

# Re First Canada Capital Partners Inc

IN THE MATTER OF:

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

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

FIRST CANADA CAPITAL PARTNERS INC

AND

MARK ANDREW WILTSHIRE

2009 IIROC 19

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

Heard: April 3, 2009  
Decision: April 6, 2009  
(7 paras.)

## Hearing Panel:

Wade Nesmith, Chair  
Brian Field  
Chris Lay

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## DECISION

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### Introduction

1. We were constituted as a Hearing Panel under the Rules of the Investment Industry Regulatory Organization of Canada (“IIROC”) to consider, pursuant to IIROC Rule 20.36 whether to accept or reject the Settlement Agreement (the “Agreement”) appended hereto. A hearing into the Agreement was held on April 3, 2009. Following submissions by counsel, we indicated that we accepted the Agreement and that we would provide our reasons at a later date. These are the reasons.

### Agreement

2. The respondent Mark Andrew Wiltshire, the Ultimate Designated Person, on behalf of the respondent First Canada Capital Partners Inc. (“First Canada”) (together, the “Respondents”) agreed as a condition of the approval of a change of ownership by the Pacific District Council of the Investment Dealers Association of Canada (the IDA”) to ensure that a Chief Compliance Officer was working on site at First Canada on a daily basis. Approximately 5 months after approval, the Chief Compliance Officer, D,

asked to work from home 2 days per week and Wiltshire approved the arrangement. Approximately one month later, staff of the IDA discovered the new arrangement during a Sales Compliance Review and reported it as a Significant Item on its report. First Canada attempted, without success, to have the condition removed. Subsequently, D returned to full time attendance on site. There is no allegation of supervisory failure.

3. The Respondents admit that their conduct breached Dealer Member Rule 38.13 and that they engaged in business conduct or practice which was unbecoming or detrimental to the public interest contrary to Dealer Member Rule 29.1. Staff of IIROC and the Respondents have agreed that an appropriate penalty is the payment by First Canada, on behalf of the Respondents, of a fine of \$40,000.

### **Reasons**

4. A Hearing Panel reviewing a negotiated settlement agreement should not lightly interfere with an agreement. It should not substitute its discretion for that of Staff (Re Clark, [1999] I.D.A.C.D. No. 40, November 29, 1999). It should not reject a settlement unless it views the penalty as clearly falling outside the appropriate range (Re Milewski, [1999] I.D.A.C.D. No. 17, July 28, 1999)
5. Both counsel in this matter submitted that this was a unique case and without precedent. Certainly, no real precedent has been provided to us. Similarly, there appears to be no analogous set of facts in the Dealer Member Disciplinary Sanction Guidelines.
6. We have reviewed the cases provided and the submissions of counsel and we agree that this is a unique case. That said, a breach of a condition of approval is an important matter, but it appears that the Respondents agreed to remedy the situation relatively quickly. There is no allegation of supervisory failure. We are advised that the Respondents cooperated with the investigatory and hearing process and an early decision was made to proceed by way of an agreed settlement. No request for costs has been made.
7. In all the circumstances, we find that this is a narrow and unique, but important issue. We find the agreed penalty to be within the range of appropriate penalties and, therefore, we approve the Agreement.

Dated: April 6, 2009

Wade Nesmith, Chair  
Chris Lay  
Brian Field

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## **SETTLEMENT AGREEMENT**

### **I. INTRODUCTION**

1. The Enforcement Department Staff (Staff) of the Investment Industry Regulatory Organization of Canada (IIROC) has conducted an investigation (the Investigation) into the conduct of First Canada Capital Partners Inc. (First Canada) and Mark Andrew Wiltshire (Wiltshire), together referred to as the Respondents.
2. The Investigation was commenced by Enforcement Department Staff of the Investment Dealers Association of Canada (IDA) prior to May 30, 2008. On June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the IDA and Market Regulation Services Inc. Pursuant to the *Administrative and Regulatory Services Agreement* between the IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for the IDA to carry out its regulatory functions.

3. The Investigation discloses matters for which the Respondents may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1 (the Hearing Panel).

