

Re Trites

IN THE MATTER OF:

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

And

Bradley Ferris Trites

2010 IIROC 48

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

Heard: September 30, 2010 in Vancouver, BC
Decision: October 27, 2010
(30 paras.)

Hearing Panel:

Catharine Esson, Chair, Don Teatro and Mike Johnson

Appearance:

Wietzke Gerber, Enforcement Counsel

The Respondent was not present and did not appear by counsel

DECISION ON THE MERITS AND PENALTY

Preliminary Matters

¶ 1 The Investment Industry Regulatory Organization of Canada (IIROC) issued a Notice of Hearing dated July 23, 2010 against Bradley Ferris Trites. In it, IIROC alleged that:

On Tuesday, February 2, 2010, Mr. Trites refused and / or failed to meet and give information regarding an IIROC investigation into his conduct while an Approved Person, contrary to IIROC Rule 19.5.

¶ 2 Mr. Trites did not attend the hearing into this allegation. We adjourned the hearing for 10 minutes from the scheduled starting time, in case Mr. Trites was late. We then proceeded to hear evidence and submissions on whether to proceed in his absence.

¶ 3 Counsel for IIROC filed an Affidavit of Shannon Miller sworn September 23, 2010. It evidences that the Notice of Hearing was served on Mr. Trites by personal service on August 9, 2010 and was mailed by registered mail on July 23, 2010 to the address which appears in the registration file as Mr. Trite's address. On the basis of this evidence, we found that Mr. Trites had been served with the Notice of Hearing in accordance with Rule 5.2 of IIROC's *Rules of Practice and Procedure*. We determined that it was appropriate to proceed with this hearing in his absence.

Evidence

¶ 4 We received in evidence the Affidavit of Edwin Wang, a senior investigator with IIROC. Mr. Wang

attested to facts which we find establish that:

- a) Mr. Trites was registered as a Registered Representative with Canaccord Genuity Corp. from January 24, 2002 until he resigned in June 2008.
- b) IIROC received complaints from four clients of Mr. Trites. This led Mr. Wang to investigate whether Mr. Trites had engaged in discretionary trading, recommended unsuitable investments and misrepresented the risks of certain investments.
- c) IIROC informed Mr. Trites by letter dated October 31, 2008 that it was investigating his conduct.
- d) Mr. Trites agreed on July 23, 2009 to attend an interview with Mr. Wang on November 6, 2009. On July 24, 2009, Mr. Wang sent a letter to Mr. Trites' residence confirming this interview date.
- e) Mr. Wang reminded Mr. Trites by email dated October 27, 2009 of the November 6, 2009 interview date.
- f) Mr. Trites advised Mr. Wang by email on November 2, 2009 that he would not be able to attend the interview on November 6, 2009 because he was out of town. Mr. Trites advised Mr. Wang that he expected to be out of town for much of the remainder of the year and invited Mr. Wang to ask his questions by email.
- g) Mr. Wang replied to Mr. Trites' November 2, 2009 email on the same date. He advised Mr. Trites that:
 - i) he required Mr. Trites to attend for an in person interview because IIROC interviews are generally done under oath or affirmation, interviews are videotaped, and Mr. Wang had documents about which he wished to question Mr. Trites.
 - ii) Mr. Trites was obligated under Rule 20.7 to attend for the interview even though he was no longer registered with IIROC,
 - iii) Mr. Wang would reschedule the interview to another date before the end of the year. Mr. Wang asked Mr. Trites to contact him by November 6, 2009 about this, and
 - iv) if Mr. Trites was unable to travel to Vancouver, Mr. Wang would discuss arranging an interview in Kelowna [where Mr. Trites lived].
- h) Mr. Trites did not respond to Mr. Wang's Nov. 2, 2009 email.
- i) Mr. Wang sent additional emails to Mr. Trites on November 12, 2009 and November 23, 2009 seeking to reschedule the interview. In the Nov. 23, 2009 email, Mr. Wang advised Mr. Trites that a lack of communication from Mr. Trites might be construed as a failure to cooperate and result in Mr. Trites' conduct being referred to enforcement counsel for disciplinary proceedings. Mr. Trites did not respond to these emails.
- j) On January 11, 2010, Mr. Wang telephoned Mr. Trites' residential phone line and left a voicemail message for Mr. Trites. Mr. Trites did not respond to this message.
- k) Mr. Wang caused a registered letter to be sent to Mr. Trites dated January 15, 2009 in which Mr. Wang advised that Mr. Trites was compelled to attend at the offices of IIROC in Vancouver on Tuesday February 2, 2010 at 9 am for an interview and that, if Mr. Trites failed to attend this interview, his conduct would be referred to enforcement counsel to initiate disciplinary proceedings against Mr. Trites.

