

# Re Li

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of  
Canada (IIROC)**

**and**

**Yu-Qiong (Kevin) Li**

2015 IIROC 18

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Pacific District)

Heard: March 3, 2015

Decision: May 22, 2015

**Hearing Panel:**

Alison Narod (Chair), Lloyd Costley, Michael Johnson

**Appearances:**

Paul Smith, Enforcement Counsel, IIROC

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## INTERIM DECISION

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- ¶ 1 Four counts are alleged against the Respondent. Three relate to trading improprieties and one relates to non-cooperation with an IIROC investigation.
- ¶ 2 The trading allegations concern conduct that occurred between July and October, 2011, while the Respondent worked as a Registered Representative for an IIROC member dealer, TD Waterhouse. His employment with that firm terminated in October, 2011. The Respondent has not worked in the industry since then.
- ¶ 3 At a hearing held on March 3, 2015, two issues were raised before this Panel:
- (1) a preliminary issue about whether the Notice of Hearing in this matter was properly served under Rule 5 of the IIROC Rules of Practice and Procedure, and
  - (2) an issue about whether, if there was proper service, this is an appropriate case to accept as proven the facts and violations alleged in the Notice of Hearing, in light of the Respondent's failure attend a disciplinary hearing under IIROC Rule 13.5 of the Rules of Practice and Procedure.
- ¶ 4 At the hearing held on March 3, 2015, the Panel reserved its rulings as to whether the Notice of Hearing had been properly served and whether it would accept the facts and violations alleged in the Notice of Hearing as proven under Rule 13.5.
- ¶ 5 Briefly, for the reasons set out below:
- (1) the Panel has decided the first issue in the affirmative; the Notice of Hearing is deemed to have been effectively served, however, the Notice is flawed because the date for hearing abridged the time period for filing a Response; and
  - (2) the Panel has decided the second issue in the negative; this is not an appropriate case to accept as

proven the facts and violations alleged in the Notice of Hearing.

¶ 6 Certain personal information has been anonymized or redacted from this decision.

### **THE PRELIMINARY ISSUE RE: SERVICE**

¶ 7 As noted, a preliminary issue was raised on March 3, 2015 about whether a Notice of Hearing issued on February 4, 2015 was served in accordance with the IIROC Rules of Practice and Procedures, Rule 5. The relevant facts are described below.

¶ 8 At all times during and after his employment with TD Waterhouse, the Respondent's residential address listed on the National Registration Database ("NRD") has been Suite A – XYZ Street, Vancouver BC (the "Vancouver Condo"). The NRD also listed the Respondent's residential telephone number (the "Listed Phone Number"). We are satisfied on the evidence supplied by IIROC that the Respondent lived at that address with his wife or common-law partner for at least part of the time he worked at TD Waterhouse. We are also satisfied that the Vancouver Condo is the Respondent's "last known address" as recorded on the NRD.

¶ 9 TD Waterhouse conducted an investigation of the trading allegations in October, 2011 with the result that the Respondent left its employ.

¶ 10 IIROC commenced an investigation of the Respondent's trading activities and sent a standard investigation opening letter dated March 13, 2012 by Canada Post Registered Mail to the Respondent at the Vancouver Condo. Tracking information from Canada Post confirmed that the letter was delivered to the Vancouver Condo on March 19, 2012 and that it was signed for by a person using the name "Yu Li".

¶ 11 Ms. T., an IIROC investigator assigned to this case, indicates that the Respondent's Chinese name is "Yu Qiong Li" and that, although she is not a handwriting expert, the signature on the Canada Post tracking confirmation appears to be the same as the Respondent's signature on his TD Waterhouse client account documentation.

¶ 12 The March 13, 2012 letter notifies the Respondent that IIROC has commenced an investigation into the Respondent's conduct relating to trades in several accounts while registered with TD Waterhouse.

¶ 13 After sending the March 13, 2012 letter, IIROC, through Ms. T., communicated with the Respondent about its investigation. Ms. T. has supplied a string of emails dated November 4, to November 21, 2012 showing that she communicated with him by email to a yahoo email address (the "Yahoo Email"). The last date that Ms. T. received an email from the Respondent was November 21, 2012.

