



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Frank Louis Surette

Heard: November 5, 2019 in Toronto, Ontario
Reasons for Decision: January 20, 2020

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

John Lorn McDougall, QC
Brigitte J. Geisler
Kenneth P. Mann

Chair
Industry Representative
Industry Representative

Appearances:

Brendan Forbes)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
Charles Toth)	Managing Director, Litigation, Mutual Fund
)	Dealers Association of Canada
)	
Frank Louis Surette)	Respondent, not in attendance or represented by
)	counsel
)	

I. INTRODUCTION

1. By Notice of Hearing dated March 5, 2019 (“Notice of Hearing”), the Mutual Fund Dealers Association of Canada (“MFDA”) commenced a disciplinary proceeding against Frank Louis Surette (“Respondent”).

2. The Notice of Hearing made the following allegation of a violation of the By-laws, Rules or Policies of the MFDA (“Allegation”):

Allegation #1: Commencing on July 11, 2017, the Respondent has failed to cooperate with an investigation into his activities conducted by Staff of the MFDA (“Staff”), contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1(c).

3. This case concerns that single Allegation. The only issue before the Hearing Panel was whether the Respondent failed to cooperate with Staff’s investigation into his activities. There is no allegation relating to those activities themselves and thus they are not subject to review by the Hearing Panel in this proceeding.

4. The Respondent first became registered in Ontario as a mutual fund salesperson (now known as a dealing representative) in 1994. Between October 2013 and March 2017 the Respondent was registered as a dealing representative with Peak Investment Services Inc. (“Member”) and was therefore an Approved Person within the meaning of section 1 of By-law No. 1.

5. The Respondent has not been registered in the securities industry in any capacity since March 3, 2017 when his registration with the Member was terminated. The Respondent has no past disciplinary history with the MFDA.

6. The Respondent did not serve or file a Reply to the Notice of Hearing.

7. The Respondent did not attend the first appearance in this matter on May 14, 2019 despite being properly served with the Notice of Hearing, as shown in the affidavit of service of Dwight Gordon, sworn April 3, 2019. At the first appearance, the Hearing Panel ordered that the hearing of this matter on its merits should begin on November 5, 2019.

8. The Respondent did not attend the September 17, 2019 interim appearance in this matter which was also ordered by this Hearing Panel in the May 14, 2019 Order. During this interim appearance, the Chair of this Hearing Panel ordered a second hearing day to be held on November 7, 2019.

9. The Respondent did not provide disclosure as required under Rule 10.2 of the *Mutual Fund Dealers Association of Canada Rules of Procedure* (“MFDA Rules of Procedure”) and as required by the Hearing Panel in the May 14, 2019 Order.

MFDA Rules of Procedure, Rule 10.2

10. The Respondent did not provide witness statements as required under Rule 11.1 of the MFDA Rules of Procedure and as required by the Hearing Panel in the May 14, 2019 Order.

MFDA Rules of Procedure, Rule 11.1

11. Notwithstanding the Respondent’s failure to fulfil his obligations under the Rules as set out above and his further failure to attend the Hearing on the Merits commencing on November 5, 2019, the Respondent was in frequent contact with many of the Staff involved in the investigation and was fully aware of the progress of the investigation, but offered virtually no cooperation or assistance with it despite his obligation to do so.

12. In the event, as the Respondent did not appear for the Hearing on the Merits on November 5, 2019, the Hearing Panel, as it is entitled to do under Rule 7.3 of the MFDA Rules of Procedure, elected to proceed with the Hearing without further notice to and in the absence of the Respondent and did so.

II. FACTS

13. The evidence filed by Staff consisted of an affidavit with exhibits of Lara Rowles (“Ms. Rowles”), who is a manager in the Investigations group of the Enforcement Department of the MFDA. She oversaw the Staff investigation of the Respondent after carriage of the matter was transferred to her on May 15, 2018 when the original investigator assigned to the file retired.