- l) Bradley Trites signed for the January 15, 2010 letter on January 25, 2010.
- m) Mr. Trites did not respond to the January 15, 2010 letter and did not attend at IIROC's offices on February 2, 2010 to be interviewed.
- n) IIROC was unable to complete its investigation without interviewing Mr. Trites.

The Failure to Cooperate

¶ 5 Rule 7.1 of IIROC's *Rules of Practice & Procedure* require a respondent to a hearing to serve a Response within 20 days of the effective date of Service of the Notice of Hearing. Counsel for IIROC advised us that Mr. Trites failed to do so. In this circumstance, Rule 7.2 allows a hearing panel to accept as proven the facts and violations alleged by IIROC in the Notice of Hearing.

¶ 6 Regardless of Rule 7.2, we concluded on the basis of the evidence of Mr. Wang that Mr. Trites had notice that he had been compelled to attend an interview on February 2, 2010. He failed to attend the interview or to provide any excuse for not attending. We found that this was a breach of his obligation under IIROC Rule 19.5.

The Penalty Phase of the hearing

¶ 7 Rule 13.5 of IIROC's *Rules of Practice and Procedure* allows a hearing panel to immediately hear submissions on penalty where the respondent has been served with a Notice of Hearing, the respondent fails to attend the hearing and the hearing panel makes a finding of the violation alleged in the Notice of Hearing.

¶ 8 Having found that Mr. Trites violated Rule 19.5 of IIROC's *Dealer Member Rules*, as alleged in the Notice of Hearing, we concluded that it was appropriate to hear submissions on penalty immediately after making that finding.

IIROC Staff submissions on Penalty

¶ 9 IIROC Staff submitted that Mr. Trites should be permanently barred from approval by the Association in any capacity, be fined the amount of \$50,000 and pay costs of \$10,598.00. IIROC Staff referred us to IIROC's *Dealer Member Disciplinary Sanction Guidelines* (the "*Guidelines*") and a number of authorities in support of this submission.

¶ 10 The authorities which were provided to us are useful for their general comments on sanctioning and the importance of the obligation to cooperate with an investigation. In four of the decisions provided to us, the only allegation pursued by IIROC was, as in this case, the failure of a former Approved Person to attend an interview in an investigation into his conduct. These decisions were:

- i) Re: Bushkell [2008] IIROC No. 6
- ii) Re: Lower [2009] IIROC No.39
- iii) Re: Morrison [2009] IIROC No. 4
- iv) Re: Smith [2009] IIROC No. 48

In each of these decisions, the respondent received a permanent bar from approval in any capacity and was ordered to pay a fine of \$50,000 and costs.

Considerations in Imposing an Appropriate Penalty

¶ 11 We have the authority under Rule 20.33(2) of IIROC's *Dealer Member Rules* to impose a variety of penalties on Mr. Trites, including barring him from future approval in any capacity by IIROC and imposing a fine on him.