¶ 14 Ultimately, IIROC arranged a telephone interview with the Respondent, who was then in Beijing. The interview was scheduled for 3:00 pm on November 21, 2012, Vancouver time, which was 7:00 am Beijing time. The Respondent provided a Chinese telephone number at which he could be reached (the "Chinese Number"). IIROC supplied the Respondent with a number of exhibits to address in the interview, by email. The interview was held on November 22, 2012.

¶ 15 During the interview, among other things,

- (a) The Respondent was informed that he was required by Dealer Member Rule 19.5 to give IIROC information respecting the investigation and to answer IIROC's questions.
- (b) The Respondent confirmed that he was currently in Beijing, China.
- (c) The Respondent said he had moved from Vancouver to China and was now permanently living in Beijing.
- (d) The Respondent declined to provide an address where he could be reached in China. He said that he could not provide his address. He said he might move from it. He confirmed that he had no reason for not providing an address where he could be reached. He said he did not want to provide his address.
- (e) Once the discussion turned to the subject matter of the client complaints, the IIROC participants

decided to reschedule the balance of the interview because of the poor telephone connection and their view that the interview would be assisted by the use of a Mandarin translator.

- (f) The Respondent agreed to do a new interview.
- (g) The Respondent agreed that if his contact information changed in any way he would inform Ms. T.
- (h) Ms. T. advised that she would be in touch with the Respondent, probably through email.

¶ 16 Unbeknownst to IIROC until February, 2015 was that, on November 21, 2012, an application was received by the Land Title Office in Vancouver to transfer title to the Vancouver Condo, which was formerly in the names of the Respondent and his wife, as joint tenants, into the name of the Respondent's wife, alone. According to documents supplied by IIROC, this application was entered on November 30, 2012. As of February, 2015, the Vancouver Condo remained in the wife's name.

¶ 17 IIROC was not successful in its subsequent attempts to hold another interview with the Respondent.

¶ 18 On July 18, 2013, IIROC sent a Letter compelling the Respondent to participate in its investigation (a "Compel Letter") to the Vancouver Condo by Canada Post Registered Mail and Regular Mail. Despite two notice cards being left indicating where the letter sent by Registered Mail could be picked up, the letter was not claimed and was ultimately returned to the sender, IIROC. The letter sent by Regular Mail was returned to IIROC.

¶ 19 Additionally, IIROC hired a process server to deliver the Compel Letter to the Vancouver Condo. The process server attended at the building containing the Vancouver Condo but found it was a secure building with an intercom system that could not be entered by the public without being "buzzed in" using the intercom. The process server made nine unsuccessful attempts to contact someone in the Vancouver Condo by intercom from July 20 to 27, 2013 and was unable to personally serve the Compel Letter.

¶ 20 In late January, 2015, Ms. T. was contacted by Ms. M., a Senior Registration Administrator with the B.C. Securities Commission (the "Commission"). Between January 26 and 30, 2015, Ms. M. advised Ms. T., in a series of telephone calls, that the Respondent had applied for reactivation of his registration through the Commission to work for Sloane Capital Corp., an Exempt Market Dealer. Ms. M. also conveyed that the Respondent's residential address listed on his registration application form was the Vancouver Condo, that his telephone number listed on the NRD was the Listed Phone Number, that he could be reached at a certain cell phone number (the "New Cell Number") and that he could be emailed at a Google email address (the "Google Email").

¶ 21 On January 30, 2015, Ms. T. was present when Mr. S., an IIROC Enforcement Counsel, called the New Cell Number. Mr. S. introduced himself as a lawyer from IIROC and asked if he was speaking with Kevin Li. He received an affirmative answer. Mr. S. then advised the Respondent that IIROC had been sending him emails and endeavouring to interview him, but had been unsuccessful because the phone number he provided no longer worked and he had not supplied a new one. Mr. S. said he needed to address the IIROC investigation now that it had his new number and asked where the Respondent was located. Mr. S. then put the phone call on speaker so that Ms. T. could listen.