14. Other than a telephone call with the Respondent on April 18, 2018, Ms. Rowles appears not to have had any other direct contact with him until she took over responsibility for the file in May 2018. She describes the sources of her knowledge in her affidavit as follows:

I became aware of most of the facts to which I refer herein by reviewing the file concerning the investigation into the Respondent's conduct while he was an Approved Person of PEAK Investment Services Inc. (the "Member"). I have also become aware of facts related to this matter through first hand discussions with the Respondent and after receipt of information from the Respondent. As a result of my involvement with this matter, I have knowledge of the facts deposed herein. Where I do not have direct knowledge of the matters to which I depose, I have identified the source of my information and I believe the information to be true.

15. The evidence in this case clearly establishes the failure of the Respondent to live up to his obligation to cooperate with the investigation into his activities.

16. In particular, as outlined in the Rowles Affidavit, the following summary of evidence establishes that the Respondent failed to cooperate with Staff's investigation:

- In January 2017, Staff obtained information that the Respondent had allegedly borrowed or misappropriated approximately \$65,718.11 from the investment account of his father by processing withdrawals from the account and depositing the funds into either: his personal bank accounts, joint bank accounts held between the Respondent and his spouse, or bank accounts held solely by his spouse.

Rowles Affidavit, paras 10-19 and Exhibits C-D.

- Between February 13, 2017 and April 18, 2018, Staff made eight requests for documentation from the Respondent, including requests for: the Respondent's bank statements, the Respondent's spouse's bank statements, statements for the bank accounts held jointly between the Respondent and his spouse, and information relating to the withdrawals from the investment account of the Respondent's father.

Rowles Affidavit, paras 20-52 and Exhibits E-U2.

- Between December 12, 2017 and April 18, 2018, Staff made three requests to the Respondent to attend and give information to matters relevant to Staff's investigation including the purpose of the withdrawals from the investment account of the Respondent's father.

Rowles Affidavit, paras 41-52 and Exhibits Q-U2.

- Staff is of the belief that the Respondent received and understood these requests. During its investigation, Staff contacted the Respondent through the following methods: letters sent by personal service to the Respondent, letters sent to the Respondent by registered and/or regular mail, emails sent to email addresses which the Respondent regularly corresponded with Staff, and verbal communications by telephone with the Respondent.

Rowles Affidavit, paras 20-52 and Exhibits E-U2.

- The Respondent largely failed to provide the information requested by Staff and failed to schedule or attend an interview to give information within his knowledge that was relevant to Staff's investigation.

Rowles Affidavit, paras 53-55.

17. Staff submits, and the Hearing Panel agrees, that its requests for the Respondent to submit information and to attend an interview were reasonable and the Respondent's failure to comply with the requests therefore constituted a contravention of section 22.1 of MFDA By-law No. 1. The Hearing Panel therefore found that the Allegation was established.

III. ANALYSIS AND DECISION

18. By virtue of section 24.1.4 of MFDA By-law No. 1, an Approved Person such as the Respondent remains subject to the jurisdiction of the MFDA notwithstanding the fact that the individual has ceased to be an Approved Person. Furthermore, the MFDA is entitled to commence disciplinary proceedings against an Approved Person up to five years from the date upon which the person ceased to be an Approved Person, which in this case was March 3, 2017. The Notice of Hearing commencing this proceeding is dated March 5, 2019.

19. 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.

MFDA By-law No. 1, section 21.

20. In carrying out its section 21 duty, 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 investigation;
- 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.

MFDA By-law No. 1, section 22.1.

21. Correspondingly, the Member, Approved Person or other person under investigation is obliged to cooperate with the section 21 requirements.

22. In *B.C. Securities Commission v. Branch*, a decision that has subsequently been cited by MFDA and IDA/IIROC hearing panels, the Supreme Court of Canada held that it is reasonable for a securities regulator to compel individuals under its jurisdiction to produce documents and attend oral examinations to answer questions relevant to an investigation. The majority of the Supreme Court of Canada stated:

Clearly the purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry.

B.C. Securities Commission v. Branch, [1995] 2 S.C.R. 3 (“*Branch*”) at para. 35, cited with approval in *Rathore (Re)*, [2005] Hearing Panel of the Central Regional Council, MFDA File No. 200504, Panel Decision dated June 28, 2005, at p. 15.

