Re Morrison

IN THE MATTER OF:

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

TREVOR SCOTT MORRISON

2009 IIROC 4

Investment Dealers Association of Canada
Hearing Panel (Pacific District)

Heard: August 19, 2008; October 2, 2008; November 20, 2008; December 22, 2008 at Vancouver, BC.
Decision: January 16, 2009
(53 paras.)

Hearing Panel:
Stephen D. Gill, Chair
James Harkness
Christopher Lay

Appearances:
Barbara G. Lohmann, for the Investment Inventory Regularly Organization of Canada
Patricia A.A. Taylor, for the Respondent

REASONS FOR DECISION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") on behalf of the Investment Dealers Association of Canada, and pursuant to the By-laws of the Investment Dealers Association of Canada (hereinafter the "Association") issued a Notice of Hearing to the Respondent, Trevor Scott Morrison ("Morrison" or the "Respondent"); the Notice of Hearing (Exhibit 1) set a hearing date of August 19, 2008. As appears by the Affidavit of David Zwarich (Exhibit 3) Mr. Morrison was duly served.

2. The Notice of Hearing alleged Mr. Morrison had committed the following contravention:

> COUNT 1
>
> On or about January 10, 2008, the Respondent, having been, until September 24, 2007, an Approved Person of Union Securities Ltd. ("Union"), a Member firm, refused and/or failed to attend and give information in respect of an investigation into his conduct while he was an Approved Person being conducted by the Association's Enforcement Department, contrary to Association By-Law 19.5
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> (Exhibit 1, page 2)

AUGUST 19, 2008 HEARING

3. On August 19, 2008 the hearing into this matter commenced. Ms. Barbara Lohmann appeared for IIROC, and Ms. Patricia Taylor appeared on behalf of the Respondent, Morrison. Mr. Morrison was not present.

4. Ms. Taylor had served a Notice of Motion seeking an adjournment. At the hearing, she advised the Panel that as a result of some eleventh hour research, she wished to amend her application to seek the following relief: a declaration that IIROC does not have jurisdiction over Mr. Morrison, a former member; an order that the Notice of Hearing dated June 27, 2008, be set aside; or alternatively, an order that the proceeding be stayed, or in the further alternative, that the matter be adjourned. Ms. Taylor indicated that she would be making a substantial argument, supported by case law, on the amended motion.

5. Ms. Lohmann, counsel for IIROC, had only just been advised of the proposed amended motion. She was aware of the jurisdiction issues proposed to be raised on the amended motion, and advised the Panel that she was aware of the cases that counsel for Morrison referenced.

6. After hearing submissions from counsel, and receiving copies of relevant cases, the Panel directed that an amended motion be filed, and that outlines be exchanged by counsel, and the matter be adjourned to October 2, 2008.

OCTOBER 2, 2008 HEARING

7. The disciplinary hearing reconvened on October 2, 2008 in Vancouver. An amended notice of motion was served on behalf of the Respondent Morrison, along with his counsel's outline, and a reply and outline by IIROC counsel. The Panel heard submissions from both counsel including proposals as to how to proceed at this hearing, and we were referred to the decision of the IIROC Panel in the matter of John Anastasious Collias of July 31, 2008. In very similar circumstances, the Collias Panel had concluded:

> In the circumstances, and pursuant to Rule 20.2, we hereby order that a temporary stay be issued in this matter until the release of the decision of the British Columbia Court of Appeal in the Dass matter. Following the release of that decision we require the parties appear in front of a hearing Panel of the Pacific Region to determine the next steps in this process.

8. After a brief adjournment, the hearing reconvened. At that time, counsel informed the Panel that they both had instructions to consent to a stay of these proceedings pending the outcome of the Court of Appeal decision in Dass. The Panel expressed the view that, in our opinion, this case was indistinguishable from the Collias decision.

9. Given the consent of both parties, the Panel ordered a temporary stay of this case, until the release of the decision of the British Columbia Court of Appeal in the Dass matter. Following release of the Dass decision, the Panel directed the parties to appear before this Panel to determine the next step in the hearing process.