¶ 22 After a significant pause, the Respondent denied knowing what Mr. S. was talking about and denied recollection of an investigation. When Mr. S. asked the Respondent where he was located so that he (Mr. S.) could send him a Notice of Hearing, the Respondent terminated the telephone call. Mr. S. immediately called back on the same phone number, but there was no answer.

¶ 23 Mr. S. contends that his advice to the Respondent about a Notice of Hearing put him on notice of the instant hearing.

¶ 24 The Notice of Hearing was issued on February 4, 2015. The next day, Ms. T. and Mr. S. again called the New Cell Number, this time on speakerphone, and both heard a recorded message stating, "The cellular number you have called is not assigned. Please check the number and try your call again." A repeat call to this

number received the same message. Mr. S. then tried calling the Respondent's Listed Number and received a busy signal.

¶ 25 Mr. S. prepared a package comprised of a letter to the Respondent dated February 5, 2015, advising that an IIROC disciplinary hearing was scheduled for March 3, 2015 and enclosing the February 4, 2015 Notice of Hearing and a copy of the procedural rules which govern IIROC hearings (the "Package").

¶ 26 Mr. S.'s letter warned that if the Respondent failed to file a Response within the stipulated time of 20 days, IIROC may proceed with the disciplinary hearing and that the alleged facts may be accepted as proven and penalties and costs imposed, all in his absence. Additionally, it warned that failure to provide grounds for denial of an alleged fact may result in that alleged fact being accepted as proven. It also stated that IIROC still wished to conduct an interview and asked that the Respondent contact its office immediately to arrange one.

¶ 27 IIROC made a number of attempts to serve the Notice of Hearing on or otherwise give notice of the hearing to the Respondent:

- (a) An attempt was made to deliver the Package to the Respondent at the Vancouver Condo by registered mail. The Package was accepted by Canada Post on February 6, 2015, an unsuccessful attempt at delivery was made on February 10, 2015 and a notice card was left at the building indicating where the item could be picked up. On February 26, 2015, a final notice card was left at the building indicating where the item could be picked up and advising that it would be returned to sender if not collected within 10 days. The item was ultimately returned to sender.
- (b) An attempt was made on February 5, 2015, to deliver the Package to the Respondent at the Google Email, which was the email address supplied by his proposed new employer to the Commission. IIROC received an email notification that the delivery of the email to the Google Email was "complete". However, it has no record that the email was opened.
- (c) An attempt was made on February 18, 2015 to deliver the Package to the Respondent at the Yahoo Email. IIROC received an email notification that the delivery of the email to the Yahoo Email was "complete". It has no record that the email was opened.
- (d) An attempt was made to deliver the Package to the Respondent at the Vancouver Condo by regular mail. It was returned to sender and received by IIROC on February 16, 2015
- (e) IIROC posted a Notice/News Release dated February 18, 2015 on its website, as it does in the normal course, advising that the hearing was scheduled for March 3, 2015 and including a link to the Notice of Hearing.
- (f) According to IIROC's verbal advice, on February 18, 2015, Mr. P., an IIROC employee, attempted to personally serve the Package on the Respondent at the Vancouver Condo. When Mr. P. attended at the building, he twice attempted to enter by pressing the buttons on the intercom system associated with the Vancouver Condo, but could not gain entry to deliver the Package.

¶ 28 In the result, IIROC was unable to confirm that the Respondent actually received the Notice of Hearing. We find that the Respondent was notified verbally by Mr. S. that IIROC wanted to send a Notice of Hearing to him. However, at the time of this conversation, the Notice of Hearing had not been issued.

¶ 29 We accept that in February 2015, IIROC attempted to deliver the Notice of Hearing to the Respondent at his last known address as listed on the NRD, by various means, including by Registered Mail, as well as by email, and that it advertised the Notice of Hearing on its website. As noted above, the Respondent advised IIROC on November 22, 2012, that he no longer lived at the Vancouver Condo and he had declined to provide a new address. Despite all of this, the Respondent never changed his address as listed on the NRD. Rather, his address remained the same as listed on the NRD when the February 2015 attempts to deliver the NOH were made. Indeed, in February 2015 an employer who proposed to employ him had given the Vancouver Condo as his current address to another agency, the Commission. Therefore, IIROC was entitled to use the Vancouver

Condo as the Respondent's last known address.