23. L’Heureux-Dubé J., in concurring reasons in *Branch*, explained the rationale for the fundamental obligation to cooperate in an investigation:

...it must be remembered that participants engage in this licensed activity of their own volition and ultimately for their own profit. In return for permitting persons to obtain the fruits of participation in this industry, society requires that market participants also undertake certain corresponding obligations in order to safeguard the public welfare and trust. Participants must conform with the extensive regulations and requirements set out by the provincial securities commissions. Many of these requirements are fundamental to maintaining an efficient, competitive market environment in a context where imperfect information is endemic. They are also essential to prevent and deter abuses of such asymmetries of information, and therefore to maintain the integrity of the securities system and protect the public interest.

...

...given the nature and breadth of this obligation, as well as the important economic stake that the investing public holds in its proper fulfillment, I fail to see how market participants would not expect to be questioned by regulators from time to time as to their market activities, in order for the securities commissions to be able to ensure that they, or the corporation that they represent, have complied with the prescribed standards.

Branch, ibid, at paras. 77-78.

24. There is ample authority for the proposition that Approved Persons must provide Staff with information and documentation, and must attend for an interview to give information, when requested to do so. To hold otherwise would hinder the MFDA's ability to investigate the conduct of participants in the mutual fund industry who are subject to its jurisdiction and could undermine the MFDA's ability to fulfill its regulatory mandate of protecting the public.

In the Matter of Rholyn St. George Hylton, [2018] Hearing Panel of the Central Regional Council, MFDA File No. 201829, Panel Decision dated October 30, 2018.

In the Matter of David Hamilton Cudmore, [2018] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201737, Panel Decision dated June 13, 2018.

In the Matter of Walter John Dixon, [2017] Hearing Panel of the Central Regional Council, MFDA File No. 201728, Panel Decision dated November 13, 2017.

In the Matter of Arash Gabriel Armani, [2017] Hearing Panel of the Central Regional Council, MFDA File No. 201701, Panel Decision dated August 3, 2017.

In the Matter of Michael Raymond McBurney, [2015] Hearing Panel of the Central Regional Council, MFDA File No. 201522, Panel Decision dated December 29, 2015.

25. The requirement to cooperate with an MFDA investigation is paramount and exists without exception. As stated in *Vitch (Re)*:

“There can be no exception to [the obligation to cooperate with a self-governing body]. The fulfillment of that obligation is particularly important to the MFDA because it has no statutory power to search and seize or to compel the production of documents. Without the cooperation of Members and Approved Persons, the MFDA’s ability to investigate and discipline its Members and Approved Persons is gravely fettered...”

In the Matter of David Allan Vitch, [2011] Hearing Panel of the Central Regional Council, MFDA File No. 201103, Panel Decision dated September 22, 2011, at para 55.

26. In short, the Hearing Panel found that the Respondent largely failed to fulfil his obligations to provide the information and assistance to Staff and failed completely to attend to be interviewed by Staff.

IV. PENALTY

27. Staff proposed the following penalties against 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 \$75,000;
- c) Costs in the amount of \$10,000.¹

28. In exercising its discretion to impose a penalty, a Hearing Panel should take into account the following considerations:

- a) The protection of the investing public;
- b) The integrity of the securities market;

¹ Staff submitted a Bill of Costs at the hearing which reflected total costs of \$11,187.50.

- c) Specific and general deterrence;
- d) The protection of the MFDA's membership; and
- e) The protection of the integrity of the MFDA's enforcement process.

Tonnies (Re), [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Panel Decision dated June 27, 2005, at p. 22.

29. Other factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include the following:

- 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 decision made in similar circumstances.

Tonnies (Re), *supra*, at p. 23.

30. In the present case, from the list proposed in *Tonnies (Re)* above, each of which was considered by the Hearing Panel, four were selected for particular consideration in this case. Each of these is dealt with separately in what follows.

Nature of the Misconduct

31. The Respondent has engaged in very serious misconduct which the Hearing Panel has confirmed by the finding that the Allegation had been established. To repeat, the obligation of participants in a self-regulatory industry such as the securities business to cooperate with an investigation is fundamental to its functioning. Any derogation from that obligation is fundamental in the sense that it imperils the whole regime.

