

# Re Evergreen Capital Partners Inc.

IN THE MATTER OF:

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

THE DEALER MEMBER RULES OF THE  
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

EVERGREEN CAPITAL PARTNERS INC.

2008 IIROC 31

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

Heard: November 4, 2008  
Decision: November 10, 2008  
(16 paras.)

## Hearing Panel:

D. Brian Foster, Chair  
Kathleen Jost  
Bill Welton

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## DECISION

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### A. INTRODUCTION

¶ 1 Pursuant to a Notice of Application dated November 3, 2008, the Investment Industry Regulatory Organization of Canada ("IIROC") brought an application for an Expedited Hearing for relief against Evergreen Capital Partners Inc. ("Evergreen") pursuant to Dealer Member Rules 20.41, 20.42(1)(d) and Rule 16 of the Rules of Practice and Procedure. The Dealer Member Rules are hereinafter referred to as the "Member Rules" and the "Rules of Practice and Procedure" are hereinafter referred to as the "Practice Rules". The application was heard the afternoon of November 4, 2008. The relief sought is described in the Notice of Application as:

- 1) An order pursuant to Rule 20.45(1)(a) suspending Evergreen's Membership.
- 2) An order pursuant to Rule 20.45(1)(d) directing Evergreen to immediately cease dealing with the public.
- 3) An order pursuant to Rule 20.45(1)(e) authorizing Staff of its agent to enter Evergreen's offices and to copy any electronic information or any computer hard drive that may exist.
- 4) An order pursuant to Rule 20.45(1)(e) authorizing Penson Financial Services Canada Inc. (Penson) and/or Staff to take any action to facilitate the orderly transfer of client accounts from Evergreen, with the exception of accounts of Partners, Officers, Directors, Shareholders, and debt holders and their affiliates, which accounts shall transfer to Penson and liquidating trades will be allowed.

5. An order that Evergreen shall bear all costs associated with this application and any action taken by Penson, IIROC or its Staff pursuant to the Order.
6. Such further and other relief that counsel may request and that the Hearing Panel may permit.

¶ 2 In support of the application IIROC relied on Affidavits of Trevor Conway, the Chief Executive Officer for Evergreen, Greg Clarke, the Chief Financial Officer for Evergreen and Robert DeGoeij, the Manager of Financial and Operations Compliance, Prairie Region, for IIROC.

¶ 3 No oral evidence was given at the Hearing. Mr. Conway attended as a representative of Evergreen.

## **B. EVIDENCE**

¶ 4 The facts are not in dispute. Further, Mr. Conway's Affidavit contains a paragraph that states the following:

3. I hereby provide consent, on behalf of the Respondent, to the Order sought by IIROC Staff for the Suspension of Evergreen's membership with IIROC and to the transfer of Evergreen's client accounts, in accordance with the direction of IIROC (W. Funt's letter dated October 29, 2008), and other necessary and appropriate relief.

¶ 5 Therefore, the application was consented to by Evergreen.

¶ 6 The relevant facts are:

- Evergreen was incorporated in Alberta on May 26, 2006 and became an Investment Dealers Association (IDA) member on January 31, 2007. Since joining the IDA, Evergreen has been a Type 2 Introducing Broker. Evergreen's registration status was continued with IIROC as of June 1, 2008;
- Penson has been the Carrying Broker for Evergreen since the firm's admission to the IDA. Evergreen states that Penson advised it on October 29, 2008, that it has or will be terminating its Carrying Broker relationship with Evergreen;
- Evergreen has been advised by Penson that it owes Penson an amount of \$67 million to \$74 million relating to trades executed by Penson for Evergreen clients, which trades have not settled. Any amount alleged to be owed by Evergreen to Penson has not been substantiated and this issue is presently unresolved;
- Evergreen is unable to provide a current reliable risk adjusted capital (RAC) calculation, but states, in view of the Penson claim, the firm could be capital deficient;
- Evergreen has stated that it has no carrying broker and Evergreen ceased operations as of October 29, 2008;
- On October 30, 2008, Evergreen employees were advised of their employment termination with the exception of the following individuals:  
Calgary Office
  - Trevor Conway (CEO and Director)
  - Loretta Carbonelli (CCO and COO)Toronto office
  - Paul Reid (Director)
  - Tim Dalton (Branch Manager)
  - Clarinda Bernardo (Administrative Assistant);
- On October 30, 2008, Evergreen delivered formal notice to TSX Markets, advising of the

surrender of membership of Evergreen as a Participating Organization of the Toronto Stock Exchange and member of the TSX Venture Exchange.

¶ 7 The dispute between Penson and Evergreen relates to positions accumulated in average price accounts. Penson states that Evergreen owes Penson \$67 million to \$74 million for positions accumulated in the average price accounts and that those positions now have a market value of approximately \$39 million. This information was made known to Evergreen in late October, 2008 and Evergreen promptly reported this information to IIROC. Mr. Clarke, in his Affidavit, states that to the best of his knowledge, there is no other relevant activity and there are no client liabilities beyond those recorded and alleged as owing to Penson. He states that with the exception of the alleged liability to Penson, Evergreen has sufficient assets to meet its other liabilities. However, Mr. Clarke also states that due to the current problem with Penson, it would be impossible to provide a reliable RAC calculation. Further, Evergreen has now ceased operations.

