

Re Smith

IN THE MATTER OF:

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

AND

DAVID KENNETH SMITH

2009 IIROC 48

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

Heard: November 4, 2009 at Vancouver, BC

Decision: November 6, 2009

(23 paras.)

Hearing Panel:

Stephen D. Gill, Chair, Brian Field, Member, Jim Harkness, Member

Appearances:

Lorne Herlin, for IIROC

The Respondent was not present and did not appear by counsel

REASONS FOR DECISION

¶ 1 The Investment Industry Regulatory Organization of Canada (“IIROC”) issued a Notice of Hearing to the Respondent, David Kenneth Smith (“Smith” or the “Respondent”) dated August 19, 2009; the Notice of Hearing (Exhibit 1,) set a hearing date of November 4, 2009 at Suite 1010 – 925 West Georgia Street, Vancouver, British Columbia, at 10:00 a.m. The Respondent was personally served, in Kelowna, on August 19, 2009 with the Notice of Hearing and a letter dated August 19, 2009 from Mr. Herlin, enforcement counsel, as appears from the Affidavit of Personal Service (Exhibit 2, Tab N).

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

On or about May 26, 2009, the Respondent refused and/or failed to attend and give information in respect of an IIROC investigation into his conduct, contrary to IIROC Dealer Member Rules 19.5 and/or 29.1.

¶ 3 Rule 19.5 states:

Investigatory Powers

19.5 For the purpose of any examination or investigation pursuant to this Rule 19, a Dealer Member, registered representative, investment representative, sales manager, branch manager, assistant or co-branch manager, partner, director, officer, investor or employee of a Dealer Member or any other person approved or seeking approval or under the jurisdiction of the Corporation pursuant to the Rules, may be required by the Corporation:

(a) To submit a report in writing with regard to any matter involved in any such investigation;

(b) To produce for inspection and provide copies of any books, records, accounts and documents, that are in the possession or control of the Dealer Member or the person, that the Corporation determines may be relevant to a matter under examination or investigation and such information, books, records and documents shall be provided in such manner and form, including electronically, as may be required by the Corporation; and

(c) To attend and give information respecting any such matters;

And the person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any person subject to an investigation conducted pursuant to this Rule 19 shall be advised in writing of the matters under investigation and may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion require that any statement given by any person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath.

¶ 4 Rule 29.1 states:

Dealer Members and each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board of Directors.

For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.

¶ 5 At the hearing, counsel for IIROC provided the Panel with a full description of the background and events leading up to the present hearing, including the absence of Mr. Smith. As a result of the facts set forth in the PARTICULARS set forth in the Notice of Hearing, IIROC commenced an investigation into the conduct of Mr. Smith. By letter dated August 7, 2008, IIROC staff informed the Respondent that it had begun an investigation into his handling of certain accounts (Exhibit 2, Tab E).

¶ 6 In an email sent to Mr. Smith on April 24, 2009, Mr. Rai, the IIROC investigator, advised the Respondent that they required his attendance at an interview to answer questions in regards to the investigation. The final paragraph of that email stated:

If you do not intend to participate in an interview, please let us know. Your failure to participate in an interview concerning this matter will result in IIROC pursuing disciplinary measures against you for your failure to cooperate in this investigation. I encourage you to contact me as soon as possible.

By an email sent April 30, 2009 the Respondent advised Mr. Rai, among other things, that he had decided **not** to participate in the investigation (Exhibit 2, Tab G and Tab I)

¶ 7 On May 7, 2009, the Respondent was personally served at his residence with a letter dated May 6, 2009 which, amongst other things, stated:

IIROC requires your attendance at an interview to occur at 10:00 a.m. on Tuesday May

26, 2009. This interview will take place at IIROC’s Vancouver office, located at Suite 2800, 1055 West Georgia Street Vancouver, British Columbia. If this date, time or location is not suitable, please contact me before 4:30 p.m. on May 19, 2009 to re-schedule this interview. You may contact me by telephone between the hours of 8:30 am and 4:30 p.m. from Monday to Friday at (604) 331-4791 to re-schedule this interview, or leave a message on how otherwise to get in touch with you.

(Exhibit 2, Tab I).

¶ 8 Mr. Smith did not respond to the May 6, 2009 letter, nor did he attend the May 26, 2009 investigatory interview. The Respondent’s failure to attend his interview, and to provide information as required, compromised IIROC’s staff ability to complete their investigation.

¶ 9 As appears by the emails from the Respondent to IIROC, he decided not to participate in IIROC’s investigation.

¶ 10 The Respondent did not file a Response to the Notice of Hearing as required by Rule 7. Rule 7.2 states:

Failure to Serve Response

If a Respondent served with a Notice of Hearing fails to serve a Response in accordance with Rule 7.1:

- (a) the Organization 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 Organization in the Notice of Hearing, and may impose penalties and costs pursuant to Dealer Member rules 20.33, 20.34 and 20.49.

