



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: David Allan Vitch

Heard: September 12, 2011 in Toronto, Ontario
Reasons for Decision: September 22, 2011

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. P. T. Galligan, Q.C.
Linda J. Anderson
Robert C. White

Chair
Industry Representative
Industry Representative

Appearances:

Francis Roy)	For the Mutual Fund Dealers Association of Canada
)	
David Allan Vitch)	Did not appear either in person or by counsel
)	

1. By Notice of Hearing dated February 24, 2011, MFDA made the following allegations of misconduct against the Respondent David Allan Vitch:

2. **Allegation #1:** Between November 30, 2005 and October 9, 2006, the Respondent had and continued in the following two other gainful occupations that were not disclosed to and approved by the Member:

- (a) operating a packaging company; and
- (b) providing tax preparation services for clients and other individuals;

contrary to MFDA Rules 1.2.1(d) and 2.1.1.

3. **Allegation #2:** Between November 30, 2005 and October 9, 2006, the Respondent failed to comply with the Member's policies and procedures by not disclosing the outside business activities in which he was involved, thereby interfering with the ability of the Member to supervise the Respondent and comply with its regulatory obligations, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

4. **Allegation #3:** Commencing March 25, 2010, the Respondent has failed to produce for inspection copies of documents and records requested by the MFDA during the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1.

5. Although he was properly served with the Notice of Hearing, the Respondent did not appear at the first appearance hearing. At that hearing, September 12, 2011 was fixed for the hearing of the allegations. The Respondent was notified of the date. When the hearing came before us on September 12, 2011, the Respondent did not appear. However, in the interim, he and Enforcement Staff were in communication and ultimately entered into an Agreed Statement of Facts. The Hearing Panel determined that it would proceed with the hearing in the absence of the Respondent. The Agreed Statement of Facts was filed as an exhibit. Submissions were then made by Mr. Roy on behalf of MFDA.

6. For ease of reference we set out, in full, the contents of the Agreed Statement of Facts:

I. INTRODUCTION

7. By Notice of Hearing dated February 24, 2011, the Mutual Fund Dealers Association of Canada (the “MFDA”) commenced a disciplinary proceeding against David Allan Vitch (the “Respondent”) pursuant to ss. 20 and 24 of MFDA By-law No. 1.

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

Allegation #1: *Between November 30, 2005 and October 9, 2006, the Respondent had and continued in the following two other gainful occupations that were not disclosed to and approved by the Member:*

- (i) *operating a packaging company; and*
- (ii) *providing tax preparation services for clients and other individuals;*

contrary to MFDA Rules 1.2.1(d) and 2.1.1.

Allegation #2: *Between November 30, 2005 and October 9, 2006, the Respondent failed to comply with the Member’s policies and procedures by not disclosing the outside business activities in which he was involved, thereby interfering with the ability of the Member to supervise the Respondent and comply with its regulatory obligations, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.*

Allegation #3: *Commencing March 25, 2010, the Respondent has failed to produce for inspection copies of documents and records requested by the MFDA during the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1.*

II. IN PUBLIC / IN CAMERA

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

III. ADMISSIONS AND ISSUES TO BE DETERMINED

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

11. *Subject to the determination of the Hearing Panel, Staff submits and the Respondent does not oppose that the appropriate penalty to impose on the Respondent is:*

(a) *a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity over which the MFDA has jurisdiction, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;*

(b) *a fine in the amount of \$50,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and*

(c) *costs in the amount of \$5,000 pursuant to s. 24.2 of MFDA By-law No. 1.*

IV. AGREED FACTS

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

13. *Nothing in Parts IV and V herein is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.*

Registration History

14. *From November 1, 2000 to October 9, 2006, the Respondent was registered in Ontario as a mutual fund salesperson with Assante Financial Management Ltd. (“Assante”). During this time, the Respondent was also registered as a branch manager for the periods November 1, 2000 to August 6, 2002 and February 15, 2006 to October 8, 2006.*

15. *The Respondent is no longer registered in the securities industry in any capacity.*
16. *The Respondent was previously registered with another mutual fund dealer from July 9, 1994 to October 31, 2000.*
17. *Assante is registered as a mutual fund dealer and exempt market dealer in all Canadian provinces and territories, except Saskatchewan, Québec and the Yukon territory.*
18. *Assante has been a Member of the MFDA since May 30, 2002.*