¶ 8 Mr. DeGoeij summarizes in his Affidavit the financial compliance requirements of Member firms, including the requirements set out in Member Rule 17.1 which requires all Member firms to have and maintain at all times a RAC greater than zero. Member firms are also required to submit to IIROC annual and monthly financial reports. He states that the financial requirements of Member firms is essential for the determination of the financial solvency of a Member firm and ultimately for the protection of the public, other members and IIROC.

¶ 9 To conclude, Evergreen is unable to provide a current reliable RAC calculation. In view of the Penson claim, the firm could be capital deficient. Evergreen has ceased its active business operations and has no carrying broker and few remaining employees. Evergreen has also surrendered its membership in the Toronto Stock Exchange and the TSX Venture Exchange.

### C. ANALYSIS

¶ 10 The relief sought by IIROC has been agreed to by Evergreen. This Panel grants the relief sought based on the unchallenged evidence put before it.

¶ 11 Member Rule 20.42 allows a Hearing Panel to impose penalties prescribed by Rule 20.45 in the following circumstances:

Financial or Operating Difficulty

- (d) Where a dealer member is in such financial or operating difficulty that the Hearing Panel determines the Dealer Member cannot be permitted to continue to operate without risk of imminent harm to the public, other Dealer Members or the Corporation.

¶ 12 This Panel finds that this requirement has been met by IIROC. In this case Evergreen has ceased carrying on business. There is a risk of imminent harm to the public, and other Dealer Members, and the Corporation.

¶ 13 Member Rule 20.45 allows a Hearing Panel to impose a number of penalties in the circumstances prescribed in Rule 40.42. The penalties can include:

20.45 **Powers of Hearing Panel**

- (a) suspension of approval or Membership;
- (b) imposition of terms or conditions on a suspension of approval or Membership;
- (d) direction to immediately cease dealing with the public;
- (e) an order with terms and conditions to facilitate the orderly transfer of client accounts from a Dealer Member suspended under this Rule;

¶ 14 In the circumstances, it is appropriate for the protection of the public, other Members and IIROC that Evergreen's membership in IIROC be suspended and that there be an order that Evergreen immediately cease dealing with the public. It is also appropriate that there be an order to facilitate the orderly transfer of client accounts from Evergreen. In that regard, IIROC proposes that Penson undertake any action to facilitate the

orderly transfer of client accounts from Evergreen, with the exception of the accounts of Evergreen Partners, Officers, Directors, Shareholders and Debt-holders and their affiliates. In relation to those accounts, IIROC proposes that the accounts be transferred to Penson and that liquidating trades be allowed and that this restriction remain in effect for a period of 90 days from October 29, 2008, subject to further extension upon application of IIROC. The purpose of this restriction is to allow IIROC a period of time to review this matter in more detail to gain a better understanding of the causes of Evergreen's problems before allowing the restriction over those accounts to be removed.

¶ 15 This Panel adjourned the Hearing for a brief period of time on November 4 and then reconvened and delivered its decision, with these written reasons to follow. The order granted by this Panel is annexed as Schedule "A" to this Decision.

¶ 16 The matters reserved in the order to go to this Panel either IIROC or Evergreen can on two (2) clear days notice bring those matters back before this Panel.

**DATED** at the City of Calgary, in the Province of Alberta, this 10<sup>th</sup> day of November, 2008.

D. Brian Foster, Chair

Kathleen Jost

Bill Welton

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## **ORDER**

THIS APPLICATION by the Investment Industry Regulatory Organization of Canada (IIROC) coming on for hearing at Calgary, Alberta on the 4<sup>th</sup> day of November, 2008 pursuant to Dealer Member Rules 20.41, 20.42, 20.45 and Rule 16 of the Rules of Practice and Procedure; and upon reviewing the materials filed in support; and on hearing counsel for Staff of IIROC, and upon noting the consent of the Respondent, Evergreen Capital Partners Inc. (Evergreen), a member of IIROC;

THIS HEARING PANEL ORDERS:

- 1.) Evergreen's Membership is hereby suspended indefinitely.
- 2.) Evergreen shall immediately cease dealing with the public.
- 3.) IIROC Staff or its agent may enter Evergreen's offices and copy any electronic information or any computer hard drive that may exist. If Evergreen claims privilege over any document or record, then such claim shall be brought back before this Panel within 30 days of the date of this order, or of the date that such document or record is taken, on two clear days' notice.
- 4.) Penson Financial Services Canada Inc. (Penson), and/or IIROC Staff may undertake any action to facilitate the orderly transfer of client accounts from Evergreen, with the exception of the accounts of Evergreen Partners., Officers, Directors, Shareholders, and debt holders and their affiliates. Penson shall report to IIROC Staff every 30 days regarding any action taken pursuant to this Order, until such time as all Evergreen client accounts have been transferred to third party Member Firms or have become clients of Penson.

- 5.) The accounts of Evergreen Partners, Officers, Directors, Shareholders, and debt holders and their affiliates shall transfer to Penson and liquidating trades will be allowed.
  - (a) This term of the Order shall remain in effect for a period of 90 days, commencing from October 29, 2008.
  - (b) IIROC Staff may seek an extension of this term of the Order upon application and introduction of additional evidence to this Panel.
- 6.) Costs can be spoken to within 60 days of the date of this Order.
- 7.) Nothing herein contained should be construed as making any decision or finding on the facts in dispute or the rights as between Penson and Evergreen or as between Evergreen and any other party.
- 8.) This Order will come into effect on November 4, 2008, at 3:30 p.m.

DATED this 5th day of November, 2008.

Mr. Brian Foster, Chair

Ms. Kathleen Jost

Mr. Bill Welton

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