## **II. Joint Settlement Recommendation**

4. Staff and the Respondents consent and agree to the settlement of these matters by way of this settlement agreement (the Settlement Agreement) in accordance with IIROC Dealer Member Rules 20.35 to 20.40, inclusive, and Rule 15 of the Dealer Member *Rules of Practice and Procedure*.
5. The Settlement Agreement is subject to acceptance by the Hearing Panel.
6. The Settlement Agreement shall become effective and binding upon the Respondents and Staff as of the date of its acceptance by the Hearing Panel.
7. The Settlement Agreement will be presented to the Hearing Panel at a hearing (the Settlement Hearing) for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.
8. If the Hearing Panel accepts the Settlement Agreement, the Respondents waive their right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
9. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondents may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.
10. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
11. Staff and the Respondents agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.
12. Staff and the Respondents jointly recommend that the Hearing Panel accept the Settlement Agreement.

## **III. Statement of Facts**

### *(i) Acknowledgment*

13. Staff and the Respondents agree with the facts set out in this Section III and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

### **(ii) Factual Background**

#### *Formerly StoxTrade*

14. StoxTrade Investments Inc. (StoxTrade) was admitted as a Member of the IDA in 2005 and operated as a discount brokerage with its head office in downtown Vancouver, British Columbia. It had no branches or other offices.
15. StoxTrade had a Type 3 Introducing / Carrying Broker agreement with Penson Financial Services (Penson), another Member.
16. In or about September 2006 a new ownership group unrelated to StoxTrade's previous owners proposed to purchase StoxTrade, change its name to First Canada, and change the focus of its business.

#### *New Ownership and Name Change*

17. The proposed new ownership group was led by Mark Andrew Wiltshire ("Wiltshire") who would acquire majority ownership of the Member.
18. The new owners proposed to change the name of the firm to First Canada.

19. The new owners also proposed that First Canada would enter into a similar Type 3 Introducing / Carrying Broker agreement that StoxTrade had with Penson and would change the type of business pursued by the firm by transferring out the discount brokerage business with an emphasis on transactional, higher risk business, the majority of which related to Over the Counter Bulletin Board (OTCBB) companies.
20. The OTCBB is an electronic quotation system that displays real-time quotes, last-sale prices, and volume information for many over-the-counter securities that are not listed on The Nasdaq Stock Market or a national securities exchange.
21. Pursuant to IDA By-laws, the proposed new ownership structure and name change required approval from the Pacific District Council (PDC).
22. At a PDC meeting on November 23, 2006 the proposed change in ownership and name change was rejected by PDC because the Member did not have sufficient compliance personnel with OTCBB compliance experience.

*Full-time, On-site CCO*

23. On December 7, 2006, StoxTrade and Wiltshire wrote the IDA and proposed D as the Chief Compliance Officer (CCO) of First Canada and stated, “She has agreed to work full time for the company, on site, and is available immediately.”
24. At a PDC meeting on December 14, 2006 the proposed change in ownership and name change was approved by PDC subject to the CCO working full – time on-site.
25. On December 15, 2006 the IDA Secretary advised StoxTrade that PDC had approved the name change and the change in ownership subject to two “condition precedents”, one of which was: “Chief Compliance Officer to be working full-time on-site with the start of the OTCBB business.”
26. On December 20, 2006 Wiltshire was registered at First Canada as a Registered Representative, Officer and Director - Trading, and Shareholder. Wiltshire, the President of First Canada, was also registered as the Ultimate Designated Person (UDP).
27. Wiltshire had previously been continuously registered as a Registered Representative with Member firms since 1986 but had not previously been registered in any supervisory capacity.
28. On or about December 20, 2006 D was registered at First Canada as the CCO. She was also registered as a Registered Representative, Officer, the Alternate Designated Person and Alternate Registered Options Principal.
29. D had previously been continuously registered as a Registered Representative with Member firms since 1998 and in supervisory roles since 2001.

*Vancouver Island*

30. At all material times, D lived on Vancouver Island, approximately 40 kilometers north of [Nanaimo](#). Vancouver Island is separated from mainland British Columbia where First Canada’s office is located in the city of Vancouver. A one way trip by car and ferry from Nanaimo to downtown Vancouver would require a minimum of approximately 2 and ½ hours travel time. The quickest mode of air travel is from Nanaimo harbour to Vancouver harbour via seaplane. The flight time is approximately 20 minutes, however when travel to Nanaimo harbour and check in are factored the total travel time is approximately one hour. The cost of a seaplane ticket is approximately \$132.00 each way. Frequent travelers pay a discounted amount, approximately \$119.00 each way.