Allegations #1 and #2

19. *On May 30, 2002, the Respondent signed an Assante Certificate (the “Assante Certificate”) in which he acknowledged the following:*
 - (a) *having received and read Assante’s Compliance Manual and Assante Bulletins (together, the “Compliance Manual”); and*
 - (b) *that he would observe and comply with MFDA Rules and relevant securities laws, that his sales conduct and trading activity would be compliant with the Compliance Manual including any amendments thereto;*
 - (c) *that all outside business names, trade names or style names under which he operated would be disclosed to Assante’s registrations and licensing department.*
20. *The Compliance Manual, consistent with MFDA Rule 1.2.1(d), prohibited an Approved Person from having or engaging in other occupations that were not disclosed to, and approved by, Assante’s compliance department.*
21. *When he signed the Assante Certificate, the Respondent disclosed that he operated a business known as Assante Estate & Insurance Services through which he sold life insurance to clients and other individuals (the “Respondent’s Insurance Business”). Assante approved the Respondent’s Insurance Business.*

22. *By signing the Assante Certificate, the Respondent undertook to inform Assante's compliance department of any changes in the status of the Respondent's Insurance Business and any future outside business activities in which he proposed to engage.*

23. *On November 30, 2005, the Respondent incorporated Nelitech Inc. ("Nelitech"), a corporation for which he was the sole shareholder, director and officer.*

24. *Through Nelitech, the Respondent then entered into a contract with Canada Pack & Parcel Inc. ("CPP"), a packaging business located in London, Ontario, wherein Nelitech obtained the rights to operate CPP's business with CPP's owner, DN, and to use the CPP trade name and logo (the "CPP Business"). Under the terms of this contract, Nelitech also obtained the rights to franchise the CPP concept.*

25. *The Respondent, through Nelitech, started to operate the CPP Business on or about November 30, 2005. In doing so, he sought out potential investors, opened a bank account for Nelitech bank account, purchased equipment and arranged for CPP's store to be renovated.*

26. *While operating the CPP Business, the Respondent deposited its revenues in, and paid its expenses from, the Nelitech bank account.*

27. *In or about 2005, the Respondent also commenced providing tax preparation services for clients and other individuals.*

28. *The Respondent did not disclose the existence of Nelitech, his involvement in the CPP Business or his provision of tax preparation services to Assante.*

Personal Financial Dealings between the Respondent and client TK

29. *On or about November 1, 2000, TK became a client of Assante. The Respondent was the mutual fund salesperson responsible for servicing client TK's account.*

30. *In November 2005, the Respondent approached client TK about borrowing \$250,000 from client TK for use in connection with the CPP Business, and in particular, to launch a flagship store for CPP in London, Ontario (the "Flagship Store"). At or about this time, the Respondent provided*

client TK with a document forecasting projected profits and losses for the CPP Business (the “Forecast”).

31. *On December 2, 2005, the Respondent, through Nelitech, entered into a written loan agreement with client TK (the “Loan Agreement”) whereby client TK agreed to lend \$250,000 to the Respondent to finance the CPP Business (the “Loan”). Client TK provided the Respondent with a cheque in the amount of \$250,000 payable to Nelitech, which the Respondent deposited in the Nelitech Bank Account.*

32. *Under the terms of the Loan Agreement it was agreed that, among other things:*

(a) the Loan would be used exclusively for opening and maintaining the Flagship Store;

(b) client TK would receive monthly progress reports concerning the CPP Business;

(c) the Loan would be considered in default if certain projections in the Forecast were not met; and

(d) in the event of a default on the Loan, any outstanding balance would be immediately repaid in full to client TK.

33. *The Compliance Manual prohibited an Approved Person from “having personal financial dealings with clients including the lending of money or the borrowing of money...”*

34. *The Respondent did not disclose to Assante that he directly, or indirectly through Nelitech, had borrowed \$250,000 from client TK.*

35. *On March 9, 2006, client TK transferred his investments from Assante and thereafter ceased to be a client of Assante.*

36. *In May 2006, TK informed the Respondent that, in TK’s view, the Loan was in default given that certain projections in the Forecast had not been met. TK requested that the Respondent immediately repay the outstanding balance of the Loan.*

37. *In response to TK’s request, the Respondent made a partial repayment to TK on account of the Loan in the amount of \$100,000, consisting of \$85,000 paid from the Nelitech bank account and*

a further \$15,000 paid from the Respondent's personal funds. After this partial repayment, the outstanding principal balance of the Loan remained at \$150,000.