¶ 30 As noted, the first question for this Panel is whether the Notice of Hearing was delivered in accordance with the IIROC Rules of Practice and Procedures, Rule 5. Relevant parts of Rule 5 are reproduced below:

**RULE 5: SERVICE AND FILING**

**5.1 Parties to be Served**

Any document required to be served under these Rules shall be served on every adverse party to the proceeding.

**5.2 Manner of Service - Notice of Hearing**

A Notice of Hearing shall be served by one of the following methods:

- (a) by personal service on the Respondent;
- (b) by delivering a copy of the Notice of Hearing by registered mail to the Respondent's last known address as recorded in the Organization's Registration file; or
- (c) where a Respondent is represented by counsel, by delivering a copy of the Notice of Hearing to the Respondent's counsel with the consent of counsel.

**5.3 Manner of Service - Other Documents**

Where these Rules require a document other than a Notice of Hearing to be served, it may be served by mail, courier, facsimile, or by any other means effective to deliver a copy of the document.

**5.4 Effective Date of Service**

Service of a document is deemed effective:

- (a) if served personally, on the same day of service;
- (b) if sent by mail, on the fifth day after the day of mailing;
- (c) if sent by facsimile, on the same day as the transmission unless received after 4 p.m., in which case the document will be deemed to have been served on the next day that is not a holiday; or
- (d) if sent by courier, on the second day after the day on which the document was given to the courier.

**5.5 Proof of Service**

The Hearing Panel may accept proof of service of a document by a sworn statement of the person who served the document.

¶ 31 This Panel gave extensive consideration to the question of whether IIROC's various efforts to serve the Respondent with the Notice of Hearing conformed with the Rules. In our view, Rule 5.2 makes it clear that service of a Notice of Hearing is to be treated differently from the service of other documents. Rule 5.2 stipulates only three methods for serving a Notice of Hearing. This is consistent with the principle that a person who is to be subjected to proceedings that may adversely affect them or their right to carry on their occupation ought to be given advance notice of the allegations against them and an opportunity to respond. To this end, IIROC's Rules stipulate the level of care that must be taken serving a Notice of Hearing on such a person.

¶ 32 We will focus our comments on the method of service described in Rule 5.2(b), which is delivery by registered mail, since there is no evidence that the Respondent was personally served and since he has not been represented by counsel at any relevant time.

¶ 33 In the instant case, IIROC sent the Notice of Hearing by registered mail, addressed to the Respondent at the Vancouver Condo. Because the particulars of a Registrant’s address are within his or her personal knowledge, we are of the view that the onus is on the Registrant to update the NRD with any new address. The Respondent did not do so. Therefore, we have no reasonable alternative but to accept that his last known address is the one listed on the NRD, which is the Vancouver Condo.

¶ 34 That said, however, we must address the fact that we do not have evidence that the Notice of Hearing was actually delivered by registered mail to the Respondent’s last known NRD address. We reiterate that the address of the Vancouver Condo is Suite A located in a building on XYZ Street, which we distinguish from the general address of the apartment building on XYZ Street. We again note that the apartment is a multi-storey building where the public cannot enter except by being “buzzed in” by someone on the other end of an intercom system.

¶ 35 The evidence is that IIROC attempted to deliver the Package containing the Notice of Hearing by Canada Post registered mail, but Canada Post was unable to deliver the Package to a recipient at the Vancouver Condo’s specific address. Its records show that it twice left notices at the building about where the Package could be picked up and the second of the two notices advised that it would be returned to the sender if it was not picked up within a stipulated period. In the result, the Package itself was not actually delivered by registered mail to Suite A of the building on XYZ Street and it was returned to IIROC.

¶ 36 We now turn to the question of whether there is any provision in the Rules that permits the Panel to depart from a requirement of actual delivery. In the instant case, we are of the view that we need not consider whether we have the discretion to make an order for substituted service or to direct that the attempts at service made by IIROC are sufficient because of what IIROC describes as the Respondent’s evasive conduct. This is because we are of the view that the deeming provisions of Rule 5.4, and Rule 5.4(b) in particular, encompass IIROC’s efforts to deliver the Notice of Hearing by registered mail.