¶ 11 The Respondent, having been served with the Notice of Hearing, failed to attend the disciplinary hearing. Rule 13.5 provides

13.5 Where Respondent Fails to Attend Disciplinary Hearing

- (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.
- (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.

¶ 12 Mr. Herlin, counsel for IIROC, having reviewed the facts and circumstances that led to this disciplinary hearing, thereupon reviewed the Rules, By-laws and a number of relevant authorities, and entered the Affidavit of Jasmer Rai (Exhibit 2) in evidence. As a result of the failure of the Respondent to serve a Response to the Notice of Hearing, and the failure of the Respondent to attend the disciplinary hearing, pursuant to the Rules, the Panel accepted as proven the facts and violation alleged by IIROC in the Notice of Hearing.

¶ 13 It is appropriate to set forth, in full, the Particulars alleged and proven as per the Notice of Hearing (Exhibit 1):

1. The Respondent’s registration history is set out in the following table:

Registration Issue Date	Registration Termination Date	Member	Registration Category

November 1977	March 1979	A.E. Ames & Co. Ltd.	Registered Representative
April 1979	August 1982	Rademaker, Macdougall & Company	Registered Representative
August 1982	October 1996	Levesque, Beaubien Inc.	Registered Representative
October 1996	October 1997	HSBC James Capel Canada Inc.	Registered Representative
November 1997	October 1998	C.M. Oliver & Company Ltd.	Registered Representative
October 1998	August 2005	Canaccord Capital Corp.	Registered Representative
August 2005	December 2008	Northern Securities Inc. (Northern Securities)	Registered Representative (Options)

2. On June 1, 2008, the Respondent became a regulated person of IIROC.

Client Complaints

3. In or around August 2005, Client A opened a margin account and a registered retirement income fund (RRIF) at Northern Securities (collectively, the A accounts). The Respondent was the registered representative who was responsible for the A accounts. In or around February, 2008, Client A closed the A accounts.

4. The following chart summarizes the activity in the A accounts from August 2005 to January 2008:

	Margin Account	RRIF Account
Opening Value of Account	\$1,080,623.07	\$643,437.32
Value of Additional Deposits	\$0.00	\$0.00
Value of Total Withdrawals	\$149,500.00	\$77,022.80
Total Commission Charged	\$317,052.94	\$132,760.78
Number of Transactions (Buy or Sell)	1,421	574
Closing Value of Account	\$89,274.84	\$155,455.92

5. By way of a February 28, 2008 letter to Northern Securities, Client A, among other things, indicated that Respondent made numerous unsuitable and unauthorized trades on behalf of the A accounts.

6. In or around September, 2005, Client B opened a cash account at Northern Securities (the B account). The Respondent was the registered representative who was responsible for the B account. In or around February 2008 Client B closed the B account.

7. The following chart summarizes the activity in the B account from September 2005 to December 20097:

Opening Value of Account	\$50,000.00
Value of Additional Deposits	\$15,000.00
Value of Withdrawals	\$10,000.00

Total Commission Charged	\$10,216.00
Number of Transactions (Buy or Sell)	135
Closing Value of Account	\$8,826.16

8. By way of an April 24, 2008 email to Northern Securities, Client B, among other things, indicated that Respondent made numerous unsuitable and unauthorized trades on behalf of the B account.

IIROC Investigation

9. By way of an August 7, 2008 letter, IIROC Staff informed the Respondent that it had begun an investigation into his handling of the A accounts and the B accounts.

10. On December 5, 2008, Northern Securities terminated the Respondent's employment and since then he has not been employed by a Dealer Member.

11. On March 11, 2009, the IIROC investigator who has conduct of the Investigation (the IIROC investigator) attempted to contact the Respondent at his last known telephone number in order to schedule an investigatory interview. The telephone number was not in service.

12. The IIROC investigator then attempted to locate the Respondent. Ultimately on April 22 2009 the Respondent left a voice mail message for the IIROC investigator. In the voice mail message the Respondent provided his email address. The Respondent did not leave his telephone number.

13. By way of an April 23, 2009 email, and an April 24, 2009 email, the IIROC investigator, among other things, informed the Respondent that he wished to interview the Respondent and that pursuant to IIROC Dealer Member Rule 19, the Respondent was required to attend such an interview.

14. By way of an April 30, 2009 email, the Respondent informed the IIROC investigator that he had decided to not participate in the Investigation.

15. On May 7, 2009 the Respondent was personally served at his residence with a May 6, 2009 letter which, among other things, stated.

On April 24, 2009, IIROC sent you an electronic mail message to the email address of ... You provided this email address to IIROC in your telephone message of April 22, 2009. In this electronic mail message, IIROC advised you of your requirement to attend an interview to answer questions in regards to this investigation... On April 30 2009 IIROC received your response in which you stated, 'I have decided to not participate in your investigation.'