38. *On October 9, 2006, the Respondent was terminated by Assante.*

39. *On May 30, 2008, TK commenced an action in the Ontario Superior Court of Justice against, among others, the Respondent, Nelitech, CPP and Assante seeking, among other things, repayment of the outstanding balance of the Loan.*

40. *The Respondent therefore engaged in personal financial dealings with client TK by entering into the Loan Agreement and borrowing \$250,000 from him to finance the CPP Business, only \$100,000 of has been repaid by the Respondent.*

Allegation #3 – Failure to Cooperate

41. *On March 10, 2010, the Respondent attended an interview with MFDA Staff pursuant to section 22.1 of MFDA By-Law No. 1 with respect to his outside business activities and personal financial dealings with client TK (the "Interview").*

42. *During the Interview, the Respondent undertook to provide MFDA Staff with a number of documents, including in particular the following documents (the "Undertaking Documents"):*

- 1. A copy of the executed contract between Nelitech and CPP;*
- 2. Copies of the cheques in the amounts of \$85,000 and \$15,000 that the Respondent made payable to client TK as partial repayment of the Loan;*
- 3. A copy of the executed Loan Agreement;*
- 4. A copy of a letter the Respondent sent to client TK advising of his plans to leave Assante;
and*
- 5. Copies of any communications in which the Respondent disclosed to and received approval from Assante concerning his tax preparation activities.*

43. *On March 11, 2010, MFDA Staff sent a letter to the Respondent requesting that he provide the Undertaking Documents as well as certain other documents requested by Staff during the*

Interview by March 25, 2010. The Respondent confirmed receipt of MFDA Staff's request that same date.

44. *The Respondent did not provide copies of any of the Undertaking Documents or of the other documents requested by MFDA Staff by March 25, 2010.*

45. *Between March 29, 2010 and April 12, 2010, MFDA Staff and the Respondent exchanged numerous letters and emails with respect to the Respondent's failure to provide the documents requested by Staff during the Interview.*

46. *On April 12, 2010, the Respondent informed MFDA Staff that he had sent a package to the MFDA offices in Toronto containing copies of the Undertaking Documents as well as certain other documents requested by Staff. The next day, Staff received the Respondent's package. While the package contained copies of certain documents requested by Staff, it did not contain copies of any of the Undertaking Documents.*

47. *On April 15, 2010 and April 27, 2010, MFDA Staff sent emails to the Respondent reminding him of his obligations as a former Approved Person of the MFDA to cooperate with Staff during the course of an investigation, and again requested that he provide the Undertaking Documents. The Respondent was informed that his failure to cooperate with MFDA Staff's requests may result in disciplinary proceedings being commenced against him.*

48. *To date the Respondent has not provided any of the Undertaking Documents to Staff.*

49. *Due to the failure of the Respondent to provide the Undertaking Documents, MFDA Staff has been unable to, among other things:*

- (a) determine the true nature and extent of the business arrangement between the Respondent (through Nelitech) and CPP, including the possibility of the involvement of clients other than client TK; and*
- (b) determine the true nature and extent of the personal financial dealings with client TK, including in particular the terms of the Loan Agreement, the chronology of events pertaining to the Loan, the amount outstanding on the Loan and the possibility that other*

clients may have been involved in or affected by the Respondent's financing of the CPP Business or Respondent's borrowing and repayment activities with client TK.

V. MISCONDUCT ADMITTED

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

(a) *between November 30, 2005 and October 9, 2006, he had and continued in the following two other gainful occupations that were not disclosed to and approved by the Member:*

(i) *incorporating Nelitech through which he operated a packaging company known as CPP; and*

(ii) *providing tax preparation services for clients and other individuals;*

contrary to MFDA Rules 1.2.1(d) and 2.1.1;

(b) *between November 30, 2005 and October 9, 2006, the Respondent failed to comply with the Member's policies and procedures by not disclosing the outside business activities in which he was involved, thereby interfering with the ability of the Member to supervise the Respondent and comply with its regulatory obligations, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1;*

(c) *between December 2, 2005 and March 9, 2006, the Respondent engaged in personal financial dealings with client TK by entering into the Loan Agreement and borrowing \$250,000 from him to finance the CPP Business, which dealings gave rise to an actual or potential conflict of interest between the Respondent and client TK which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1; and*