¶ 37 For convenience, we repeat Rule 5.4(b) below.

#### **5.4 Effective Date of Service**

Service of a document is deemed effective:...

(b) if sent by mail, on the fifth day after the day of mailing;

¶ 38 We find that Rule 5.4 is sufficiently broad as to apply to both Rule 5.2 (the special procedures for serving a Notice of Hearing) and Rule 5.3 (the procedure for serving other documents). Indeed, it appears that the drafter of the Rules intended it to apply to both Rules 5.2 and 5.3. For example, Rule 5.4(a) stipulates when personal service is deemed effective and the only part of Rule 5 that requires personal service is Rule 5.2. Therefore, Rule 5.4 must apply to Rule 5.2. Additionally, Rule 5.4(d) states when service by courier is deemed effective and the only part of Rule 5 permitting service by courier is Rule 5.3. Therefore, Rule 5.4 must also apply to Rule 5.3.

¶ 39 Notably, Rule 5.4(b) deems service of a document to be effective if it is sent by “mail” on the fifth day after mailing. The use of the term “mail” in Rule 5.4(b) does not distinguish between regular mail and registered mail. The word “mail” is general and sufficiently broad to encompass registered mail, which is a particular or specialized form of mail. It is nonetheless “mail” (see for example, *Thiffeault v. Canada*, [1999] F.C.J. No. 1952, paras. 16 to 18). However, the fact that the term “mail” can encompass “registered mail” does not mean the reverse. Service of a Notice of Hearing cannot be accomplished under Rule 5.2 by ordinary mail (*D’Cunha v. Manitoba*, [1993] M.J. No. 507).

¶ 40 Our views about Rule 5.4(b) in this regard are supported by the reasoning of the Saskatchewan Court of Appeal in *Marose Investments Ltd. v. Regina (City)*, 2009 SKCA 20. In that case, a preliminary issue was raised about whether a Notice of Appeal had been filed within the applicable time limit. The appellants sought to appeal the City Assessor’s property valuation to the Board of Revisions. The Board found no error in the assessment and dismissed the appeals on May 16, 2007. The same day, the decision of the Board was sent by courier to the appellants. The appellants then sent Notices to Appeal the Board’s decision to an appellate

Committee. The notices were received on June 18, 2007. The appellate Committee decided as a preliminary matter that the 30 day time limit for appealing had expired on June 15, 2007 because the Board decision was served on the appellants on May 16, 2007.

¶ 41 The Saskatchewan Court of Appeal found that the appellate Committee had erred. The governing legislation stipulated that the Board’s decision “shall” be sent to each party by registered mail. The court found this was the mandatory method of service and that there had not been strict compliance with that mandatory method when the Board sent its decision by courier.

¶ 42 What is more relevant to this case is the fact that the Court of Appeal found, on language similar to that at issue in the instant case, that had the Board’s decision been sent by registered mail, service would have been deemed to have occurred five days afterwards because of the deeming provision in a general provision of the same governing legislation, titled “Service of Documents”. The relevant portions of that general provision stated:

- 347(1) Except where otherwise provided in this Act, any notice, order or other document required by this Act or the regulations to be given or served may be served:
- (a) personally;
  - (b) **by registered mail to the last known address of the person being served;**
  - (c) by hand delivering a copy of the notice, order or document to the last known address of the person being served; or
  - (d) by posting a copy of the notice, order or document at the land, building, structure or on a vehicle to which the notice, order or documents relates.
- (2) A notice, order or document served in accordance with clause (1)(b) is **deemed to have been served on the fifth day after the day of its mailing** period....

**[emphasis added]**

¶ 43 Notably, the Court of Appeal held that subsection 347(2), the deeming provision, would have applied had the Board complied with its mandatory obligation to send its decision to the parties by registered mail. If that had been the case, deemed service would have occurred five days later. If the 30 day time limit began running on that fifth day, the time limit for appealing would have expired on June 20, 2007, not June 15, 2007. Since the appellants filed their Notice to Appeal on June 18, 2007 they were within the 30 day time limit, as it had not yet expired.

