



**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: Scott Michael Kelly**

Heard: October 11, 2012 in Toronto, Ontario  
Reasons for Decision: October 23, 2012

**DECISION AND REASONS  
(Misconduct)**

Hearing Panel of the Central Regional Council:

The Hon. John B. Webber, Q.C.	Chair
David W. Kerr	Industry Representative
T. Hugh McNabney	Industry Representative

Appearances:

H. C. Clement Wai	)	Enforcement Counsel, Mutual Fund Dealers
	)	Association of Canada (“MFDA”)
Scott Michael Kelly	)	Unrepresented by counsel
	)	

1. By Notice of Hearing dated June 22, 2012 a hearing panel of the Central Regional Council of the MFDA was convened to hear the merits of this matter.

2. The allegations of the MFDA are as follows:

**Allegation #1:** In June 2011, the Respondent falsified the signatures of clients WG and CD on a client account document, contrary to MFDA Rule 2.1.1.

**Allegation #2:** Commencing in September 2011, the Respondent has failed or refused to provide documents and information, and to attend on interview requested by the MFDA, during the course of an investigation, contrary to s. 22.1 of MFDA By-law No. 1.

3. The Respondent admitted that he engaged in the misconduct alleged in Allegation #1 at the time of this hearing and in his Reply dated October 8, 2012 (Exhibit 3) in these words:

I have already admitted to falsifying the client signatures on clients WG and CD. We had been preparing a Financial Plan together and I had failed to obtain the signatures on the financial planning agreement in time for the review of the plan. I had tried unsuccessfully to obtain their signatures prior to submitting the plan for review. As this would have negatively effected my performance review and my compensation with RBC I falsified their signatures with the plan to replace the agreement with the proper signatures once I received them from the client.

4. The admitted allegation is more particularly described in paragraphs 3, 4, 5 and 9 of the Notice of Hearing. It should be noted that the clients confirm that they had authorized the transactions and dealings with the Respondent in each instant.

5. The Respondent denies that he engaged in the conduct alleged in Allegation #2. In his Reply dated October 8, 2012 he makes the following statement:

I did not fail to cooperate as all documentation that was sent out in regards to this matter were forwarded to an incorrect address. I did not update my address with

the MFDA when I moved as I no longer was licensed nor had any plans to resume a career selling mutual funds. When I received the documents in the spring of 2012 I contacted The MFDA, had my address updated and have cooperated with the proceedings.

## **BACKGROUND**

6. After the discovery of a discrepancy on August 8, 2011 by a Branch Compliance Officer at Royal Mutual Funds Inc. (“Royal”) with respect to the signatures of the clients WG and CD on a Financial Plan document, the Respondent verbally admitted to the falsification of their signatures on that document. The following day he resigned by letter in writing which reads as follows:

I am writing to inform you of my resignation from my position of Financial Planner with RBC Wealth Management and RBC Royal Bank. This resignation is effective immediately.

7. The investigator employed by the MFDA, Ian R. Smith, filed an affidavit and gave evidence. Mr. Smith conducted an investigation into the above facts. Prior to that investigation Mr. David DoRego, Case Assessment Officer, Enforcement Department, sent a letter dated September 23, 2011 by registered mail and regular mail to the Respondent at 837 Inverhouse Drive, Mississauga, Ontario. The registered mail was returned as undelivered. The regular mail was not returned. The letter required a written response to be made by the Respondent on or before October 17, 2011 with reference to the matters that Mr. DoRego raised in his letter.

8. Mr. DoRego did not receive a response to the letter of September 23, 2011. He sent a further letter on October 18, 2011 to the same address by registered mail and regular mail. The registered mail was returned as undelivered. The regular mail was not returned. In that letter he requested a response to the letter of September 23, 2011 setting out that in the event of continued failure to satisfy the request for the items detailed in that letter that there will be possible commencement of disciplinary proceedings against the Respondent for failing to cooperate, contrary to section 22.1 of MFDA By-law No. 1. Mr. DoRego also indicates that there may be certain penalties imposed upon the Respondent.

9. Mr. Smith, in his capacity as Senior Investigator, wrote to the Respondent on January 12, 2012 using the same address of 837 Inverhouse Drive, Mississauga. This letter was then hand delivered by a process server who left a copy in a sealed envelope addressed to the Respondent on January 21, 2012, with an adult female who identified herself as the mother of the Respondent at 1760 Saldene Terrace, Mississauga, Ontario. This letter again stressed the importance of a response by the Respondent to the letters of September 23 and October 18 on or before January 29, 2012. The letter indicated to the Respondent that if he failed to respond the Enforcement Branch of the MFDA might consider initiating disciplinary proceedings against him.

