

**ALBERTA SECURITIES COMMISSION**

**IN THE MATTER OF *the Securities Act*  
R.S.A. 2000, c. S-4**

**Citation: Robert, Re, 2007 ABASC 447**

**Date: 20070627**

**IN THE MATTER OF Michael Robert  
Application pursuant to ss. 76(3) by Michael Robert  
for a hearing in relation to the denial of registration**

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**Decision of the Executive Director**

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**Introduction**

1. This is an application pursuant to ss. 76(3) of the *Securities Act* R.S.A., c.S-4 (the “Act”) by Michael Robert (the “Applicant”) for a hearing to be conducted before the Executive Director on the issue of refusal to grant the Applicant amendment of registration.

2. The Applicant through his new sponsoring dealer (the “Dealer”) made application on February 14, 2007, for transfer of his registration as a salesperson with a mutual fund dealer (the “Application”). The Applicant had previously been dually employed as a personal banking representative and a mutual fund salesperson with one of the chartered banks (the “Bank”). The Bank submitted notice of the Applicant’s termination of employment on February 8, 2007, through the National Registration Database (“NRD”). There were no issues identified by the Bank regarding the Applicant’s discharge from their employ. The form indicated that the Applicant resigned in good standing, that there were no unresolved complaints, violations or disciplinary matters, and that he had discharged all of his financial obligations to his clients.

3. The Applicant indicated in his transfer application that he planned to spend 40 hours per week on back office processing duties and 5 hours per week on mutual fund

sales. When ASC staff (“ASC Staff”) sought clarification from the Dealer on the Applicant’s duties, the Dealer advised that the Applicant would be:

- a) doing order-entry processing (essentially mutual fund orders and paperwork for mutual fund representatives of the Dealer) for 4 to 8 hours a day; and
- b) holding a mutual fund licence to continue to sell mutual funds to family, friends and clients.

The Dealer also advised that the work the Applicant would be performing for the Dealer was very similar to that which the Applicant had performed for the Bank. Furthermore, the amount of time that would be spent on mutual fund sales (i.e., 5 hours) was the same amount of time the Applicant had proposed to spend during his employ with the Bank and that registration had been approved. The Dealer also opined that the work to be performed at the Dealer by the Applicant (presumably referring to the non-mutual fund sales portion) was very similar to that he had done for the Bank. The Dealer also suggested that the ASC had previously approved numerous individual applications for those in similar circumstances i.e., those carrying on administrative tasks for an entity were allowed to hold a mutual fund licence.

4. On February 16, 2007, ASC Staff wrote the Dealer and advised that Applicant was not approved for registration. The communication further advised that the ASC policy in respect of dual employment was limited to circumstances where “employees of a Financial Institution engaged in financial services activities may also become registered as salespersons of a mutual fund dealer.” With respect to the numerous exceptions referred to by the Dealer, ASC Staff advised that these were limited to situations where administrative individuals were licensed to assist other registered salespeople. Those individuals did not have their own clients.

5. Between February 21, 2007, and April 25, 2007, there were a series of communications between the Applicant and his Dealer with ASC Staff. The argument on behalf of the former was that the nature of the Applicant’s work with the Dealer was not materially different from what he had done with the Bank, and therefore he should be registered. A meeting occurred on April 23, 2007, wherein the Applicant confirmed his mutual fund sales practice would be limited to no more than 20 clients, all of whom would be friends and family. He would spend his free time on weeknights and weekends servicing his clients and his expectation was that it would take approximately 5 hours per week. He advised he had no long-term plans, but might in the future be interested in a career as an adviser.

6. On April 25, 2007, ASC Staff wrote the Dealer and advised that they would recommend that the Executive Director refuse the transfer application of the Applicant for the following reasons:

- a) the Applicant would not be employed full time as a salesperson (see s.41(1) of the *Alberta Securities Commission Rules (General)* (the “Rules”); and

b) none of the circumstances which permit the Executive Director discretion to register part time salespersons were present (see s. 41(2) of the Rules).

7. By letter dated May 7, 2007, the Dealer requested a hearing before the Executive Director. On May 22, 2007, the Dealer submitted hearing materials to the Executive Director. ASC Staff provided their materials in response on June 1, 2007. The Dealer provided a written reply on June 8, 2007.