¶ 44 The reasoning of the Court of Appeal is applicable to the instant case insofar as it found that the deeming clause in section 347(2) applied to service by registered mail to the last known address of the person being served. That is, where service was to be accomplished by registered mail to the “last known address” of the person being served, it was deemed to have been served on the fifth day after the date of “mailing” and therefore mailing by “registered mail” would have fallen in within the term “mailing”.

¶ 45 Accordingly, on the basis of the same reasoning, we find that service of the Notice of hearing in the instant case, once sent by registered mail, was deemed effective on the fifth day after mailing, pursuant to section 5.4(b) of the Rules. In the circumstances, there was proper service of the Notice of Hearing by registered mail and service was effective on February 11, 2015.

¶ 46 However, a determination as to whether or not service was properly accomplished and the effective date of service gives rise to another issue in the instant case. That issue relates to whether the Respondent was given full benefit of the 20 day time period allotted to him in Rule 7.1 to serve a Response before the date of hearing specified in the Notice of Hearing.

¶ 47 Rule 7.1 addresses service of responses in the case of a Standard Track hearing:

7.1 Service of Response

For a discipline hearing designated on the Standard Track, the Respondent shall serve a Response **within 20 days from the effective date of service of the Notice of Hearing.**

For a discipline proceeding designated on the Complex Track, the Respondent shall serve a Response within 30 days from the effective date of service of the Notice of Hearing.

[emphasis added]

¶ 48 This discipline proceeding was designated on the Standard Track. Therefore, the Respondent had 20 days from the effective date of service of the Notice of Hearing to serve his Response. Accordingly, we turn to the question of what was the “effective date” of service of the Notice of Hearing.

¶ 49 We find that the effective date for service of the Notice of Hearing was February 11, 2015, which was the earliest date on which service by registered mail could be deemed following February 6, 2015, the date the Package was given to Canada Post for delivery by registered mail. Therefore, the 20th day of the time period allocated to the Respondent for serving his Response on IIROC was, and included, March 3, 2015. However, March 3, 2015 was also the date designated in the Notice of Hearing for the hearing, itself.

¶ 50 The impact of these time periods is that the Respondent was not given a full 20 days within which to serve his Response before the hearing. Rather, it was effectively abridged by one day, viz, the date set for the hearing to proceed. As a result, the hearing could not proceed on March 3, 2015. The Notice of Hearing was flawed because it specified a date for the proceedings to commence that fell within the 20 day time period allocated to a Respondent to serve a Response, and that time period had not been abridged in accordance with a prior application of a party or a determination by a hearing panel.

¶ 51 It would seem that our decision that service of the Notice of Hearing by registered mail can be deemed pursuant to Rule 5.4 may be a novel one in IIROC cases. Although IIROC selected the date of the hearing, it likely would not have contemplated the impact of our decision on the time period given the Respondent for serving his Response before the Hearing.

¶ 52 In the result, however, we are of the view that a respondent in disciplinary proceedings should have full benefit of the time limits set out in the Rules unless an application for abridgement of the time limits is made and granted. In the instant circumstances, the hearing date that was selected effectively and inadvertently abridged the Respondent’s time for serving a Response, since there seems to have been no urgency for holding the hearing on March 3, 2015.

¶ 53 Accordingly, the Panel has decided that the hearing of this disciplinary matter on its merits will proceed afresh and in compliance with all applicable time limits, subject to any further decisions of the hearing Panel about those time limits. Moreover, as part of this, a new Notice of Hearing with a new hearing date will be issued and served on the Respondent.

### **THE DISCRETION TO ACCEPT FACTS & VIOLATIONS IN THE NOTICE OF HEARING**

¶ 54 Despite our determinations above, we have considered the second issue, below.

¶ 55 The second issue relates to IIROC’s submission that the hearing Panel accept the facts and violations alleged in the Notice of Hearing dated February 4, 2015, pursuant to Rule 13.5 of the IIROC Rules. That Rule states:

#### **13.5 Where Respondent Fails to Attend Disciplinary Hearing**

Where a Respondent, having been served with a Notice of Hearing, fails to attend a disciplinary hearing, the Hearing Panel may proceed in the absence of the Respondent and may accept as proven the facts and violations alleged by the Organization in the

## Notice of Hearing.

Upon making a finding of the violations as alleged in the Notice of Hearing, the Hearing Panel may immediately hear submissions of the Organization regarding an appropriate penalty and may impose such penalty, as it deems appropriate, pursuant Dealer Member Rule 20.33 and 20.34.