(d) *commencing March 25, 2010, the Respondent has failed to produce for inspection copies of documents and records requested by the MFDA during the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1.*

VI. ACKNOWLEDGEMENT

51. *In admitting the facts and misconduct described herein, the Respondent acknowledges that he was advised of his right to be represented by, and obtain the advice of, legal counsel or an agent.*

52. Paragraphs 13-22, inclusive, and paragraphs 35-43, inclusive, prove the allegations of misconduct contained in the Notice of Hearing. Paragraphs 23-24, inclusive, establish that the Respondent engaged in misconduct, personal financial dealings with a client, contrary to Rules 2.1.1 and 2.1.4. While there is no specific allegation respecting that misconduct contained in the Notice of Hearing, a hearing panel is entitled to take it into account when determining the appropriate penalty for the misconduct which has been specifically alleged in the Notice of Hearing.

53. We need say only a few words about the misconduct covered by Allegation #1 and Allegation #2. The need for a Member to know what other occupations and businesses its employee might be engaged in is obvious. There are many reasons why a Member must know what its employees are doing. We will mention only two of what seem to us to be the most important reasons. The first is that a failure to know about an employee's other commercial activities impinges upon the Member's ability to properly supervise its employee. The second reason is that the Member could be exposed to litigation alleging that the Approved Person's activity was within the scope of his/her employment with the Member. It is, therefore, our opinion that we are required to view very seriously the conduct covered by Allegations #1 and #2.

54. Failure to cooperate with an investigation, even where, as here, the failure is not total, is a matter which goes to the very heart of MFDA's ability to attempt to protect investors, maintain capital market efficiency and ensure public confidence in the system. Over twenty years ago, the Ontario Divisional Court, in *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704, said:

... every professional has an obligation to cooperate with his/her self-governing body.

55. There can be no exceptions to that obligation. 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. While penalty guidelines are not binding upon a Hearing Panel, they can indicate how seriously the industry views certain types of misconduct. The guideline suggests a

minimum fine of \$50,000 for failure to cooperate and envisions the possibility of permanent prohibition of an Approved Person.

56. This Hearing Panel cannot overstate the importance of cooperation with an investigation. We think that it is necessary that Members and Approved Persons understand that any failure to cooperate with an investigation will likely attract severe sanctions.

57. By paragraph 5 of the Agreed Statement of Facts, Staff proposes, and the Respondent does not oppose, the following penalty:

- (a) a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity over which the MFDA has jurisdiction, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- (b) a fine in the amount of \$50,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- (c) costs in the amount of \$5,000 pursuant to s. 24.2 of MFDA By-law No. 1.

58. Upon the completion of the submissions by Mr. Roy and reading the Agreed Statement of Facts, the Hearing Panel withdrew to consider the matter. Based upon the Agreed Statement of Facts, we determined that the Respondent had committed the misconduct specified in the three allegations contained in the Notice of Hearing. We followed the usual practice of Hearing Panels to consider, among others, the following matters:

- (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 decisions made in similar circumstances.

59. In addition to those matters, we gave particular attention to the fact that the Respondent admitted all of the essential facts alleged against him. That made the holding of a lengthy hearing unnecessary. We take his admission of those facts to be an indication of remorse. More importantly, we think it is admirable that he has saved the MFDA the substantial expense of a lengthy hearing. In addition, he has saved witnesses the inconvenience, to which they would have been subjected, had it been necessary to prove the allegations by witnesses. What is, in effect, an acknowledgement of misconduct justifies mitigation of what otherwise might have been a more substantial penalty.

60. We think that paragraph 50 of Mr. Roy's written submission neatly captures the result at which we arrived. We adopt it.

50. The proposed penalties are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members and Approved Persons. Furthermore, the proposed sanctions will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry.

61. Accordingly, following our deliberations, on September 12, 2011, we made the following order:

1. The Respondent's authority to conduct securities related business in any capacity over which the MFDA has jurisdiction shall be permanently prohibited, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
2. The Respondent shall pay a fine in the amount of \$50,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and

3. The Respondent shall pay costs of this proceeding in the amount of \$5,000 pursuant to s. 24.2 of MFDA By-law No. 1.

DATED this 22nd day of September, 2011.

“Patrick Galligan”

The Hon. P. T. Galligan, Q.C.,
Chair

“Linda Anderson”

Linda J. Anderson,
Industry Representative

“Robert White”

Robert C. White,
Industry Representative

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