*Decision to Work from Home*

31. D was hired by First Canada in December 2006 after she was contacted by Wiltshire and offered the CCO position. She told Wiltshire that she had a young child and would only take the job if First Canada paid her travel costs. First Canada did pay for her travel.
32. During the first week of May 2007 D asked Wiltshire if she could work from her home two days a week, due to her personal circumstances. Wiltshire agreed, as long as she was able to perform her function as CCO and necessary systems were put in place to allow her to do her job, she could work from home every Monday and Friday.
33. Because she was not part of the ownership group involved in the PDC approval process, D was unaware at that time that it was a condition of the PDC that there be a full-time on-site CCO. She was only aware of a full-time on-site requirement contained in her letter of employment.
34. D worked from home every Monday and Friday commencing the second week of May 2007.

*Sales Compliance Review*

35. D's work from home arrangement was never reported to the IDA or PDC. IDA Sales Compliance Staff (SC Staff) learned of the arrangement in June 2007 while they were conducting the field work for a Sales Compliance Review (SC Review) of First Canada.
36. On or about July 4, 2007 at the exit meeting held upon completion of the field work portion of the SC Review, SC Staff told Wiltshire and First Canada that the work from home arrangement did not meet the PDC requirements and would be cited as a deficient item. Wiltshire told SC Staff that he was aware of this point and would address it, however he did not address it by ensuring that D recommenced working on-site on a full-time basis.
37. Wiltshire addressed the point with D. after the exit meeting and understood that D was communicating with SC Staff with respect to the appropriate resolution that accommodated SC Staff's concerns and the personal circumstances of D.
38. On or about September 28, 2007 Sales Compliance Staff delivered First Canada's Draft Sales Compliance Report (SC Report) which cited First Canada's failure to have its CCO working full time on site as a "Significant Item." The Draft SC Report explained that First Canada "must promptly address, resolve and reply" to the IDA on all "Significant Items."
39. In separate correspondence dated October 10 and October 11, 2007 D wrote the IDA to address some of the items in the Draft SC Report but did not address the issue of D working on-site on a full-time basis.
40. On or about October 17, 2007 First Canada's Final SC Report was delivered. Like the Draft SC Report, the Final SC Report cited First Canada's failure to have its CCO working full time on site as a "Significant Item." The Final SC Report explained that First Canada "must promptly address, resolve and reply" on all "Significant Items." The cover letter delivered with the Final SC Report, further explained that a written reply to each significant item was required within one month.
41. On or about November 21, 2007 Wiltshire and D co-signed a response to the IDA which explained that First Canada had allowed D to work from home two days a week, that D had full access to all First Canada's systems and that First Canada intended to apply for sub-branch status for D's home.
42. On or about January 31, 2008 SC Staff wrote Wiltshire and advised that CCO issue would be referred back to PDC for review.
43. At a PDC meeting on February 6, 2008 PDC reaffirmed its view that the full-time, on-site condition should remain and asked the IDA Enforcement Department to investigate First Canada's non-compliance with the condition.
44. D recommenced working on-site, full-time on March 10, 2008.

**IV. CONTRAVENTIONS**

45. The Respondents admit that between approximately May 2007 and March 2008, the Respondents allowed First Canada's CCO to work from home two days a week and thereby failed to adhere to a condition regarding the implementation of a supervisory structure at First Canada which was mandated by the Pacific District Council when it approved a change in ownership at First Canada, and thereby breached Dealer Member Rule 38.13, and engaged in business conduct or practice which was unbecoming or detrimental to the public interest contrary to Dealer Member Rule 29.1.

**VI. TERMS OF SETTLEMENT**

46. The Respondent First Canada agrees to pay a fine of forty thousand dollars (\$40,000) jointly on behalf of the Respondents. IIROC will forego any claim for contribution toward its investigation and prosecution costs.

47. The monetary penalty imposed upon the Respondents is payable immediately upon the latter of the Effective Date or March 31, 2009.

**AGREED TO** by the Respondents at the City of Vancouver in the Province of British Columbia, this 19<sup>th</sup> day of March, 2009.

Witness signature  
**WITNESS**

"Respondent's signature"  
**FIRST CANADA CAPITAL PARTNERS  
INC.**

Witness signature  
**Witness**

"Mark Andrew Wiltshire"  
**Mark Andrew Wiltshire**

**AGREED TO** by Staff at the City of Vancouver in the Province of British Columbia, this 11<sup>th</sup> day of March, 2009.

"Lorne Herlin"  
**WITNESS**

"Paul Smith"  
**PAUL SMITH**  
Enforcement Counsel

**ACCEPTED** this 3<sup>rd</sup> day of April, 2009, by the following Hearing Panel:

Per: "Wade Nesmith"  
Panel Chair  
Per: "Chris Lay"  
Panel Member  
Per: "Brian Field"  
Panel Member