¶ 56 As noted, at the hearing held on March 3, 2015, the Panel reserved its rulings as to whether the Notice of Hearing had been properly served and whether it would accept the facts and violations alleged in the Notice of Hearing as proven under Rule 13.5. However, we permitted IIROC to proceed with its submissions on the merits and on appropriate sanctions. IIROC proceeded in a summary way, on the footing that Rule 13.5 applied in whole or in part. For the reasons set out below, we have not considered the evidence and submissions on the merits, nor have we reached any conclusions on the merits of this case, because of our conclusions about Rule 13.5.

¶ 57 We now turn to the question of whether the Panel ought to accept the facts and violations as proven pursuant to Rule 13.5. It is significant that the determination to be made under Rule 13.5 is a discretionary one, not a mandatory one.

¶ 58 In *Fridgant (Re)*, 2014 IIROC 47, a panel considered similar issues regarding an IIROC investigation. There, IIROC had sent a registered letter containing a Notice of Hearing to a Respondent at his last recorded NRD address. The letter was not collected. The panel noted that no copy of the Notice of Hearing had been actually left at the last recorded NRD address. It grappled under the question of service, as follows:

10 Given the elapse of time since the Respondent was last heard from and the Respondent's NRD record of frequent home address changes, it was not clear to us from the affidavits of service filed whether the Respondent was actively evading service (abetted by housemates and neighbours) or had simply moved away at some point and was passively ignoring the IIROC investigation and these proceedings. Although attempts had been made to serve him in Ajax, and Richmond Hill, his second last recorded NRD address, no copy of the Notice of Hearing had been actually left at either house, so we were concerned that on a strict reading, neither the "personal service" test of s. 5.2 (a) nor the "delivery" test of s. 5.2 (b) had been met. We had a secondary concern that the misconduct originally put to the Respondent at the meeting with his branch manager had been unauthorised trading in RM's and MM's accounts, not providing false account information to them or to EP and CP as alleged later in the Notice of Hearing. This was first communicated to the Respondent on January 24, 2013 by a letter which was delivered by courier to his Richmond Hill address. The respondent did not reply or acknowledge delivery.

11 We decided we should proceed with the hearing rather than adjourning until staff had left a copy of the Notice of Hearing at the doorstep at the Respondent's last recorded NRD address. We noted the power of a court under the Rules of Civil Procedure (Ontario) to dispense with service in the interests of justice. While this discretion is not provided us in the IIROC rules, we did not consider that more heroic efforts on the part of IIROC staff to trace and serve the Respondent would be effective.

12 Nor did we consider such efforts necessary to ensure fairness to the Respondent on the basis that (1) at a very early stage he chose not to provide information or explanation or to participate in his employer's inquiries relating to his treatment of RM and MM; (2) PI made reasonable efforts to advise him of the EP and CP complaint in January 2013; (3) the Respondent could not be expected to be surprised by the conduct implications of his own signed communications with CP and EP should they be scrutinised, or that CP and EP would conclude from this correspondence that funds they owned were missing and complain to his employer; (4) having been the subject to IIROC disciplinary

proceedings in the past, the Respondent must have known the likely outcome of the formal inquiries would be a hearing; (5) the Notice of Hearing and the present allegations were published on the Internet; (6) the Respondent could be expected to be aware of Section 13.5 of the IIROC hearing procedures, which provides that where a Respondent fails to attend a disciplinary hearing, the facts alleged may be deemed proven; and (7) the decision in this proceeding and any penalties imposed are enforceable only through the IIROC membership structure which the Respondent has clearly abandoned.

