

Re Wells

IN THE MATTER OF:

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

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Dale Richard Wells

2011 IIROC 15

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

Heard: February 1, 2011 in Calgary, Alberta
Decision: March 28, 2011
(14 paras.)

Hearing Panel:

John D. James (Chair), Phil Heimbecker, Martin Davies

Appearances:

Milton Chan and David McLellan, Enforcement Counsel
Stephanie McManus, Respondent's Counsel

PENALTY PHASE DECISION

¶ 1 In written reasons dated October 27, 2010, attached hereto as Appendix A to this decision, we found the Respondent, Dale Wells, responsible for the sole allegation contained in the Notice of Hearing, that being:

During the period February 2006 to July 2008, the respondent acted as an advisor, within the meaning of the Alberta Securities Act, without being registered as such, contrary to IIROC Dealer Member Rule 29.1.

¶ 2 Except as is necessary to provide context to our decision on penalty we do not propose to repeat the facts outlined in our prior written reasons on the merits.

¶ 3 At the penalty hearing, conducted February 1, 2011, counsel for Staff and the Respondent took significantly divergent positions. Staff argued for an administrative penalty of \$70,000 and a costs award of \$20,000 while counsel for the Respondent submitted that all that was required in the circumstances was simple reprimand. At the conclusion of the penalty hearing our decision, expressed verbally at that time, was to impose an administrative penalty of \$10,000 and a cost award of \$13,000 against the Respondent. We indicated then that we would provide our reasons in writing and these are those reasons.

¶ 4 We accept without reservation the applicability of IIROC's Dealer Member Disciplinary Sanction

Guidelines (“Sanction Guidelines”) to this proceeding and in reaching our decision have been guided by what we consider to be the overarching principles of the protection of the investing public and the protection of the integrity of the securities markets. The applicability and weight to be attached to the other “Key Considerations” outlined in the Sanction Guidelines are matters that are determined by the facts as we have found them.

¶ 5 In this particular case there was no harm whatsoever to the Respondent’s clients or to his employer, Peer Financial (“Peer”). On the contrary, the uncontradicted evidence is that Peer, the Respondent’s client, and all of Peer’s clients who were indirectly affected, benefitted substantially from the advice being provided. The Respondent’s employer, First Financial, was not harmed and in fact supported and encouraged the activity that forms the basis of the contravention here.

¶ 6 While the conduct of the Respondent was neither, unintentional or negligent, it was in no way manipulative, fraudulent or deceptive. His activity in acting as an advisor to Peer’s portfolio manager was entirely transparent and the regulatory authorities became aware of his activity as a result of the Respondent’s self reporting through his firm’s information provided to the National Registration Database. At all times the Respondent held an honest belief that what he was doing in providing his “Buy/Sell” signals to Peer did not violate any regulatory or legislative prohibitions. However, while the belief was honest, the reasonable nature of that belief, or lack thereof, is certainly open to question. This is particularly so in relation to the time period after IIROC Staff notified him in July 2007 that his actions were in breach of registration requirements.

¶ 7 The Respondent’s decision to continue the activity, after notification by IIROC that his registration did not permit him to engage in the activity, we view as indicative of the strength of his belief that he was right and IIROC was wrong. Given the very aggressive support and encouragement he was receiving from his employer, First Financial, to continue the impugned activity and the dispute with IIROC we do not consider his attitude as an aggravating factor. However, we do consider that it militates against our accepting his position that a simple reprimand is all that is required in the circumstances. Such a result would not adequately address the requirement that our decision protect the integrity of IIROC’s processes and membership.

¶ 8 In addition to the Respondent’s self reporting of his activity he was also fully cooperative with both the investigative and hearing processes that followed. While Staff maintained that this is a requirement and to be expected of all registrants and therefore not particularly mitigating, nonetheless the Sanction Guidelines identify a respondent’s cooperation as a mitigating factor. It is to be viewed not only as an indication of a respondent’s attitude towards compliance but also recognizes the dependence of the compliance regime on cooperation of the participants. Not all cooperation is equal and we find here that the cooperation exhibited by the Respondent throughout has been at the highest level and he is entitled to credit for it.