10. On October 23, 2008, the Court of Appeal for British Columbia issued its decision in the Investment Dealers Association of Canada v. Dass; (2008) B.C.C.A. 413. In its reasons, the Court of Appeal considered, among other things, the Ontario decision in Investment Dealers Association of Canada v. Taub, (2008) Carswell Ontario 4279 (Ont.Div.Ct.). As set forth in the reasons, the Court did not find the majority reasons in Taub persuasive. The Court concluded that the decision of the British Columbia Securities Commission in Dass was reasonable, and the appeal was dismissed. The decision was unanimous.

NOVEMBER 20, 2008 HEARING

11. The disciplinary hearing reconvened on November 20, 2008; counsel for IIROC and Mr. Morrison were present. Counsel for IIROC submitted that based on the Court of Appeal decision in Dass, the Panel should proceed and set a date for the disciplinary hearing. Ms. Taylor, on behalf of Mr. Morrison, made

submissions requesting either a continuation of the temporary stay, or for an adjournment. Ms. Taylor submitted that counsel for the respondent in Dass had 60 days within which to seek leave to appeal the decision to the Supreme Court of Canada, and that the Panel should not proceed until the appeal process in the Dass case was completed or exhausted. That included that if leave to appeal to the Supreme Court of Canada were sought, and granted, waiting for the decision of that Court. Ms. Taylor also submitted that as the proceedings in Ontario in the Taub case were ongoing, and the IDA had appealed to the Ontario Court of Appeal, that was a further ground upon which this Panel should continue the stay. She urged that there was potential prejudice to Mr. Morrison, in terms of time, and cost, were the Panel to proceed, and if the law were to change as a result of any further decisions in the Dass or Taub cases. The Panel heard submissions from both counsel on the adjournment application.

12. Counsel for the parties agreed that the hearing in this case would likely take only one day.

13. After consideration of the submissions of counsel, the Panel held that the B.C. Court of Appeal decision in Dass had established the law in British Columbia in respect of the jurisdiction of this Panel over the former member Mr. Morrison. The request for a further adjournment, or a continuation of the stay was dismissed, and a hearing date set for December 22, 2008.

DECEMBER 22, 2008 HEARING: Before Stephen Gill, Chair; Christopher Lay, Member.

14. The disciplinary hearing reconvened at 10:00 a.m. on December 22, 2008. Unfortunately one member of the Hearing Panel was unable to attend due to the severe winter weather. Ms. Lohmann was present for the Association, but neither Mr. Morrison nor Ms. Taylor appeared although Ms. Taylor had been in communication with Ms. Lohmann re the hearing. The hearing adjourned so Ms. Lohmann could attempt to contact Ms. Taylor.

15. The two member Panel reconvened and Ms. Lohmann submitted that pursuant to Appendix 3, Section 1.8 of the Rules, the Panel could proceed with two members, with the consent of all parties. Subsection 1 states:

> If a member (including the chair) of a Hearing Panel becomes incapacitated or is otherwise unable to serve on a Hearing Panel for whatever reason, the remaining member or members of the Hearing Panel may continue to deal with any matter and may make any order or decision that a Hearing Panel may make provided that the Hearing Panel may only continue to deal with any matter with the consent of all parties to the hearing.

16. The Panel heard submissions from counsel for IIROC, and adjourned to consider the matter. When we reconvened, Ms. Lohmann advised that during the break she had been in communication with Ms. Taylor, counsel for Mr. Morrison. Ms. Taylor stated that her instructions, from her client, were not to appear at this hearing, but to receive any materials produced as a result of the hearing.

17. Ms. Lohmann advised the Panel that she had also informed Ms. Taylor that a Panel Member, Mr. Harkness, had been unable to attend because of the inclement weather, and Ms. Lohmann asked if she consented to the Panel proceeding with only the chair and one member. Ms. Taylor stated that on behalf of the Respondent she consented to the hearing proceeding with the two remaining Panel members. Based on the foregoing the Panel determined that it had jurisdiction to proceed with the disciplinary hearing.