### **Submissions**

8. The Dealer's submission of May 22, 2007, attached his letter of March 15, 2007 and the ASC reply of April 25, 2007. The Dealer stated that he had nothing to add to his earlier letter by way of argument other than to note that the ASC Staff letter did not provide a substantive response to the submissions contained in the March 15, 2007 communication of the Dealer. The March 15, 2007 letter identified that the ASC Staff concerns were focussed upon the proficiency of the Applicant and whether he was employed "full time". The Dealer accused ASC Staff of being subjective in its analysis of the difference between the Dealer's business and that of the Bank. The Dealer maintained that the Applicant would be provided with "ample opportunity to remain current with developments in the financial services industry." The Dealer further posited that the involvement of a registered individual in a branch of a financial institution may not get any such exposure to mutual funds other than processing an occasional unsolicited trade or being part of the "production line" sales campaign during RSP season. The Dealer also maintained that there is no legislative stipulation for maintenance of ongoing knowledge or continuing education as a suitability requirement for registration.

9. The Dealer submitted that the Applicant clearly came within the part-time salesman exception set out in s.41(2)(h) of the Rules in that his administrative duties would not conflict with his sales requirements, as the latter would be done outside of his administrative business hours. No issue of conflict of interest had been raised as an issue and accordingly the Applicant would satisfy the second requirement of s.41(2)(h).

10. ASC Staff's submission was that the Applicant is no longer a suitable candidate for registration and that his registration would be objectionable in that he obviously does not come within the provisions of s.41(1) of the Rules (ie. full time employment as a salesman), nor does he satisfy the exceptions (see s.41(2) of the Rules). ASC Staff alleged that the Applicant's administrative duties would prohibit his clients from accessing him during these hours and therefore would interfere with his duties and responsibilities as a salesman.

11. ASC Staff maintained that the part-time salesperson exception would only be recommended in the case of an applicant that is dually employed in the financial services

industry and is actively engaged in financial services activities. ASC Staff submitted that the Applicant does not come within this exception. ASC Staff pointed to banking representatives and insurance salespeople as examples of accepted registrations. Their submission was that a salesperson's active participation in these activities keeps them informed about the capital markets and allows clients access during regular business hours.

12 In the alternative, ASC Staff submitted that even if the Applicant comes within the exceptions described in s. 41(2) of the Rules, the Executive Director may exercise his discretion to refuse an applicant who is not suitable or whose registration is objectionable.

13. In reply to ASC Staff submissions, the Applicant stated that the ASC Staff's position was that although the Applicant was currently proficient, he would not be so in the future. The Applicant pointed out the lack of any statutory continuing education or proficiency requirement in the legislation. If the ASC had intended such a result then clearly they could articulate the same through a rule. The suggestion was further made that limiting the exceptions to the "financial services industry" would not necessarily satisfy a continuing education requirement and decisions would need to be made on a case by case basis.

14. The Applicant suggested that the concern raised by ASC Staff relating to his availability did not reflect the practicality of the mutual fund business. Specifically, mutual funds are generally priced on a daily basis and accordingly access to one's salesperson is not as time critical as in the non-mutual fund securities business. The Applicant would be available to clients on a reasonable basis.

15. In conclusion, the Applicant submitted that ASC Staff had not demonstrated that the Applicant is no longer suitable for registration nor that the proposed transfer would be objectionable. The Applicant agreed that the Executive Director did have "considerable discretion", but that such discretion was not absolute and must be exercised in a reasonable and equitable manner.

## **Discussion**

16. This is a particularly interesting and unique application. The majority of registration applications involve an applicant's integrity; typically relating to some misconduct or misfortune that an applicant has been involved with prior to the application. None of these circumstances are present in this application.

17. The purpose of registration, as quoted from the January 13, 2006, CSA Registration Reform Project *Proposal on Registration Reform*, is as follows:

The registration requirement protects investors from unfair, improper or fraudulent practices and enhances capital market integrity and efficiency. The cornerstones of the registration requirements are:

- proficiency -- only qualified persons can deal or advise
- integrity -- registered persons must be honest and of good repute
- solvency -- registered persons must be financially viable

The courts accept that the registration requirement is in the public interest and have framed their approval with reference to protecting the public from persons carrying on a securities business.

18. The ASC has commented that mutual fund dealers have an important role in protecting investors and in fostering a fair and efficient market for mutual fund securities. The ASC has also stated that it is not up to regulation to fit itself around a business model of any particular registrant. Rather, the mutual fund dealer industry is a regulated field and registrants must ensure their business model complies with the letter and spirit of the regulatory system. In *Re Lysalta Capital Development Corporation* (2004) ABSECCOM ENF - #1491166v1, at par 48, the Commission stated:

Strong registrants who conduct themselves in accordance with both the letter and the spirit of the regulatory system play an important part in achieving those fundamental objectives. That does not, however mean that it is the responsibility of the regulatory system or of those who administer it to assure for any particular market participant a profitable or fulfilling role of its own choosing. Mutual fund dealers operate in a regulated industry, and regulation can undoubtedly be constraining. Some participants may find the requirements or constraints not to their liking. We endeavour to deal fairly and objectively with all market participants, but it is not our task to craft a regulatory structure that happens to satisfy the business model, or any other attribute, of each and every current or prospective market participant. Our decisions are made in light of the fundamental objectives of securities regulation mentioned earlier.

