



Decision and Reasons

File No. 200514

MUTUAL FUND DEALERS ASSOCIATION OF CANADA

**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 ANDREW STEVENS

DISCIPLINARY HEARING

Hearing: April 28, 2006
Decision: June 14, 2006

DECISION and REASONS

Hearing Panel of the Ontario Regional Council:

The Hon. Edward Saunders, Q.C.
Lesley Brown
Darcy Lake

Chair
Industry Representative
Industry Representative

Appearances:

William Donegan)	for the Mutual Fund Dealers Association
)	of Canada
Anthony H. Little, Q.C.)	for Scott Andrew Stevens
)	

Decision

This is a disciplinary hearing under the rules of the Mutual Fund Dealers Association of Canada (the "MFDA"). The Respondent Stevens was charged with the following violations:

Allegation #1: Between December 2004 and February 2005, the Respondent misappropriated from his clients SG, LG, RB and FK the sum of \$77,500, more or less, and thereby failed to deal fairly, honestly and in good faith with those clients, contrary to MFDA Rule 2.1.1.

Allegation #2: Commencing August 2005, the Respondent failed to provide a report in writing as required by the MFDA in the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1.

Following the hearing, the panel announced its decision with reasons to follow. These are the reasons.

Allegation #1

At the outset of the hearing, counsel for the Respondent made submissions which, in effect, admitted the first allegation. On the basis of the evidence of Daryll Hillier and Ian Smith contained in the Hearing Record (Tabs 3 and 4 of Exhibit 2) and the admissions made on behalf of the Respondent, there was a finding that the Respondent failed to deal fairly, honestly and in good faith with SG, LG, RB and FK, contrary to MFDA Rule 2.1.1.

Allegation #2

The second allegation was that the Respondent failed to provide a report in writing as required by the MFDA in the course of an investigation, contrary to Section 22.1 of MFDA By-law No. 1.

Section 22.1 provides in part as follows:

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-law 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; ...

and the Member or person shall be obliged to submit such report,...

As pointed out at the Hearing, the provision of a report is the first stage of an investigation and it may be followed by other requirements such as an inspection of documents, provision of copies and attendance to give information.

On August 23, 2005, Mr. Smith, who is an investigator employed by the MFDA, wrote to the Respondent advising that the MFDA was investigating allegations that the Respondent had personally borrowed money from his mutual fund clients. To assist in the investigation, the Respondent was required to provide a written response with full details of all loans obtained by him from mutual fund clients. The Respondent was advised that he was required to cooperate in the investigation in accordance with his obligations as set out in Section 22.1. He was given until September 6, 2005 to provide the documents (the letter is at Tab 4D of Exhibit 2).

Having received no reply, Mr. Smith again wrote to the Respondent on September 13, 2005 (Tab 4E of Exhibit 2). The letter required a response to the August 23 letter no later than September 26 failing which the MFDA might consider initiating disciplinary proceedings against the Respondent for failure to cooperate.

There was no dispute at the hearing that the Respondent was required to provide a written response. The dispute involved whether the Respondent had failed to cooperate in a timely fashion. To assess this allegation, it is necessary to review what happened after September 13, 2005.

On the deadline date, September 26, the Respondent telephoned Mr. Smith and told him that his lawyer would be responding on his behalf and requested an extension to September 30 which was granted.

On September 29 the solicitor for Mr. Smith telephoned and advised that the Respondent would like to cooperate but did not want "to jeopardize the criminal charges laid against him". Mr. Smith advised the solicitor that notwithstanding the criminal charges, the Respondent was required to cooperate with the investigation and that a failure to cooperate might result in disciplinary proceedings. The solicitor requested an extension to October 7 so that he might review the matter and this was agreed to.

Having had no response, Mr. Smith again wrote to the Respondent on October 13 with a copy to the solicitor (Tab 4G of Exhibit 2). After reviewing what had taken place to date, Mr. Smith advised that the MFDA would consider initiating disciplinary proceedings against the Respondent for failure to cooperate.