18. The Respondent, Mr. Morrison, did not file a Response to the Notice of Hearing, as required by Rule 7. Rule 7.2 states:

> 7.2 Failure to Serve Response
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> (1) If a Respondent served with a Notice of Hearing fails to serve a
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> Response in accordance with Rule 7.1:
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> (a) the Association may proceed with the hearing of the matter as

set out in the Notice of Hearing without further notice to and in the absence of the Respondent; and

((b) the Hearing Panel may accept as proven the facts and violations alleged by the Association in the Notice of Hearing, and may impose penalties and costs pursuant to By-laws 20.33, 20.34 and 20.49.

19. Further, the Respondent, Mr. Morrison, having been served with a Notice of Hearing, failed to attend this disciplinary hearing. Rule 13.5 provides:

> 13.5 Where Respondent Fails to Attend Disciplinary Hearing
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> (1) 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 Association in the Notice of Hearing.
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> (2) Upon making a finding of the violations as alleged in the Notice of Hearing, the Hearing Panel may immediately hear submissions of the Association regarding an appropriate penalty and may impose such penalty, as it deems appropriate, pursuant to By-law 20.33 and 20.34.

20. As a result of the Respondent's failure to serve a Response to the Notice of Hearing, and his failure to attend the disciplinary hearing, pursuant to the Rules, the Panel accepted as proven the facts and violation alleged by the Association in the Notice of Hearing (Exhibit 1).

PARTICULARS ALLEGED AND PROVEN

21. The Respondent entered the securities industry in May, 1991 with Scotia Capital Inc. In June, 1995 he transferred to McDermid St. Lawrence following which he joined Kim Oishi & Associates in August, 1997. In 1999 he was briefly employed by Regal Capital Planners Inc. before he joined IPO Capital from March, 1999 to February, 2001. He was employed by Research Capital Corp. from February, 2001 to July, 2002 after which he worked for Canaccord Capital Corporation from July, 2002 to August, 2003. He was then employed by Northern Securities from August, 2003 to October, 2004 before becoming employed by Union Securities Ltd. ("Union") in October, 2004 as a Registered Representative. The Respondent remained with Union until he resigned on September 24, 2007.

22. The Respondent has not been registered in any capacity in the securities industry since his resignation from Union.

23. Pursuant to Association By-law 20.7(1), the Association retains jurisdiction over Approved Persons for a period of 5 years from the date on which the Approved Person ceased to be an Approved Person, in this case, September 24, 2007.

24. In December, 2004, the Respondent was disciplined by the Association. Pursuant to a Settlement Agreement, he admitted that he distributed US $56,000 in securities in the form of a company's debtor certificates without a receipt or prospectus for the security having been obtained pursuant to the British Columbia Securities Act and without any exemption from the requirements of the Act being available, contrary to Association By-law 29.1. The Respondent was fined $5,000 and ordered to pay $1,500 in Association By-law 29.1. Further, the Respondent's approval in any capacity was suspended for one year, which suspension was deemed served by the more than three year period that he was under strict or close supervision. The Respondent has paid the fine and costs to the Association.

INVESTIGATION/FAILURE TO COOPERATE

25. On or about September 17, 2007, Union received a package (the "Package") from the Respondent's licensed assistant who was, at the time, on parental leave from Union (the "Package"). The documents contained in the Package suggested that the Respondent may have had offshore brokerage accounts and/or outside business interests that had not been previously disclosed to Union.

26. Upon receipt of the Package, Union met with the Respondent and asked him what his connection was to each of the organizations identified in the Package. This request was confirmed in an email dated September 18, 2007 sent to the Respondent. Union also advised the Respondent in that email that he must take a temporary leave of absence from Union until the completion of its internal investigation.

27. On or about September 24, 2007, the Respondent delivered a letter to Union in which he resigned his position as an investment advisor from that firm. The Respondent requested that any further communication be directed to his legal counsel.