¶ 12 As an Approved Person, Mr. Trites was obligated to cooperate with IIROC's investigation. He

intentionally failed to attend an interview to answer questions related to client complaints against him. IIROC made reasonable efforts to accommodate him. Mr. Trites offered no excuse or explanation for his failure to attend the interview. It is of vital importance to the integrity of the system for regulating approved persons that approved persons cooperate with reasonable demands made on them during an investigation of their conduct. This obligation does not end when an approved person ceases to be registered.

¶ 13 We consider Mr. Trites' failure to attend IIROC's interview to be a serious matter, which warrants a penalty which will prevent Mr. Trites from participating in IIROC in the future and will discourage others, including others who have already resigned from IIROC, from ignoring their regulatory obligations.

¶ 14 In determining the appropriate penalty, we have had regard to IIROC's *Guidelines*. The *Guidelines* are not binding on us. They do, however, provide useful discussion of the purposes of sanctions and of factors which a hearing panel may find relevant in assessing the sanction for a failure to cooperate with an IIROC investigation.

¶ 15 The *Guidelines* include a number of "Considerations in Addition to General Principles" which a hearing panel may wish to consider where there has been a breach of Rule 19.5. Our conclusions on those considerations are as follows:

- a) The disciplinary history of the Respondent – Mr. Trites has no disciplinary history.
- b) Was the contravention intentional or inadvertent? - Mr. Trites' failure to cooperate was intentional. Mr. Trite knew IIROC wanted to interview him and received the letter compelling him to attend the interview.
- c) Was there complete or partial non-compliance? Mr. Trites' failure to cooperate was substantially complete. Although he initially responded to the IIROC Staff and offered to respond to written questions, he did not attend the interview as he was required to do, and he stopped communicating with the IIROC Staff.
- d) The impact that the non-compliance had on the investigation – Mr. Wang stated in his affidavit that the investigation could not be completed without interviewing Mr. Trites. We cannot however, conclude from this the practical impact of the non-compliance on the investigation. While it is probably always preferable to have testimony from the respondent during the investigation, the evidence before us does not establish whether the Staff could have proceeded with a hearing on some or all of the underlying allegations against Mr. Trites without his evidence.
- e) Was the refusal to cooperate based on reasonable reliance on competent legal advice? There is no evidence of this.
- f) Was the information requested of material importance to the pending investigation? Mr. Trites' evidence with respect to the allegations of unsuitability, discretionary trading and misrepresentation would likely have been material.

¶ 16 We have also considered the authorities provided to us. While there are many similarities, there are also differences. In each of those cases:

- a) the hearing panel found that the Respondent's failure to attend the interview prevented or frustrated the investigation. The evidence in this case did not establish this.
- b) the hearing panel took into account as an aggravating factor the seriousness of the underlying allegations in assessing the seriousness of the failure to attend an investigative interview. We do not find this to be a relevant factor, at least in this case where it is not clear what impact the failure to attend the interview

had on the ability to hold a hearing into the underlying allegations. The underlying allegations have not been proven. We do not consider that it is generally worse to fail to attend an interview in an investigation involving serious allegations than in an investigation involving less serious allegations. The gravaman of the misconduct is not respecting that, as a participant or former participant in a regulated industry, one must comply with the obligation to cooperate with the regulator's investigation, regardless of how one regards the allegations.

Decision on Penalty

¶ 17 In this case, we consider the most significant factors in determining the appropriate penalty to be the following:

- a) Mr. Trites' failure to cooperate was with respect to a substantial step in the investigation into his conduct,
- b) Mr. Trites' failure to cooperate was intentional, and
- c) Mr. Trites' failure to cooperate was without reasonable excuse.

¶ 18 Mr. Trites' disregard of his obligations satisfies us that he should not be allowed to return to this regulated industry. We therefore impose as part of the penalty a permanent bar on approval in any capacity.

¶ 19 We recognize that this is perhaps the most serious sanction that IIROC can impose. It clearly meets the objective of deterring the Respondent from further misconduct as an Approved Person.