IIROC requires your attendance at an interview to occur at 10:00 a.m. on Tuesday May 26, 2009. This interview will take place at IIROC's Vancouver office, located at Suite 2800, 1055 West Georgia Street, Vancouver, British Columbia. If this date, time or location is not suitable, please contact me before 4:30 p.m. on May 19, 2009 to re-schedule this interview.

16. The Respondent did not respond to the May 6, 2009 letter.

17. The Respondent failed to attend his May 26, 2009 investigatory interview.

18. The Respondent's failure to attend his interview and to provide information as required has compromised IIROC Staff's ability to complete the Investigation.

¶ 14 The Facts and circumstances set forth in the PARTICULARS set forth facts and circumstances that, if proven, would indicate a serious breach of the Rules. The Respondent Smith, by his deliberate conduct, namely his refusal to comply with Rule 19.5 and attend and give information, totally obstructed and compromised IIROC's ability to properly conduct its investigation into the Respondent's activities, and subverted IIROC's ability to perform its regulatory function.

¶ 15 The Panel, having accepted as proven that the Respondent had contravened By-law 19.5 as alleged by IIROC in the Notice of Hearing, proceeded to hear submissions on penalty from IIROC counsel.

SANCTIONS SOUGHT AND IMPOSED

¶ 16 Mr. Herlin, Counsel for IIROC, in his submissions to the Panel, sought the following sanctions.

(1) Pursuant to Sections 20.33 and 20.49 of the By-laws:

- (a) a fine of \$50,000.00;
- (b) a permanent ban on registration in any capacity of the Respondent; and
- (c) costs in the amount of \$4,329.00.

¶ 17 In support of its position, IIROC counsel referred to a number of authorities dealing with penalty in circumstances analogous to those in this case; that is, where the consequences of the failure to cooperate amounted to serious misconduct. In the majority of those cases the penalty was a \$50,000 fine, imposition of a permanent ban, and an award for costs. The authorities included *Re: Lower* [2009] IIROC No. 39, *Re: Morrison* [2009] IIROC No. 4, and many of the authorities referred to in those decisions including *Re: Bassett*; *Re: Buskell*; *Re: Crittall*; *Re: Katz*; *Re: Loewen*; *Re: Milardovic*; *Re: Reiffenstein*; *Re: Stauffer*; and *Re: White*.

¶ 18 Counsel also referred to the Dealer Member Disciplinary Sanction Guidelines, paragraph 5.1 Failure to Cooperate, wherein it states:

Dealer Member Rule 19.5 provides that any person under the jurisdiction of the Corporation is obliged to submit a report in writing with regard to any matter being investigated by the Corporation, 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 Corporation's staff is entitled to free access to any and all records of the Dealer Member or person concerned, who is prohibited from withholding or concealing any documents reasonably required for the purpose of the examination or investigation (Dealer Member Rule 19.6).

Consequently, failure to cooperate / impeding a Corporation investigation, whether by a Dealer Member firm or a registered representative, is serious misconduct because it subverts the Corporation's ability to perform its regulatory function. This category of misconduct is broad enough to include the following:

- failure to cooperate or respond in a timely manner
- failure to respond truthfully
- failure to cooperate or respond completely

¶ 19 The Disciplinary Sanction Guidelines also provide "Considerations in Addition to General Principles", and counsel for IIROC reviewed each of those points in relation to the Respondent Smith. We find that while the Respondent had no prior disciplinary history, the contravention here was clearly intentional; there was complete non-compliance; the impact of that non-compliance was to completely frustrate and impede the IIROC investigation; there is no evidence the Respondent's refusal to cooperate was based on any legal advice; and lastly, the information requested was of vital significance, and material to the pending investigation. Mr. Smith's failure to file a Response, and his failure to attend the hearing demonstrate his ongoing unwillingness to comply.

¶ 20 We also agree with and adopt the comments of the panel in *Re Morrison* at paragraphs 50 and 51:

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. (emph. added)

¶ 21 IIROC counsel, Mr. Herlin, also provided the Panel with a Bill of Costs (Exhibit 3), which spelled out, in some detail, the costs incurred in connection with this case. He pointed out this did not include any costs in relation to the broader investigation. We find the Bill of Costs to be appropriate and reasonable in the circumstances of this case.

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

- i. The Respondent Smith pay a fine of \$50,000;
- ii. A permanent ban on registration in any capacity of the Respondent David Kenneth Smith; and
- iii. The Respondent pay costs in the amount of \$4,329.00.

¶ 23 These reasons may be signed in counterpart.

Dated this 6th day of November, 2009.

Stephen D. Gill, Chair

Brian Field, Member

Jim Harkness, Member

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