28. The Respondent has never answered any of the substantive questions posed by Union in respect of the Package.

29. The Association was advised by Union of the Respondent's resignation and the circumstances surrounding same through ComSet (ComSet is the Association's Complaints and Settlement Reporting System through which Members are required to report client complaints and disciplinary matters, including internal investigations, denial of registration, disciplinary actions, settlements and civil, criminal or regulatory action against the firm or its registered employees).

30. On or about December 20, 2007, Association Staff contacted the lawyer identified in the Respondent's letter of resignation, who advised that she had not been retained by the Respondent with respect to any matter with the Association. The lawyer said that she would attempt to contact the Respondent to get instructions, however, she has never contacted Association Staff again with respect to this matter.

31. On or about January 2, 2008, Association Staff called the Respondent on his cellular telephone. The Respondent identified himself and advised that he was not interested in speaking with the Association as he was (in his words) no longer a stock broker, was no longer "associated to" the Association and he had no intentions of coming back to the industry. He then asked the Association not to call him again and hung up the telephone.

32. Union advised Association Staff that it had sent the Respondent's record of employment to an address in White Rock, B.C., which is the same residential address of record with the Association (the "Address").

33. On or about January 3, 2008, Association Staff advised the Respondent by registered letter sent to the Address that it had commenced an investigation into his alleged outside business activities while employed at Union (the "Investigation Letter").

34. On or about January 3, 2008, the Association sent a registered letter to the Address compelling him to attend an interview at the Association office at 10:00 a.m. on January 10, 2008 (the "Interview Letter").

35. The Investigation Letter and the Interview Letter were sent together in the same envelope. That envelope was delivered by Canada Post on January 4, 2008 and signed for by the Respondent's mother.

36. The Respondent did not attend the compelled interview as scheduled on January 10, 2008.

37. On or about January 11, 2008, Association Staff called the Respondent's telephone number of record and spoke with a female who identified herself as the Respondent's mother. She confirmed that she had received the envelope from the Association and that she had mailed it to the Respondent who was "out of town". She declined to say where the Respondent was or how he could be reached. Further, she did not know when the Respondent would return. She did take the telephone number of the Association Staff and said that she would pass on a message to the Respondent the next time he called. She indicated that she did not want to be involved in this matter.

38. Association Staff has obtained and analyzed documents and spoken with a witness to collect evidence in respect of the investigation.

39. Information currently available to Association Staff suggests that the Respondent was using an email address other than his Union email address to conduct business, including trading and requests from a client located in Chile to borrow money.

40. On or about April 18, 2008, Association Staff twice called the Respondent's telephone number and heard an automated answering system stating the Respondent's name. Association Staff did not leave a voice mail message.

41. Association Staff called the Respondent's cellular telephone number again on or about April 21, 2008 and left a voice mail message identifying himself and stating that he wanted to discuss his (Respondent's) failure to attend the January 10, 2008 interview. He requested that the Respondent contact him and left his telephone number. The Respondent did not return the message nor has there been any contact from him since the January 2, 2008 conversation with Association Staff.

42. The Respondent's failure to attend the interview and provide information as requested in accordance with Association By-law 19.5 has compromised the Association's ability to properly complete its investigation into the Respondent's activities and subverts the Association's ability to perform its regulatory function.

43. The Hearing Panel accepted as proven that the Respondent had contravened Association By-law 19.5 as alleged by the Association in the Notice of Hearing, and proceeded to hear submissions on penalties and costs from Association counsel.

SANCTIONS SOUGHT AND IMPOSED

44. The Association Staff, in its submissions to the Hearing Panel, sought the following sanctions:

(1) Pursuant to Sections 20.33 and 20.34 of the By-laws:

(a) a fine of $50,000.00.

(b) a permanent ban on registration in any capacity of the Respondent Morrison; and

(c) costs in the amount of $11,108.00.