¶ 20 The permanent bar also, we believe, sends a strong message to others about the importance of cooperating with IIROC investigations. We have considered particularly whether it is likely to be effective in encouraging those who have already left the industry to respect their ongoing obligation to cooperate. A permanent bar will prevent such a person from ever returning to a career which he or she has trained for and acquired experience in. It also signals to third parties who become aware of it that the respondent has been found unfit to participate in a regulated industry. In many cases, the allegations against the respondent would not, if proven, justify the same result. We conclude therefore, that the prospect of facing a permanent bar for failing to attend an interview should provide a substantial incentive for those who have left the industry to continue to cooperate.

¶ 21 That being said, we believe that a fine is also warranted to reinforce that even those who may have no intention of returning to the industry must comply with their ongoing obligations to cooperate. In the circumstances of this case, we consider that a fine in the amount of \$25,000 is appropriate to meet that objective. We order that the Respondent pay that amount.

Costs

¶ 22 Rule 20.49 of IIROC's *Dealer Member Rules* allows us to "assess and order any Corporation Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances".

¶ 23 IIROC Staff have sought costs of \$10,598.00 in this case. We were provided with a Bill of Costs which breaks this down into \$8,427.00 for Investigation Costs, \$1,310 for Enforcement Counsel Costs and \$861.00 for the Estimated Hearing Costs for a half day hearing. The Bill of Costs provides a general description of the activities included under each heading.

¶ 24 Counsel for IIROC advised us that the Bill of Costs totalling \$10,598.00 does not include a claim for time relating to the investigation of the underlying allegations of misconduct, but it does include a claim for Mr. Wang's time to prepare for the interview which Mr. Trites did not attend. We do not agree that this is appropriate. The interview related to allegations that did not form part of this hearing. The time to prepare for this interview would have been incurred regardless of whether Mr. Trites attended the interview. We do not believe that it should form part of the costs.

¶ 25 Counsel for IIROC provided us with the recent decision of an IIROC hearing panel in *Re: Steinhoff [2010] IIROC No. 42*. In that decision, the hearing panel described serious issues it encountered in assessing

what costs were appropriate and reasonable, including the inability to determine the basis of the hourly rates relied upon by the IIROC Staff as the basis for the claim for investigative and legal costs.

¶ 26 We have encountered a similar problem in assessing costs. The Bill of Costs provided to us is based on hourly rates for the investigator and legal counsel. There is, however, no indication of the basis for those rates. Without knowing how the hourly rates are arrived at, or what they represent, we cannot conclude that the amounts claimed represent reasonable cost recovery. We agree with the hearing panel in *Steinhoff* that this leaves us in a position where we cannot accurately calculate costs in the manner suggested by the IIROC Staff. As the hearing panel in *Steinhoff* stated at paragraph 44 of its decision:

So we do not think it helpful - indeed we think it would be misleading - to try and invest our conclusion with a purportedly rational explanation or justification. The best we can do is state it and make for it the unchallengeable assertion that it satisfies our sense of propriety and reasonableness in the circumstances

¶ 27 We have, therefore, assessed an amount which we consider appropriate and reasonable for the cost of the investigation and prosecution of the allegation of failing to attend the interview. We assess this amount at \$4500 and order that the Respondent pay this amount.

¶ 28 In making this order, we agree with the *Steinhoff* hearing panel that IIROC may wish to reconsider its costs provisions.

Orders

¶ 29 Pursuant to IIROC Dealer Member Rules 20.33(2) and 20.49, therefore, we order as follows:

1. Mr. Trites be permanently barred from approval by IIROC in any capacity, effective immediately,
2. Mr. Trites pay a fine of \$25,000, and
3. Mr. Trites pay costs in the amount of \$4500.

¶ 30 This Decision may be signed in counterpart.

Dated at Vancouver, BC this 27th day of October, 2010.

Catharine Esson, Chair

Don Teatro

Mike Johnson

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