¶ 59 The panel in that case decided to proceed with the hearing for reasons that differ from those of the instant Panel. However, for reasons of fairness, it decided against deeming the allegations proven under section 13.5 of the IIROC Rules. They wrote:

13 We did, however, consider that in fairness to the Respondent we should not deem the allegations proven by virtue of the Respondent's absence under Section 13.5 of the IIROC Rules of Practice and Procedure, but rather should hear IIROC staff's argument. In the affidavits and supporting documents submitted by staff we should look for clear, cogent and convincing evidence of the facts alleged and staff should establish on the balance of probabilities that the alleged misconduct occurred as described in the Statement of Allegations.

¶ 60 We reach a similar conclusion as the panel in *Fridgant*, supra.

¶ 61 In this case, although IIROC made reasonable efforts to give the Respondent notice of its investigation and the Notice of Hearing, we do not have evidence that a copy of the Notice of Hearing was actually delivered to and left at the Respondent's last recorded NRD address, by registered mail. Service of the Notice of Hearing in this case has been deemed. As such, there is a presumption of service, which may be rebutted by the Respondent should he persuade a future panel that there are grounds to do so (*Manitoba v. Paterson* 2014 MBQB 206, para. 4; *Mullen v. The City of Flin Flon*, 2000 MBCA 104).

¶ 62 We note that the instant case is somewhat distinguishable on its facts from the *Fridgant* case insofar as the Respondent has not been subject to disciplinary proceedings in the past and is therefore not personally familiar with them. He may not have known of the provisions that permit deemed service or the prospect that if service was deemed, proof of the facts and violations may also be deemed if he failed to attend a disciplinary hearing based on those allegations.

¶ 63 Accordingly, we consider that in balance and fairness to the Respondent and IIROC in the circumstances, and in the interests of the integrity of the investigation and hearing process, we should not (1) deem the Notice of Hearing to have been served and then (2) accept as proven the facts and violations alleged by IIROC in the Notice of Hearing by virtue of the Respondent's absence under Rule 13.5.

¶ 64 Rather, we have decided that the hearing on the merits should proceed afresh as a full evidentiary hearing in the usual way. Moreover, we agree with the panel in *Fridgant*, supra, that in conducting the hearing in circumstances such as these, we ought to look for clear, cogent and convincing evidence of the facts and violations alleged and determine on the balance of probabilities whether the allegations are proven and the sanctions sought are justified.

¶ 65 In a fresh hearing of this matter, we anticipate that IIROC will adduce documentary and viva voce evidence that supports each of the allegations, rather than the abbreviated or synopsized evidence it may submit in a case where Rule 13.5 is applied to such proof of facts and violations. As in a typical hearing, the Dealer Member Rule 20.2 and Rule 13.4 of the IIROC Rules of Practice and Procedure will apply. We also expect that IIROC'S investigation files likely include complete documentation in support of the allegations made by IIROC, and that unredacted copies of the evidence submitted to the Panel will be available to it, where appropriate. Despite the foregoing, we anticipate that counsel for IIROC will determine, in the usual way, what evidence to submit at the fresh hearing.

¶ 66 Accordingly, we direct IIROC to arrange a case management conference with the Panel, Enforcement

Counsel and the Respondent, at his last known telephone number on NRD, by teleconference, to address next steps in these proceedings, such as suitable new dates for hearing. We also direct the National Hearing Coordinator to send both this decision, and notice of the case management conference to the Respondent at his last known address on NRD, by registered mail.

## **SUMMARY**

¶ 67 In view of all of the foregoing, we summarize our decision as follows:

- 1) the hearing of this disciplinary matter on its merits will proceed afresh and in compliance with all applicable time limits, subject to any further decisions of the hearing Panel about those time limits;
- 2) a new Notice of Hearing with a new hearing date will be issued and served on the Respondent;
- 3) IIROC will arrange a case management conference with the Panel, Enforcement Counsel and the Respondent, at his last known telephone number on NRD, by teleconference, to address next steps in these proceedings, such as suitable new dates for hearing; and
- 4) the National Hearing Coordinator will send both this decision, and notice of the case management conference to the Respondent at his last known address on NRD, by registered mail.

Dated this 22nd day of May, 2015.

Alison Narod

Panel Chair

Lloyd Costley

Panel Member

Michael Johnson

Panel Member

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