45. In support of its position, Association counsel referred to a number of authorities dealing with penalty in circumstances analogous to those in this case. In many of those cases, the consequences of the failure to cooperate amounted to serious misconduct, and the penalty was a $50,000 fine, imposition of a permanent ban, and an award for costs. The authorities included:

(i) Re: Buskell (IDA and John D.W. Buskell) June 3, 2008;

(ii) Re: Reiffenstein (IDA and Randall Wayne Reiffenstein IDA file no. 0799) December 17, 2007;

(iii) Re: Puccini (IDA and Michael Joseph Puccini) April 9, 2007;

(iv) Re: Milardovic [2007] I.D.A.C.D. No. 31 Bulletin No. 3665, September 5, 2007;

(v) Re: Katz [2002] I.D.A.C.D. No. 13, Bulletin No. 2985, April 17, 2002;

(vi) Re: White [2003] I.D.A.C.D. No. 28, Bulletin No. 3181, August 6, 2003;

(vii) Re: Bassett [2005] I.D.A.C.D. No. 26, Bulletin No. 3449, August 11, 2005;

(viii) Re: Stewart [2005] I.D.A.C.D. No. 23, Bulletin No. 3443, July 22, 2005.

46. Disciplinary Sanction Guidelines 5.01, Failure to Cooperate, are instructive as to a member's obligation to cooperate:

> By-law 19.5 provides that any person under the jurisdiction of the Association is obliged to submit a report in writing with regard to any matter being investigated by the Association, to produce for inspection and to provide copies of the books, records and accounts relevant to such an investigation, and to meet and give information respecting the investigation. Once an examination or investigation is initiated, the Association's staff is entitled to free access to any and all records of the Member or person concerned, who is prohibited from withholding or concealing any documents reasonably required for the purpose of the examination or investigation (By-law 19.6).
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> Consequently, failure to cooperate/impeding an IDA investigation, whether by a Member firm or a registered representative, is serious misconduct because it subverts the Association's ability to perform its regulatory function. This category of misconduct is broad enough to include the following:
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> - failure to cooperate or respond in a timely manner
> - failure to respond truthfully
> - failure to cooperate or respond completely.

47. Both the Ontario and Pacific District Counsels have relied on five criteria in assessing a Member's failure to cooperate. (See Re: White, page 4, supra):

    1. The disciplinary history of the Respondent;
    2. Was the contravention intentional or inadvertent;
    3. Was there complete or only partial non-compliance;
    4. The impact that the non-compliance had on the investigation; and
    5. The Respondent's current willingness to comply.

48. In this case, the Respondent Morrison's failure to cooperate was clearly intentional, and it was complete. The impact on his contravention on the investigation was to effectively prevent any real investigation of events or circumstances. His failure to file a Response, and his failure to attend the hearing demonstrate his ongoing unwillingness to comply.

49. The Respondent also was disciplined by the Association in December, 2004, for distributing securities without a receipt or prospectus, and without any exemption from the requirements of the Securities Act. He was fined and ordered to pay costs, and was under strict, or close supervision for three years.

50. We also agree with, and would reiterate the view expressed in Re: Stewart, (supra page 8), that the seriousness of the alleged impropriety that forms the basis of the investigation which may have been frustrated in whole or in part by the Respondent's failure to cooperate with the investigative process, can be considered a serious, aggravating factor. In our view that factor is present in this case.

51. The securities industry is a business of trust and confidence. Approved Persons must above all conduct themselves with trustworthiness and integrity, and act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole. Approved Persons have agreed to abide by and comply with the Association's By-laws, and that includes the duty to cooperate in any investigation. As was said in Re Stewart (supra), there is a general principle that the requirement to cooperate in any investigation is fundamental to maintaining an efficient, competitive market environment, and also to maintain the integrity of the securities system and protect the public interest.

52. In the result, as we stated at the conclusion of the Disciplinary Hearing, we are satisfied that the sanctions sought by Association staff are appropriate, and should be imposed. We therefore impose the following sanctions on the Respondent Morrison for the infraction of By-law 19.5:

(i) A fine of $50,000;

(ii) A permanent ban on registration in any capacity of the Respondent Trevor Scott Morrison; and

(iii) The Respondent to pay costs in the amount of $11,000.

53. These reasons may be signed in counterpart.

Dated this 16th day of January, 2009.

Stephen D. Gill, Chair
Christopher Lay, Member