10. As mentioned in his Reply the Respondent contacted the MFDA which resulted in Enforcement Counsel, Mr. Clement Wai, sending to the Respondent a letter on May 23, 2012. After reviewing the history of the matter and a possible finding of misconduct, Mr. Wai clearly states to the Respondent that before a Notice of Hearing is issued the Respondent has the opportunity to provide information. Mr. Wai's letter, paragraph 4 on page 1, states as follows:

Prior to issuing a Notice of Hearing, we invite you, either through counsel or on your own behalf, to provide us with any information that may be relevant to our consideration of the matters described above. Any such information would be provided on a 'with prejudice' basis. In other words, any information provided to us could be brought to the attention of a Hearing Panel of the MFDA should a hearing be held in connection with these matters. You are under no obligation to provide any response to this invitation.

In that letter, Mr. Wai indicated to the Respondent that he required a response in writing no later than May 30, 2012.

11. Mr. Wai received no response. He therefore, by letter dated June 26, 2012, advised the Respondent that a disciplinary hearing had been commenced. The Notice of Hearing was enclosed in that letter.

12. As of this date there had been no response by the Respondent as required by MFDA By-law No. 1.

13. A conference call scheduled for August 21, 2012 at 11:00 a.m. was held. The persons involved were the Panel, Mr. Wai, the Respondent and the Hearings Coordinator, Mr. Marco Wynnyckyj. During that discussion a date for hearing of October 11, 2012 was set. The Respondent agreed to that date and in addition he agreed to give his new address to the MFDA and to file a Reply. The Reply, dated October 8, 2012, was filed three days prior to the hearing.

14. As a result of that conference call an order was prepared and signed directing the matter to proceed on October 11, 2012.

15. After the telephone conference call Mr. Wai sent an email to the Respondent on September 19, 2012 asking him to contact Mr. Wai as to the upcoming hearing. Mr. Wai received no response to this email request.

16. Mr. Smith described his efforts to locate the Respondent, including contacting Royal by letter dated August 23, 2011. Royal indicated that on September 13, 2011 that the last known address of the Respondent was 837 Inverhouse Drive, Mississauga, Ontario. Mr. Smith also testified that some person at the MFDA was contacted by the Respondent in the spring of 2012 at which time Mr. Wai was responsible for the file.

### **THE RESPONDENT'S EVIDENCE**

17. The Respondent gave evidence of his receipt of the information as to the requirements of the MFDA. Upon receiving the letter sent by Mr. Smith he left a message, he believes, with Marco Wynnyckyj, which included his address. He states that Robert Irich, the Compliance Manager of Royal, should have known where he, the Respondent, was and how to reach him. The Respondent says he received the letter of January 12, 2012 from his mother some time near Easter in the year 2012. He gave evidence of moving in August 2011 at approximately the time of his resignation from Royal. The Respondent never notified Royal or the MFDA of his new address. His recollection was that he did not recall the first two letters of September 23, 2011 and October 18, 2011, but he does agree that he did receive the third letter dated January 12, 2012.

## CONCLUSION

18. We found some of the Respondent's evidence to be vague and evasive. We have no difficulty in concluding that he had ample notice of the obligation he had to fulfill. We find as a fact that he ignored these obligations until finally on October 8, 2012, three days before the hearing, he forwarded his Reply. He attempts to avoid his responsibility by submitting the MFDA had an onus to contact him. In addition he alleges that he did not understand the gravity of the problem. He believed that all matters could be dealt with at the hearing and therefore it was not necessary for him to do anything. Shortly put, he made no serious efforts to understand the issues and did not cooperate with the investigation.

19. Section 21 imposes a duty on the MFDA to investigate. Section 22.1 gives the MFDA the power to demand a report in writing, production of records of the relevant facts, and an attendance to give information including an interview as to the facts of the case.

20. We accept and adopt and apply the principles found in paragraph 5 of the submissions of Staff and the authority cited, including the obligation to cooperate with the MFDA as found in *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704 (Div. Ct.). It is clear that the Respondent's failure to respond to the requests made by Staff and Enforcement Counsel in a timely manner or at all frustrates the MFDA's ability to investigate the full nature and extent of the Respondent's conduct. This constitutes a failure to cooperate and is in contravention of section 22.1 of MFDA By-law No. 1. See in that regard *Devries (Re)*, 2012 LNCMFDA 56; *Woloshen (Re)*, 2011 LNCMFDA 20; and *Vitch (Re)*, 2011 LNCMFDA 63.

21. We find that the Respondent failed to comply with section 22.1 of MFDA By-law No. 1. This is serious misconduct because the MFDA cannot make the necessary inquiry as to whether other relevant facts and information can be considered that may affect other investors who have dealt with the Respondent, or whether other persons have been affected by his misconduct. The Panel therefore finds that the misconduct alleged against the Respondent has been proven. He failed to cooperate with an MFDA investigation contrary to section 22.1 of MFDA By-law No. 1.

22. We did not receive submissions as to penalty. We would request the Hearings

Coordinator to make arrangements for a hearing date through Mr. Wai and the Respondent in order that we may receive submissions as to the appropriate penalty which should be imposed under these circumstances.

**DATED** this 23<sup>rd</sup> day of October, 2012.

“John B. Webber”

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The Hon. John B. Webber, Q.C.,  
Chair

“David W. Kerr”

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David W. Kerr,  
Industry Representative

“T. Hugh McNabney”

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