On October 21 the solicitor for the Respondent wrote to Mr. Smith (Exhibit 4). The letter confirmed that the Respondent did not want to appear uncooperative but because he was charged with offences under the Criminal Code, the solicitor felt it would be inappropriate under the circumstances for him to be interviewed. (This is the first written reference to an interview). The letter went on to say that research into the matter had not been completed and there was reference to two Ontario decisions. The letter requested "a slight indulgence" so that further investigation could be carried out and a decision made whether a concurrent interview was appropriate or whether such an interview should be

avoided at the risk of the consequences. Finally, the solicitor advised that the Respondent would be prepared to voluntarily surrender his licence.

Mr. Smith replied to the solicitor's letter on October 26 and provided some decisions in support of his view that the Respondent was obliged to fully cooperate with the investigation in spite of the criminal charges (Tab 4H of Exhibit 2). Mr. Smith referred to the history of the request and noted that information had also not been provided to the Ontario Securities Commission. Mr. Smith advised that given the serious nature of the allegations against the Respondent, the MFDA was not prepared to grant a further extension and that the matter had been escalated to "Litigation". He added that if the Respondent were to decide to comply, Mr. Smith should be contacted.

Nothing further appears to have occurred until December 15, 2005 when the Notice of Hearing was issued.

It is understandable for a respondent and his legal advisors, when facing criminal charges, to proceed with caution. The right to remain silent and to not incriminate oneself is fundamental to our justice system. Section 22.1 of By-law No. 1 on its face is counter to that principle. It is reasonable for a legal advisor to research the law to ascertain the enforceability of the by-law when there is a criminal prosecution. There are MFDA decisions and decisions of other regulatory bodies which support the position taken by the MFDA. As it has been previously said, there is now no dispute that the Respondent was required to provide the written response requested notwithstanding the criminal charges against them.

The MFDA did not provide the list of decisions on which it relied until the letter of October 26 in which it refused to grant a further extension.

On the evidence, it is clear that there was a violation of Section 22.1 of By-law No. 1 as there was no written response as required prior to December 15 when the Notice of Hearing was issued. However, as was said at the Hearing, the actions of the Respondent and his solicitor did not, in our view, justify a

finding of failure to cooperate. The solicitor needed time to consider the position of the Respondent and then to obtain instructions from him as to whether to provide the response or risk the consequences of non-compliance by remaining silent. While the MFDA was under no obligation to grant the last extension, the request for such an extension was not unreasonable.

Penalties

Turning to the penalties, the MFDA asked for an order that there be a permanent prohibition on the Respondent from engaging in any securities related business while in the employ of, or sponsored by, any MFDA member. That order was unopposed and was granted.

The MFDA also asked for monetary penalties. On the first charge it asked for a penalty of \$80,000.00 which was about \$3,000.00 more than the amount misappropriated. Approximately \$18,000.00 was involuntarily recovered by the Member from the Respondent's bank account. The object of the fine is to deter the Respondent from further similar activities and also to deter other members of the profession. A substantial fine was warranted. In our view, the amount of \$60,000.00 was appropriate.

The second allegation was the failure to provide a written response. The Respondent did not ignore the request. An effort was made to deal with the request and, as already noted, the conduct of the Respondent did not amount to a failure to cooperate. Subsequent to the commencement of proceedings, the Respondent made a number of admissions, albeit late, which considerably shortened the hearing time. In view of the substantial fine for the first charge and the circumstances surrounding the second, we considered that an appropriate fine on the second charge would be \$1,000.00.

The MFDA asks for costs in the amount of \$7,500.00. Section 24.2 of By-law No. 1 provides that the panel in its discretion may require the Respondent to pay the whole or part of the costs of the proceedings. It is recognized that \$7,500.00 may understate the actual costs incurred by the MFDA. However, the

quantum of costs is not intended to be a full indemnity but rather an amount which it is reasonable to require the Respondent to pay in the circumstances. In this case, we considered a reasonable amount to be \$2,000.00.

Date: June 14, 2006

“Edward Saunders”
The Hon. Edward Saunders, Q.C., Chair

“Lesley Brown”
Lesley Brown, Industry Representative

“Darcy Lake”
Darcy Lake, Industry Representative