19. Clearly, the Applicant does not come within the language of Rule 41(1), which requires full-time employment as a salesman. If the Applicant is to succeed in his application for registration continuance then he needs to fit himself within the exceptions set forth in Rule 41(2). The specific sub-rule identified by the Applicant is R. 41(2)(h) which has two requirements:

- 1) the activity does not interfere with the individual's duties and responsibilities;  
and
- 2) the activity will not result in a conflict of interest with the duties of the salesman.

20. The ASC has historically permitted full time salespeople of mutual funds to have other employment, so long as that employment does not conflict with the salesperson's duties. What the ASC has not permitted is people who have full time jobs to moonlight as mutual fund salespeople. There are a few exceptions to this practice. Licensed Insurance Agents are permitted to be dually registered as a mutual fund salesperson (see R. 42(2)(f)). Banking employees who sold financial services were permitted to be dually registered in accordance with A.S.C. Notice 19 *A Distribution of Mutual Funds by Financial Institutions Principles of Regulation* (effective November 4, 1988, since repealed and replaced by NI 33-102 effective August 1, 2001) which provided (see par 3):

*Dual employment.* Employees of a FI [Financial Institution] who are engaged in financial services activities may also become registered as salespersons and must satisfy normal registration requirements except where modified by this notice.

Although this Notice was repealed and the replacing National Instrument did not address this subject, the practice has been to continue to permit the dual registration. The argument is that having individuals sell financial services of a somewhat similar nature, be they segregated funds (insurance), or GIC's (banking) or mutual funds, is beneficial to the investor and therefore is seen as in the public interest.

There have also been isolated cases where administrative staff assisting mutual fund salespeople have been granted registration to facilitate their jobs. In all of these cases, the registered administrative staff are not permitted to have their own clients.

21. Canadians invest heavily in mutual funds. In 2006, annual net sales of mutual funds totalled \$20.8 billion (see Investment Funds Institute of Canada *Year 2006 in Review IFIC's Annual Review of the Canadian Mutual Fund Industry Statistics*). According to Statistics Canada (see *The Wealth of Canadians: An Overview of the Results of the Survey of Financial Security*) in 2005, Canadians had \$134 billion invested in mutual funds, investment funds and income trusts (not including registered accounts or pensions). Eighty-nine per cent of Canadian family units report having financial assets, mainly banking deposits, which has not changed since 1999. However, the mutual fund group of assets has increased more than 50% from 1999. This reflects that Canadian investors have switched many of their investments into mutual funds and like products.

22. Given the importance of mutual funds to investors, it is critical that the registrant community which services this component of the marketplace is focussed on this task and portrays a sense of confidence to the investing public. The Commissions, when asked where to go for advice, point to the registered representatives as the destination for investors. This type of responsibility is wholly inconsistent with representatives who "moonlight" as mutual fund salespeople.

23. The Applicant has submitted that he comes within the language of R.42(2)(h). That may be the case, however the distinction between the language of R. 42(1) and R.

42(2) is critical, in that the latter subsection is subject to the discretion in the Executive Director to determine whether to register. There are a number of examples under R.42(2) where I would find it difficult to register an individual, notwithstanding they met the language of the particular subsection. For example, someone who only worked for six months per year, absent compelling circumstances, would not automatically be registered (see R.41(2)(c)).

24. The Applicant has suggested that his employment is similar to the work done by bank representatives who are permitted to be dually registered. That is not the case, as the function that bank representatives are attending to is the sale of financial products. The Applicant is performing administrative tasks for the Dealer and is subject to different supervision for those tasks than he would be when acting in the capacity of a mutual fund salesperson.

24. In these circumstances, consistent with the past practice of the ASC, I do not think that it is in the public interest to permit an individual, whose proposed participation in the selling of financial services is so limited, to continue to be registered.

### **Finding**

25. The Executive Director, having provided the Applicant with an opportunity to be heard, refuses to grant registration to the Applicant.

Dated at the City of Calgary, in the Province of Alberta, this 27 day of June, 2007.

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 ) "original signed by"  
 ) David C. Linder  
 ) Executive Director  
 ) Alberta Securities Commission