32. In the Hearing Panel's view that alone justifies taking a severe view of the appropriate penalty and we have done so.

33. That said, the Hearing Panel, in the circumstances of this case, is unable to accept Staff's submission that its decision not to pursue the investigation should form part of our consideration of the appropriate remedy. In other words to blame the Respondent for causing that decision to be made. There are several reasons for this.

34. The first is that a lot of investigative work was in fact carried out. It is summarized in paragraphs 7 to 19 inclusive of Ms. Rowles' affidavit. In particular at paragraph 12 she deposes as follows:

12. Based on the information provided in the METS Report Form Staff commenced an enforcement investigation into the Respondent's conduct. Specifically, Staff was primarily concerned with whether the Respondent had borrowed funds from his father's investment account while registered with the Member.

35. Ms. Rowles continues in paragraph 13 with a description of the extent of the investigation as follows:

13. During the course of its investigation, Staff gathered information from the following sources:

- a) The Member provided documents related to the Respondent's conduct;
- b) The Respondent's branch manager who discovered the alleged misconduct provided documents and attended an interview with Staff;
- c) The Respondent provided certain documents in response to requests from Staff;

- d) The Respondent's father and mother provided certain documents and made oral statements to Staff;
- e) Staff made requests for and obtained certain bank documents from TD Canada Trust Inc.

36. The Hearing Panel was told virtually nothing about the results of the investigation, which is quite acceptable as long as we are not asked to infer any conclusion from the extent of the investigation other than it did not result in any further allegations being made. By way of example only, the Respondent's parents were interviewed but no evidence was proffered about their position in the matter. Were the withdrawals made with parental permission? We don't know that most important fact.

37. The only fair conclusion that the Hearing Panel could reach is that there were no grounds found for making any further allegations. We cannot speculate on factual matters while determining the appropriate remedy.

38. Further, in view of our conclusion that the appropriate sanction included a permanent ban, a consideration of the effect of the Respondent's conduct on Staff's investigation is not necessary as it would not have affected that result.

The Respondent's Conduct, Past and Present

39. The Hearing Panel agrees with Staff's submission that the Respondent's clear record with respect to past disciplinary proceedings should be given little or no weight in this case. The Respondent was an experienced member of the industry who knew full well what his obligations were. He chose to intentionally ignore them, at the same time he was staying in close contact with Staff as their investigation progressed. His conduct was deliberate, willful and wrong.

40. Staff suggested several times during the course of the hearing that the Respondent was attempting to "game the system" in the sense of trying to get an optimum result by withholding his cooperation and using it as a trading chip. This was simply conjecture as there was no evidence to support it. As such, it was prejudicial to the Respondent and we discounted it.

Deterrence

41. The Respondent's conduct demonstrates that he is ungovernable and a permanent ban on the Respondent from engaging in securities related business on behalf of any Member of the MFDA is warranted. This is a case where a permanent ban is really the only option available to protect the integrity of the market.

42. The permanent ban, together with a substantial fine, also serves the objective of demonstrating that a failure to cooperate with a regulator will be treated as one of the most egregious breaches of MFDA Rules and Regulations possible. It will foster confidence in the integrity of the mutual fund industry as well as providing a general deterrence.

Previous Decisions in Similar Cases

43. As has now become the usual practice, Staff prepared a matrix of the penalties imposed in the more recent cases which are similar to the present one. It was helpful to the Hearing Panel, particularly in two respects: reinforcing our view that a permanent ban was appropriate and in fixing the fine at \$50,000.

44. With respect to costs, as mentioned above, Staff asked for \$10,000 and filed a bill of costs for a total of \$11,187.50. Exercising our discretionary jurisdiction, we granted costs at the latter amount.

V. CONCLUSION

45. In summary, the Hearing Panel's disposition of this case was:

- 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; and
- c) Costs in the amount of \$11,187.50.

DATED this 20th day of January, 2020.

"John Lorn McDougall"
John Lorn McDougall, QC
Chair

"Brigitte J. Geisler"
Brigitte J. Geisler
Industry Representative

"Kenneth P. Mann"
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Industry Representative

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