¶ 9 One of the other relevant factors to be considered and is noted in the Sanction Guidelines is the “vulnerability of the victim”. In this case we consider the complete lack of vulnerability of the Respondent’s client (victim), Peer, as an important mitigating factor. Peer was a sophisticated financial planning and services firm led by a group of senior financial services professionals. They knew and understood exactly what it was that the Respondent was supplying as well as the methodology and information that went into the formulation of the “Buy/Sell” signals. The uncontradicted evidence of the Respondent is that the senior partner of Peer was instrumental in working with him to formulate the underlying formula or strategy used in obtaining the signals.

¶ 10 IIROC counsel quite properly emphasized the importance of the registration requirement to our system of securities regulation. We agree with the statement of the Alberta Securities Commission in *Re: Kroeker (2007) ABASC 748* when they state at paragraph 17 of that judgement:

The registration and prospectus requirements of the Act are neither obscure nor mere technicalities—they are fundamental to our system of securities regulation. The registration requirement is designed to give a prospective investor the benefit of the involvement of an intermediary who is knowledgeable about securities and the capital market and attentive to the financial circumstances, risk tolerances and investment objectives of the investor.

¶ 11 However, this is not a case where, because of a lack of registration, investors were subjected to

unacceptable risk or loss. The Respondent, although registered, did not have the appropriate portfolio manager designation or the training that is required to obtain that designation. But the only “client” that he dealt with as an advisor in that role was, as outlined above, a sophisticated financial planning and services firm that was itself subject to stringent regulation in an industry which provides significant investor protections. This is not a circumstance that calls for the magnitude of sanction advocated by IIROC counsel.

¶ 12 The length of time over which the Respondent’s activities occurred, February 2006 to July 2008, and the fees he received of \$5000 per month are both significant and in different circumstances might be seen as aggravating, particularly in relation to the possibility of disgorgement of profits as part of a penalty assessment. However, we again return to the actual circumstances of this matter where the “client” was highly sophisticated, fully informed, and carried with it its own set of regulatory protections for the real investors. Combined with the uncontradicted evidence that the Respondent’s advice was highly profitable for all concerned and that there were significant costs to him to provide the advice, we decline the invitation to consider disgorgement as an important consideration in these particular circumstances.

¶ 13 We do think that both general and specific deterrence are important factors to consider as a component of investor and industry protection. We note, however, that IIROC counsel was candid in advising us that he could not find a precedent in the last fifteen years in relation to penalty for this type of activity. It appears that this is not a problem rampant in the industry and general deterrence becomes less of a consideration than it might otherwise be. We are of the opinion that specific deterrence must be addressed in this case. The attitude of the Respondent in failing to heed IIROC’s initial warnings, and while always respectful, his apparent continuing view that he was right requires that he receive a penalty that will bring home to him the importance of compliance. It is for that reason that we impose the administrative penalty of \$10,000.

¶ 14 On the issue of costs, IIROC counsel presented a bill of costs of over \$130,000 in relation to its investigation and prosecution of the Respondent. They candidly admit that a large part of that bill related to investigation of the Respondent on a large number of allegations brought by a disgruntled former business associate. None of those complaints or allegations went beyond the investigative stage and the only evidence before us is that they were unfounded and the Respondent was prejudiced by those unfounded allegations in both time and money. His evidence as to the percentage of IIROC’s costs actually associated with this matter is 10%. That evidence, uncontradicted, is the basis of our cost award of \$13,000.

Dated at Calgary in the Province of Alberta 28th of March , 2011.

John D. James (Chair)

Martin Davies (Panel Member)

Phil Heimbecker (Panel Member)

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