and only stopped responding to Staff on the advice of his criminal defence lawyer; and
- d) entered into an Agreed Statement of Facts in these proceedings, thereby saving the MFDA having to hold a Hearing on the Merits for anything but the appropriate penalty.

119. While the existence of parallel proceedings is not an excuse to avoid co-operating with an MDA investigation, in the circumstances of this case, we find no further penalty for the Respondent's failure to co-operate, is warranted.

## **VI. CONCLUSION**

120. For all of the above reasons, the Panel orders that the Respondent shall be permanently prohibited from conducting securities related business in any capacity while in the employ or associated with an MFDA Member, pursuant to Section 24.1.1(e) of MFDA By-Law No. 1.

121. The Panel acknowledges and thanks both Staff and the Respondent for their respectful participation in the proceedings before it.

**DATED** this 17<sup>th</sup> day of March, 2021.

“Sherri Walsh”

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Sherri Walsh  
Chair

“Kathleen Jost”

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Kathleen Jost  
Industry Representative

“Richard Bergeron”

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Richard Bergeron  
Industry Representative

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